Whistleblowing in the Financial Services Sector

PAUL LATIMER*

> Whistleblower *n.* a person who alerts the public to some scandalous practice or evidence on the part of someone else. [US (1965-70); from the phrase blow the whistle on][1]
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> Whistleblower *n.* a person who exposes or brings to public attention an irregularity or a crime, esp. from within an organisation.[2]
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> Whistleblowing: 'an act of a man or a woman who believing in the public interest overrides the interest of the organisation he serves, and publicly blows the whistle if the organisation is involved in corrupt, illegal, fraudulent or harmful activity'.[3]

Are Whistleblowers Heroes or Traitors?

Australian law sends mixed messages to anyone considering making public statements about misconduct, inefficiency or other problems in public or private instrumentalities. A whistleblower may be seen as an informer betraying a secret or as a hero revealing a truth. In the words of Professor Fox:

> The current inhospitality of the legal system to whistleblowers is a product of communal ambivalence towards them. Admiration for the moral courage and social utility of those who defy the system in order to expose corruption or incompetence in the body politic is balanced by discomfort at their perceived disloyalty and by an awareness of the danger of encouraging mischief and malcontents. Current common law and statute

* Associate Professor of Law, Department of Business Law and Taxation, Monash University, <Paul.Latimer@buseco.monash.edu.au>. This is a revised version of papers presented at the 19th International Symposium on Economic Crime, 'The Hiding of Wealth', held at the University of Cambridge in September 2001, and at the Corporate Crime Workshop, hosted by the Department of Business Law and Taxation, Monash University, in February 2002. The author acknowledges research assistance from Warren Smith and Paul Washington, Monash graduate students in 2001 enrolled in BCom(Hons) and BBus(Hons) in Taxation respectively, with the usual disclaimers.

1 *Macquarie Dictionary* (3rd ed, 1997).

2 *Australian Oxford Dictionary* (1999).

3 R Nader, P J Petkas and K Blackwell (eds), *Whistleblowing: The Report of the Conference on Professional Responsibility* (1972).

> sends out dual messages: breaches of confidence may be permitted or punished.[4]

Either way, whistleblowing comes at a high cost to the individual and usually requires some stamina and conviction, despite its beneficial enhancement of information in the market. There is evidence that the personal risks to whistleblowers are high:

> of 23 whistleblowers studied, 90% were sacked or demoted for their pains and 27% faced lawsuits, usually for breach of confidence or defamation. About a quarter of the whistleblowers subsequently required psychiatric or medical treatment and a similar number admitted alcohol abuse. Some 17% lost their homes, 15% later divorced, 10% attempted suicide and 8% ended up bankrupt.[5]

In view of these risks to the whistleblower, there have been many proposals over the years for whistleblower protection, such as those contained in the Fitzgerald Report of 1989 in Queensland, which noted that 'There is an urgent need ... for legislation which prohibits any person from penalising any other person for making accurate public statements about misconduct, inefficiency or other problems within public instrumentalities'.[6] In the same vein, a federal government report in 2002 has recommended that 'The Government will amend the law to provide qualified privilege and protection against retaliation in employment for any company employee reporting to ASIC,[7] in good faith on reasonable grounds, a suspected breach of the law.'[8]

There are many motives for the whistleblower to go public, and despite the personal risks and disincentives to the whistleblower, whistleblowers remain motivated by reasons such as the following:

4 R G Fox, 'Protecting the Whistleblower' (1993) 15 *Adelaide Law Review* 137, 162, cited by M R Goode, 'Policy Considerations in the Formulation of Whistleblowers Protection Legislation: The South Australian *Whistleblowers Protection Act 1993*' (2000) 22 *Adelaide Law Review* 27, 49.

5 B Mellor, 'Integrity and Ruined Lives', *Time Australia*, 21 October 1991, 46-51; P H Jos, M E Tomkins and S W Hays, 'In Praise of Difficult People: A Portrait of the Whistleblower' (1989) 49 *Public Administration Review* 552.

6 Queensland, Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct, *Report of the Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* ('Fitzgerald Report') (1989) 139, cited in J G Starke, 'The Protection of Public Service Whistleblowers' (1991) 65 *Australian Law Journal* 205, 205.

7 Australia's corporate regulator, the Australian Securities and Investments Commission ('ASIC').

8 Commonwealth Treasury, *CLERP Paper No 9: Proposals for Reform – Corporate Disclosure* ('CLERP 9') (2002), Proposal 35, available at <www.treasury.gov.au>.

- sense of an obligation to inform;
- the wish to see wrongdoers punished;
- avoidance of punishment;
- hope for reward;
- the desire to protect the whistleblower from injuring himself or herself; or
- the aspiration to become a hero.[9]

There are many examples of whistleblowers being sacked, demoted, sued or otherwise being victimised, as forcefully described in Dr De Maria's *Deadly Disclosures – Whistleblowing and the Ethical Meltdown of Australia*.[10] The Victoria Police are reported to have spent some AUD$750 000 fighting former police officer Karl Konrad's claim for compensation for unfair dismissal in 1996 and civil damages after his blowing the whistle on police corruption.[11] Further examples of victimisation have been given by the Ombudsman Victoria, as follows:

- A public body refuses a deserved promotion of a person who makes a disclosure.
- A public body demotes, transfers, isolates in the workplace or changes the duties of a whistleblower due to the making of a disclosure.
- A person threatens, abuses or carries out other forms of harassment directly or indirectly against the whistleblower, his or her family and friends.
- A public body discriminates against the whistleblower or his or her family and associates in subsequent applications for jobs, permits or tenders.[12]

Yet despite these disincentives, whistleblowers, by providing disclosure, increase the information in the system and should be treated as heroes. For example, Alan Greenspan, Chairman of the US Federal Reserve Board, provided a reminder of the importance of whistleblower disclosure and the need for whistleblower protection when he stated that:

9 J Fisher, E Harshman, W Gillespie, H Ordower, L Ware and F Yeager, 'Privatising Regulation: Whistleblowing and Bounty Hunting in the Financial Services Industries' (2001) 8 *Journal of Financial Crime* 305, 310.

10 (1999).

11 Fergus Shiel, '$1m to block police outcast', *The Age* (Melbourne), 19 June 2002, 3.

12 Ombudsman Victoria, *Whistleblowers Protection Act 2001 - Ombudsman's Guidelines* (2001) 8.

> [i]n recent years, shareholders and potential investors would have been protected from widespread misinformation if any one of the many bulwarks safeguarding appropriate corporate evaluation had held. In too many cases, none did. Lawyers, internal and external auditors, corporate boards, Wall Street security analysts, rating agencies, and large institutional holders of stock all failed for one reason or another to detect and blow the whistle on those who breached the level of trust essential to well-functioning markets.[13]

Instead, whistleblowers are more often than not treated as traitors, incurring personal risk and the ambivalence of the legal system.[14]

This article examines the dispersed whistleblowing protections in Australian legislation in the financial services area and argues that the legal response to whistleblowing must continue to encourage and protect the whistleblower. The article concludes with a 'template for whistleblower legislation.

Whistleblowing in the Financial Services Industry

Intermediaries are the channel for the movement of money and for the movement of information in the financial services industry. Intermediaries in the financial services industry have access to information, research, analysis and inside information, and as such, can be described as 'information merchants'.[15] They may witness non-disclosure of information, breach of financial services licence conditions, misleading or deceptive conduct, market manipulation, insider trading, and so on.

The fact that intermediaries and their advisers in the financial services industry, including bankers, brokers and client advisers, are privy to information will normally present a conflict between their loyalty to their clients and their duties in law, in their roles as financial services intermediaries.

Yet international financial services law values and supports whistleblowing – under the name disclosure – as advanced by, for example,

[13] Testimony of Chairman Alan Greenspan in the *Federal Reserve Board's Semiannual Monetary Policy Report to the Congress*, before the United States Senate Committee on Banking, Housing and Urban Affairs, 16 July 2002, available at <www.federalreserve.gov>, quoted and discussed in Ross Gittins, 'Whistleblowers all miss their cue as the hired hands rob our nests', *The Age* (Melbourne), 20 July 2002, 3 (Business).

[14] Fox, above n 4, 159.

[15] G Tucker, 'Money Laundering, Banks and the Duties of Inquiry and Disclosure' (1995) 6 *Journal of Banking and Finance Law and Practice* 181, 181.

the International Organisation of Securities Commissions ('IOSCO'). The IOSCO objectives, upon which securities regulation is based, include investor protection and promoting fair, efficient and transparent markets.[16]

Similarly, the Financial Action Task Force on Money Laundering ('FATF') has included the lack of an efficient reporting system for suspicious transactions as one of the criteria for defining non-cooperative countries or territories. In the words of the FATF, the

> [a]bsence of an efficient mandatory system for reporting suspicious or unusual transactions to a competent authority [is one such criterion] ... provided that such a system aims to detect and prosecute money laundering.[17]

The financial sector is built upon the importance of disclosure to ensure informed and efficient markets. Corporate law and securities regulation literature is clear in the view that in the absence of a compulsory corporate disclosure system:

- some issuers will conceal or misrepresent information that is material to investment decisions;
- underwriting costs and insiders' salaries and perquisites will be excessive;
- there will be less 'public confidence' in the market;
- neither legislation nor self-regulatory organisation ('SRO') rules will be able to ensure the optimal level of corporate disclosure; and
- civil or criminal actions will not ensure optimal levels of corporate disclosure.[18]

This paper argues that whistleblowing under statute and at common law must be supported on the grounds of public interest and that in appropriate circumstances there should be a free flow of information as a matter of public interest.

Whistleblower Protection at Common Law

Whistleblowing at common law raises the potential for action for breach of confidence, to which case law has authorised an exception

16 International Organisation of Securities Regulation, *Objectives and Principles of Securities Regulation* (1998) [4], available at <www.iosco.org>.

17 Financial Action Task Force on Money Laundering, *Report on Non-Cooperative Countries and Territories*, 14 February 2000, item (v).

18 Eg J Seligman, 'The Historical Need for a Mandatory Corporate Disclosure System' (1983) 9 *Journal of Corporate Law* 1, 9.

in the case of the disclosure of 'iniquity'. Rather than attempting to define 'iniquity', this paper supports the view of Kirby P (as he then was) that 'iniquity' does not express a principle, but is an instance of the wider category of the public interest in disclosure, which may 'sometimes, even if rarely' outweigh the public interest in confidentiality and secrecy if the matters disclosed relate to matters of public concern.[19] As such, and to be applauded, the Australian common law shows a 'tolerance of disclosure of information outside official channels'.[20]

Australian Statutory Protections for Whistleblowers

Specific whistleblower protection laws in Australia are incomplete and unequal among Australia's nine Commonwealth, State and Territory jurisdictions. There is no one Commonwealth Act dealing with whistleblowers, and the specific State and Territory legislation is:

- *Public Interest Disclosure Act 1994* (ACT) (public sector disclosure only);
- *Protected Disclosures Act 1994* (NSW) (public sector disclosure);
- *Whistleblowers Protection Act 1994* (Qld) (limited private sector disclosure);[21]
- *Whistleblowers Protection Act 1993* (SA) (public and private sector disclosure);[22]
- *Whistleblowers Protection Act 2001* (Vic) (public sector).

In the view of Dr De Maria, these State and Territory laws:

> simply don't work. They don't protect whistleblowers, they don't encourage Australians to do their bit by reporting wrongdoing, and they certainly do not impact on the obese profile of wrongdoing. Four whistleblower Acts are currently on the statute books ... and not one of them, to my knowledge, has ever been used by a whistleblower.[23]

Equally, the president of Whistleblowers Australia, Jean Linnane, was dismissive of the then Whistleblowers Protection Bill (2000) in Victoria, stating that, 'If you become a whistleblower on Monday, your

19 *Attorney-General for the United Kingdom v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 171, cited by Starke, above n 6, 218.

20 Goode, above n 4, 37.

21 Danger to public health or safety, and danger to the environment: s 3.

22 'Disclosure, in the public interest, of maladministration and waste in the public sector and of corrupt or illegal conduct generally': s 3.

23 De Maria, above n 10, 210. With the Victorian Act of 2000, there are now five Acts.

career is over on Tuesday. Seeking redress through courts is too expensive and time consuming, especially when government agencies have bottomless pockets.'[24]

Four recent reported State whistleblower cases illustrate the proposition that the whistleblower Acts are not successful in encouraging and facilitating disclosures by whistleblowers. In the first case, *Morgan v Mallard*,[25] the *Whistleblowers Protection Act 1993* (SA) was raised without success as a defence to an action in defamation, on the basis that the disclosures were not 'public interest information' as defined in the Act. A whistleblower was unsuccessful in *Sutton v State of South Australia*[26] in an allegation of 'victimisation' under s 9 of the South Australian Act, because the Ombudsman's refusal to investigate a disclosure that had been fully investigated five years earlier was held not to come within the Act. There was no evidence that there was a disclosure of public interest information or that any detriment had been caused by such disclosure. In *King v SA Psychological Board*,[27] the plaintiff's detriment (if any) was alleged to have been caused not on the ground that there had been a disclosure, but on the grounds that the relevant Board did not act on the disclosure and did not reach the conclusion that the plaintiff sought. A costs order was made against the plaintiff, who later withdrew his written complaint about the conduct of a named psychologist. In *Howard v State of Queensland*, a Queensland public servant who made a public interest disclosure to the Criminal Justice Commission about a fellow employee was met with harassment, intimidation, victimisation and inappropriate treatment by the said employee and others as a result. He failed to show that the employer was vicariously liable for the statutory tort of reprisal made against him, on the basis that the acts were outside the scope of employment.[28]

There are some whistleblower protection sections in various Commonwealth statutes as discussed below, but there is no general whistleblowers protection legislation at the Commonwealth level. In its absence, the Commonwealth government has had to deal with whis-

24 Gabrielle Costa and Murray Mottram, 'Bracks threat to pull whistleblower law', *The Age* (Melbourne), 6 April 2001, 10.

25 [1997] SASC 6056, discussed by Goode, above n 4, 48. Letters were sent to the head of the Workcover Authority alleging that a senior employee abused his position.

26 [1998] SASC 663, discussed by Goode, above n 4, 47-8.

27 [1998] SASC 6621, discussed by Goode, above n 4, 47-8.

28 [2000] QCA 223.

tleblower situations, such as how to deal with a soldier who, having blown the whistle by giving evidence of bastardisation in the military, had a death threat painted outside his room.[29] In another reported instance, a whistleblower who was suspended by the Department of Foreign Affairs in 1996 was reported to have led to the Department spending over AUD$1 million in salary and legal costs in trying to resolve the issues arising.[30]

Other whistleblower legislation includes:

- *Commonwealth Public Service Regulations 1935* (Cth) reg 30 (breaches of regulations to be reported);[31]
- *Independent Commission Against Corruption Act 1988* (NSW) (public and private sector disclosure);
- *Anti-Corruption Commission Act 1988* (WA) (police officers, other public sector officers).

Statutory Protections for Whistleblowers in Australia in the Financial Sector

In addition to the specific whistleblowing legislation just mentioned and the legal protections for the whistleblower at common law mentioned above, Commonwealth statute law in the financial services sector, such as that affecting the accounting and auditing professions, the *Corporations Act 2001* (Cth), the *Financial Transaction Reports Act 1988* (Cth), the *Proceeds of Crime Act 1987* (Cth) and the *Trade Practices Act 1974* (Cth), contains whistleblowing requirements in many situations, with statutory protections – but the word 'whistleblowing' never appears.

These statutory disclosure requirements provide statutory obligations and protections requiring or encouraging people to come forward in specified circumstances:

The Accounting Profession

As individuals recording, classifying, analysing and inspecting accounts, the accounting profession is at the gateway to business and is

29 'Action demanded on whistleblower', *The Age* (Melbourne), 8 November 2000.

30 Brendan Nicholson, 'Whistleblower cost may have been $1m', *The Age* (Melbourne), 20 November 2000.

31 Eg D Lewis, 'Employment Protection for Whistleblowers: On What Principles Should Australian Legislation be Based?' (1996) 8 *Australian Journal of Labour Law* 135, 138.

in the ideal position to whistleblow in the event of detection of irregularity, non-disclosure or crime.

The accounting profession undertakes a commitment to comply with the relevant laws and to report conduct that may be in breach of the law:

> The accounting profession, in adopting a code of ethics and undertaking a measure of self-regulation, has indicated to society that it sees its members as operating ethically and within the law. It is expected that they will do more than their supervisors require, and will be prepared to assume responsibility. While they are not expected to become martyrs, accountants are expected to respond appropriately to behaviour that breaches the law.[32]

Building upon this principle, the accounting profession has recommended the establishment of an industry-based financial reporting ombudsman as a focal point for complaints and concerns of professionals and individuals about the standard and the conduct of companies, reporting standards, and the audit process, with the appropriate protective legislation. To enhance the viability of such a financial reporting ombudsman, the accounting profession has specifically recommended a review of whistleblower legislation, with stronger whistleblower protection to provide greater support for professionals.[33]

Competition Law

The Australian Competition and Consumer Commission ('ACCC') maintains a high profile in its policing of restrictive trade practices and consumer protection in the Australian marketplace. As part of this policy, the ACCC encourages whistleblowers to come forward – especially those who may have breached the *Trade Practices Act 1974* (Cth) – and for so doing, the ACCC may provide indemnity from prosecution.[34]

Section 162A of the *Trade Practices Act 1974* protects whistleblowers reporting breaches of the Act by criminalising conduct by a person

[32] J Baker Jones, 'Whistleblowing – No Longer Out of Tune' (1996) 66(7) *The Australian Accountant* 56, 56.

[33] CPA Australia, *Financial Reporting Framework – The Way Forward* (2002), Proposals 2.5.2, 3.7, available on the Institute of Chartered Accountants website at <www.icaa.org.au>.

[34] Eg S Bhojani, 'The Professions and Whistleblower Protections' (Paper presented at the Australian Institute of Criminology Conference, 'Crime in the Professions', University of Melbourne, 22 February 2000), available at <www.accc.gov.au>.

who 'threatens, intimidates or coerces another person ... [or] causes or procures damage, loss or disadvantage to another person' for providing information or documents to the ACCC. Such a person may face prosecution and penalties if convicted. Section 162A has yet to be tested in the courts.

The ACCC decides issues of leniency and indemnity for whistleblowers on a case-by-case basis, and continues its leadership role of adopting and committing itself to support for a whistleblowing policy, including the protection of whistleblowers.

Corporations Act 2001 (Cth)

Disclosure of corporate information and conduct to the market – ie whistleblowing – is one of the aims of the *Corporations Act 2001* (Cth). Although the Act imposes many statutory obligations on members of the corporate world to come forward to inform the Australian Securities and Investments Commission ('ASIC') of possible breaches of the law, it falls far short of a comprehensive whistleblowing code for the financial sector.[35] Nowhere does the word 'whistleblower' appear.

This aim is augmented by ASIC's power to investigate and to collect information under the *Australian Securities and Investments Commission Act 2001* (Cth) for the use of the market.

Each of the following imposes important whistleblower obligations to report corporate misconduct to ASIC.[36] The main remedies available to ASIC for failure to report include administrative sanctions, such as loss of the relevant licence to work in the financial sector. Recently, for example, following an ASIC investigation, an auditor who failed to report to ASIC that accounts did not comply with accounting requirements in the *Corporations Act 2001* and a number of Accounting Standards lodged notification of ceasing to act as an auditor.[37]

The whistleblower obligations in the *Corporations Act 2001* are set out in alphabetical order as follows:

[35] See generally H A J Ford, R P Austin and I M Ramsay, *Ford's Principles of Corporations Law* (10th ed, 2001). The subheading of [3.170], entitled 'Information gathering', is 'Persons bound to report irregularities'.

[36] Eg G Bastin and P Townsend, 'Whistleblowers – A Legitimate Role in Corporate Life?' (1996) 4 *Journal of Financial Crime* 197.

[37] 'Auditor Resigns After Investigation', Australian Corporate Law – Bulletin, Butterworths Online, Accounting News [77] <www.butterworthsonline.com> at 8 January 2002.

Auditors

At the heart of the integrity of company reporting is the importance of the independence of the auditor. In the words of the auditing profession, this 'requires freedom from bias, personal interest, prior commitment to an interest, or susceptibility to undue influence or pressure'.[38] Audited financial statements provide the independent and external check of the information underlying the informational efficiency of capital markets. To confirm this, the Commonwealth government has recommended a General Statement of Principle requiring auditor independence in its CLERP 9, Proposal 2, which states that '[t]he Government will amend the *Corporations Act* to include a General Statement of Principle requiring the independence of auditors.'[39]

An auditor conducting an audit or review as required under the *Corporations Act 2001* is under a duty to inform ASIC in writing if the auditor has reasonable grounds to suspect that a breach of the law has occurred, and believes that the contravention has not or will not be adequately dealt with by commenting on it in the auditor's report or by bringing it to the notice of the directors (s 311).[40] With regard to this s 311 duty, Ford comes close to using the word 'whistleblower' by describing the role of the auditor as 'a kind of watchdog'.[41] In its Practice Note 34, entitled 'Auditors' Obligations', ASIC states that serious contraventions would include clear breaches of the directors' duty of care and other fiduciary duties, breaches of the 'loans to directors' provisions of the *Corporations Act 2001*, and failure to keep proper accounting records.

This opens the way for full investigation by ASIC, including ASIC's power to call for the auditor's working papers under the *Australian Securities and Investments Commission Act 2001* (Cth) s 30, authorising notice to produce books.

Section 311 creates a statutory duty to report – to whistleblow – and hence 'presumably' a cause of action for breach of this statutory

38 *Australian Statement of Auditors Practice AUP32 – Audit Independence*, cited in CLERP 9, above n 8, [4.2].

39 CLERP 9, above n 8, [4.6.3].

40 At common law, an auditor who discovers fraud is to report this to management in the first instance, but if the problem is not addressed, the auditor may be required to raise this at board level: *Daniels t/as Deloitte Haskins & Sells v AWA Ltd* (1995) 13 ACLC 614. If the irregularity reflects on the board, the auditor should report concerns to the shareholders: Ford et al, above n 35, [10.590].

41 Ford et al, above n 35, [10.460].

duty.[42] Section 311 notwithstanding, the Commonwealth government in CLERP 9 notes that there has been 'almost a total absence of reports' to ASIC by auditors under s 311, and as a result has recommended in Proposal 33 expanding auditors' duties: '[t]he Government will amend the law to expand matters which auditors must report to ASIC to include any attempt to influence, coerce, manipulate or mislead the auditor.'[43]

Similarly, if an auditor of a financial services licensee becomes aware of 'certain matters', the auditor must report this to ASIC, the licensee and the licensed market (if any) and the licensed CS facility ('CS facility') in which the licensee is a participant (s 990K). Matters to be reported include those adversely affecting the ability of the licensee to meet its obligations as a licensee, dealings with clients' money and loan moneys, dealings with other property of clients and financial records and financial statements of financial services licensees (s 990K(2)).

Section 1309 of the *Corporations Act 2001* reinforces this duty of disclosure by imposing penalties on an officer of a corporation for providing false information relating to the affairs of the corporation to, inter alia, an auditor if the officer knows that the information is false or misleading in a material particular, or has omitted a matter that renders the information misleading in a material respect. Section 1309 provides for a penalty of up to AUD$11 000 and/or up to two years jail, a penalty that the Commonwealth government's CLERP 9 report has found 'might be inadequate', on the basis of the significant loss that can be occasioned by fabricating or covering up the fabrications of others in relation to financial reports.[44] In its Proposal 32, CLERP 9 has recommended that ASIC monitor the adequacy of civil and criminal penalties and make such recommendations as are required to ensure consistency and adequacy of penalties under current law.

An enhanced s 1309 would have seen early whistleblowing of management frauds, such as those uncovered in the HIH Royal Commis-

42 Ibid [10.530]. Empirical data in M Kapardis and A Kapardis, 'Co-Regulation of Fraud – Detection and Reporting by Auditors in Australia: Criminology's Lessons for Non-Compliance' (1995) 28 *Australian and New Zealand Journal of Criminology* 193.

43 CLERP 9, above n 8, [10.2].

44 Ibid [10.1].

sion[45] and falsification of financial results to boards of directors. In the words of the Institute of Chartered Accountants, '[h]onest employees need protection via legislation just as much as directors and auditors.'[46]

Australian Stock Exchange/Sydney Futures Exchange

In line with the principle of co-regulation of companies and financial markets, exchanges are required to assist ASIC in its market regulation. For example, s 792D requires a market licensee (such as the Australian Stock Exchange and the Sydney Futures Exchange) to provide assistance to ASIC – ie to whistleblow – in the carrying out of its functions. Section 792B(2) requires a market licensee to report suspected broker misconduct to ASIC.

Bankers

Section 983A authorises ASIC to apply to a court to freeze accounts of holders and former holders of a financial services licence (such as a securities dealer and former dealer) with a financial institution (such as a bank), and if so, the financial institution must make full disclosure to ASIC of every account in the name of the person to whom the order relates, and any account that the financial institution reasonably 'suspects' is held or kept for the benefit of that person. Moreover, the financial institution is to permit ASIC to make copies of such accounts or any books relating to that person (s 983C).

Insolvency Practitioners

The *Corporations Act 2001* provides for different procedures in the case of corporate insolvency, including voluntary administration, the signing of a deed of company arrangement, winding up in insolvency and winding up by the court.

Administrators

One of the duties of an administrator of an insolvent company under voluntary administration under Part 5.3A is to investigate the company's affairs under Division 4. This includes statutory access to the company's books (s 438C) and reporting (whistleblowing) its concerns to ASIC.

[45] The HIH Royal Commission, chaired by Justice Neville Owen, at <www.hihroyalcom.gov.au>.

[46] Letter from Geoff Brayshaw, President, Institute of Chartered Accountants, to the Joint Committee of Public Accounts and Audit, 31 May 2002, available at <www.icaa.org.au>.

Section 438D requires that if the administrator, in the course of the administration, determines that a past or present officer, or a member of the company, may have been guilty of an offence in relation to the company, the administrator must report its concerns to ASIC.

Equally, the administrator must report to ASIC if it appears that a person who has taken part in the formation, promotion, administration, management or winding up of the company:

- may have misapplied or retained, or may have become liable or accountable for, money or property of the company (whether in Australia or overseas); or
- may have been guilty of negligence, default, breach of duty, or breach of trust in relation to the company (s 438D(1)).[47]

A whistleblower may be silenced expressly or by inaction, so s 438D(3) empowers a whistleblower to obtain a court order in the circumstances of s 438D(1) just outlined. On the application of 'an interested person or of its own motion', the court can direct the administrator to lodge a report on these matters (s 438D(3)).

The question of who is an 'interested person' is often debated and would presumably extend to a creditor, member or officer of the company.[48] On the one hand, the expression 'person interested' in s 533(3) (discussed below) has been limited by the courts by concluding that a 'person interested' must have a pecuniary or financial interest, rather than just mere curiosity or concern.[49] On the other hand, the equivalent expression, 'person aggrieved', in former s 777 (now s 793C), has been interpreted widely as an important public interest section not necessarily requiring a personal or economic interest in the proceedings, including a shareholder, the investing public and a takeover bidder.[50]

Section 438D is not limited to reporting offences under the *Corporations Act 2001* and it would authorise whistleblowing in general, in-

47 ASIC gave its views on the obligations imposed on administrators in Practice Note 50, 'External Administrators – Reporting Matters and Lodging Documents' (1994), available at <www.asic.gov.au>.

48 CCH, *Australian Corporations and Securities Law Reporter*, vol 2, [136-440].

49 Ibid citing *Re Spottiswoode, Dixon & Hunting Ltd* [1912] 1 Ch 410; *Re M Belmont & Co Ltd* [1951] 2 All ER 898; *Re Roehampton Swimming Pool Ltd* [1968] 3 All ER 661; *Re Wood & Martin Ltd* [1971] 1 All ER 732; *Re Kilkenny Engineering Pty Ltd, Monti v Kilkenny Engineering Pty Ltd* (1975-1976) CLC 40-241.

50 Eg P Latimer, 'Legal Enforcement of Stock Exchange Rules' (1995) 7 *Bond Law Review* 1, 10-14.

cluding reporting offences under other legislation such as the *Criminal Code Act 1995* (Cth).[51]

Deed of Company Arrangement

The statutory duty to report – the whistleblowing obligation – under s 438D ceases to apply if the company should later sign a deed of company arrangement. However, case law confirms that s 438D does not prevent an administrator, acting under a deed of company arrangement, from asking questions in relation to possible offences.[52]

Liquidators

A liquidator appointed under Part 5.4B (winding up in insolvency or by the court) is also under whistleblowing obligations to report to ASIC. Within two months of appointment, the liquidator is to make a preliminary report on various matters, including a general whistleblowing obligation 'as to whether, in his or her opinion, further inquiry is desirable with respect to a matter relating to the promotion, formation, or insolvency of the company or the conduct of business of the company' (s 476(d)).

Section 533 duplicates s 438D (above) by requiring reports to ASIC of corporate wrongdoing, and s 533(3) duplicates s 438D(3) by authorising the court, on the application of a 'person interested', to direct the liquidator to so report to ASIC.

The Chairman of ASIC recently expressed frustration with the failure of some insolvency practitioners to adequately discharge their statutory responsibilities to prepare and to lodge reports under s 533. In his words:

> Currently we are finding problems in that area: we are receiving less reports; they are often late; do not always contain information in the most useful format; and of course the s 438D equivalent is not mandatory in VAs (voluntary administrations).[53]

Receivers

A receiver of the property of a corporation must also blow the whistle by reporting to ASIC if it appears that:

51 CCH, above n 48, 204,994.

52 *Re Italo-Australian Centre (subject to deed of company arrangement)* (1999) 17 ACLC 723.

53 D Knott, 'Regulatory Issues Impacting on Insolvency' (address to the National Conference of the Insolvency Practitioners Association of Australia, Adelaide, 13 October 2000), noted as *Problems of Regulating Insolvency: ASIC Deputy Chief Speaks Out*, Australian Corporate Law - Bulletin, Butterworths Online, [404].

- a past or present officer or member of the corporation may have been guilty of an offence in relation to the corporation; or
- a person who has taken part in the formation, promotion, administration, management or winding up of the corporation may have misapplied or retained, or may have become liable or accountable for, any money or property of the corporation or may have been guilty of negligence, default, breach of duty, or breach of trust in relation to the corporation (s 422(1)).

Reports lodged by the receiver are not available for public inspection (s 1274(2)).

Trustee of a Debenture Deed

The trustee of a debenture deed must notify ASIC as soon as practicable if the borrower or the guarantor have not complied with various sections of the *Corporations Act 2001* (ss 283DA(e) and (f)).

Qualified Privilege for Whistleblowers Under the *Corporations Act 2001*

The *Corporations Act 2001* mirrors whistleblower legislation by encouraging the various classes of persons discussed above to come forward by providing qualified privilege from legal action in the form of protection from defamation when acting honestly. Qualified privilege is an exemption from liability for defamation extended to the maker in the course of duty provided the statement is made without malice.

Section 89 of the *Corporations Act 2001* provides that qualified privilege extends to proceedings for defamation, and that if there is no malice, the person will not be liable for defamation. 'Malice' is defined to include ill will or any other improper motive (s 89(2)).

The *Corporations Act 2001* provides auditors, as whistleblowers notifying a matter under s 311, with qualified privilege to actions in defamation under s 1289(1). Section 1289(2) extends the defence of qualified privilege to the publisher of any document or statement prepared by an auditor in the course of his or her duties and as required by the *Corporations Act 2001*. Equally, an auditor of a financial services licensee is protected under s 990L.

Qualified privilege is also provided for administrators (s 442E), receivers and other controllers (s 426) and liquidators (s 535).

Mandatory Whistleblowing Under the *Financial Transaction Reports Act 1988* (Cth)

As a matter of banking law and practice, the customer in the financial services area is entitled to expect that its financial institution will keep matters concerning its financial affairs confidential.

The banker/customer relationship is contractual, not fiduciary, so any disclosure would not involve any breach of a fiduciary relationship. Nor would there be any breach of any equitable doctrine, such as breach of confidential information or any breach of any duty of loyalty to its client. Equally, the financial services compliance officer is not in breach of his/her duty of confidentiality for reporting breaches to the industry self-regulator and the taxation authorities.[54]

The classic case of *Tournier v National Provincial and Union Bank of England*,[55] which involved successful action by a customer against its bank for damage caused as a result of the bank disclosing information about the customer's dealings with a bookmaker to the customer's employer, resulted in the court setting out the well-known exceptions authorising disclosure by the bank through:

(a) compulsion of law;

(b) duty to the public to disclose;

(c) interests of the bank to disclose; and

(d) express or implied consent of the customer to disclose.

In some instances, whistleblowing would be an exception to the common law duty of secrecy of the financial sector,[56] and *Tournier* exception (a) would authorise disclosure under the legislation considered below.

For example, the *Financial Transaction Reports Act 1988* (Cth) ('FTRA'), designed to fight the underground cash economy, tax evasion and concealment of organised crime, targets a 'cash dealer', defined to include a 'financial institution' (bank, building society, credit union, securities dealer and futures broker) (s 3). In so doing, it does

54 *Re a Company's Application* [1989] 3 WLR 265, noted by Lomnicka (1990) 106 *Law Quarterly Review* 42.

55 [1924] 1 KB 461, discussed in, eg, 'Tournier Turns 70' (1993) 107 *The Australian Banker* 311.

56 Eg J Walter and N Erlich, 'Confidences – Bankers and Customers: Powers of Banks to Maintain Secrecy and Confidentiality' (1989) 63 *Australian Law Journal* 404.

away with the duty of secrecy at common law, justifying the description that it has 'no forerunner in Anglo-Australian law'.[57]

As one of the exceptions to *Tournier*, the FTRA under Part II, headed 'Cash Transaction Reports: significant cash transactions', requires a 'cash dealer' to report a 'significant cash transaction' to the administering authority, the Australian Transaction and Reports Centre ('AUSTRAC') (s 7). A 'significant cash transaction' is a transaction involving the physical transfer of coin or paper money of not less than AUD$10 000.

These reporting requirements are designed to identify the money trail of the proceeds of criminal activities and tax evasion. Information supplied to AUSTRAC is made available to the Australian Taxation Office, the National Crime Authority, Customs, and various federal and State law enforcement agencies.

AUSTRAC also monitors the export of foreign currency from Australia and the import of Australian and foreign currency into Australia of AUD$10 000 or more by anybody, whether or not a financial institution or cash dealer (s 15). Anybody who fails to report a transfer of currency commits an offence under s 15, and if charged and convicted, faces a penalty of imprisonment of up to two years and/or a fine of up to AUD$13 200 (natural person) or AUD$66 000 for a body corporate.

Division 1B requires reports about the transfer of currency in calling for 'Cash transactions reports by solicitors'. Under s 15A, solicitors must report significant cash transactions to AUSTRAC.

A cash dealer who is party to a transaction which it believes may be 'suspect' is required under Division 2 to pass the information to AUSTRAC (s 16, headed 'Reports of suspect transactions'). Transactions that are 'suspect' are those relevant to an investigation of tax evasion, or an offence against Commonwealth or Territory law, or an action under the *Proceeds of Crime Act 1987* (Cth) ('POCA'), including money laundering.

The reporting obligation in s 16 is triggered where a cash dealer 'has reasonable grounds to suspect' that the information may be relevant to investigation or prosecution or may be of assistance in the enforcement of the POCA.

57 W S Weerasooria, *Banking Law and the Financial System in Australia* (5th ed, 2001) [17.1].

Most importantly, the FTRA provides protection for cash dealer whistleblowers in s 16(5).

Insurance Act 1973 (Cth)

Amendments to the *Insurance Act 1973* (Cth) are advancing whistleblower protection in the insurance industry. Section 49A of the Act, introduced by the *General Insurance Reform Act 2001* (Cth) and in force from 1 July 2002, now requires auditors or actuaries of insurers to give information to the Australian Prudential Regulation Authority ('APRA') if they have 'reasonable grounds' for believing, inter alia, that the insurer is facing insolvency, has failed to comply with the APRA prudential standards, or is intending to engage in conduct that may materially prejudice policyholders. Such amendments may now overcome the problem identified by the consulting actuary, giving evidence as a witness at the HIH Royal Commission, who stated that he would have passed on to APRA his concern with the insurer's finances in 1999 if such protections were then in force: he 'would have drawn their attention to the 1999 year of account ... [that it] did not provide for what I considered to be a proper solvency margin at that time.'[58]

In the interests of greater disclosure in the insurance market, APRA is continuing to seek extra protection for whistleblowers who alert regulators to problems that could damage the interests of policyholders in what it sees as an increasingly complex insurance market.[59]

Lawyers

Whistleblowing brings the tension between the lawyer's duty to the client and the lawyer's duty to the court into focus because Australian legislation, in many instances, imposes upon a lawyer a duty to report. For example, in the area of trade practices:

> [I]f, during the course of negotiation, they are aware that their client makes a misrepresentation and they do nothing to correct the misrepresentation, they will be 'involved in' the contravention of [the *Trade Prac-*

[58] 'Laws too late, says HIH actuary', *The Australian*, 6-7 July 2002, 31. The HIH Royal Commission is footnoted at n 45.

[59] Eg Bruce Brammall, 'Insurers to feel heat', *The Advertiser* (Adelaide), 27 September 2002, 28; Andrew White, 'In-house auditors on outer', *The Australian*, 27 September 2002, 4.

tices Act 1974 (Cth)] by their client and incur an ancillary liability under the TPA.[60]

Penalties of the *Proceeds of Crime Act 1987* (Cth)

In addition to the FTRA, the *Proceeds of Crime Act 1987* ('POCA'), aimed at organised crime, seeks to deprive those involved of the profits of their crime by tracing, freezing and confiscating criminal profits. To assist in following the money trail and reconstructing transactions, POCA places a statutory obligation on banks and other financial institutions to retain records (such as those relating to the opening of accounts) for seven years.

Knowledge of the offence is one of the factors in the definition of the offence of money laundering in the POCA, with the words 'and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some unlawful activity' (s 81(3)).

This provides an interesting connection with the 'know your client' rule, and whether it imposes a 'positive obligation on the adviser to investigate the client's position'.[61]

Whistleblower Disclosure to Whom?

Evidence shows that immediate superiors are not effective in dealing with whistleblowers' disclosures and that the effectiveness in dealing with disclosures increases only marginally when whistleblowers go up the chain of command in the public sector.[62] As a result, whistleblower laws provide for disclosure to a Public Interest Disclosure Agency or equivalent.[63]

Australian legislation provides many classes of 'appropriate authority'[64] to which a whistleblower can report – such as the Ombudsman, the Police Complaints Authority, the Auditor-General, the Environmental Protection Agency and relevant public bodies.

60 S G Corones, 'Solicitors' Liability for Misleading Conduct' (1998) 72 *Australian Law Journal* 775, 783-4.

61 G Walker, B Fisse and I Ramsay, *Securities Regulation in Australia and New Zealand* (2nd ed, 1998) 483.

62 W De Maria, 'Unshielding the Shadow Culture', Research Release One, University of Queensland, April 1994, 22-33.

63 Eg Lewis, above n 31, 158-60.

64 Goode, above n 4, 38.

Ideally, such authority can or should provide counselling for whistleblowers, legal protection, legal representation, and protection for the security of employment of the whistleblower. For example, the US Office of Special Counsel ('OSC') is an independent federal investigation and prosecution agency with functions under the *Whistleblowers Protection Act of 1989*.[65] The OSC provides a safe channel through which current and former federal employees, and applicants for employment, may disclose information which they believe shows such matters as a breach of the law, gross mismanagement, gross waste of funds, or abuse of authority. The OSC does not independently investigate allegations, but it sends them to the agency concerned for investigation and report, which it sends to the President and the congressional activities with jurisdiction over the agency. In the UK, the *Public Interest Disclosure Act 1998* (UK),[66] which has amended the *Employment Rights Act 1996*, provides for whistleblower disclosure to 'a person prescribed by an order made by the Secretary of State' (s 43F).

The existing State and Australian Capital Territory whistleblowers legislation in Australia is also monitored by self-help and private organisations such as Whistleblowers Australia,[67] set up with the aims of helping to promote a society in which it is possible to speak out without reprisal about corruption, dangers to the public and other vital social issues, and to help those who speak out in this way to help themselves. Whistleblowers Australia encourages self-help and mutual help among whistleblowers and supports campaigns on specific issues.

Since its establishment, Whistleblowers Australia has been active and, inter alia, has promoted whistleblower legislation, called for Royal Commissions into corruption, and generally given whistleblowing a profile. As a resource base, it has carried out quiet work such as supporting individual whistleblowers, sharing expertise, providing moral support, access to research and links to relevant networks.

65 <www.osc.gov>. Discussed by, eg, B D Fisher, 'The *Whistleblower Protection Act of 1989*: A False Hope for Whistleblowers' (1991) 43 *Rutgers Law Review* 355; E Kaplan, 'Whistleblower Protection in the United States Government' (Paper presented at the Ethics Regimes in the Public Sector Conference, Washington DC, 24 February 1999). See further B V Powell, 'Whistling in the Dark: The Protection of Federal Whistleblowing Protection for In-House Reporters of Corporate Wrongdoing' (1989) 68 *Oregon Law Review* 569.

66 Eg R Sarker, 'Blowing the Whistle on Fraud' (1995) 3 *Journal of Financial Crime* 185, with reference to the earlier Whistleblowers Protection Bill 1995 (UK).

67 <www.uow.edu.au/arts/sts/bmartin/dissent/contacts/au_wba/info/html>.

Proposed Template for Whistleblowing Legislation

Given the many strong points – and gaps – in current Australian whistleblowing regulation, this article endorses the following as the foundations for Australian whistleblowing regulation:[68]

1. a statement of support for the principle of disclosure by whistleblowers – whether or not there is a link between the matter disclosed and the person's employment – to enhance information in the marketplace;
2. encouragement for whistleblowers to come forward by the provision of incentives and rewards for disclosure;
3. application to both the public and the private sectors;
4. in view of the globalisation of business, the template should include disclosures of matters which occur outside the jurisdiction;
5. matters of national security, police and security services should not be excluded from whistleblowing, subject to the formulation of appropriate disclosure rules in the public interest;[69]
6. wrongdoing that can be disclosed, such as corruption and maladministration, should be defined along the lines of the protected disclosures or 'qualifying disclosures' in s 43A of the *Employment Rights Act 1996* (UK);
7. whistleblowers making protected disclosures should be relieved of civil and criminal liabilities so as to deter others – especially those the subject of the disclosure – from taking reprisals;
8. the whistleblower template should have both a retrospective and a prospective effect to include disclosure before the commencement of the legislation and disclosure of matters that are continuing;
9. immunity should exist for disclosure if the whistleblower believes on reasonable grounds that the information was true or that it

68 Adapted from and in support of Lewis, above n 31, 191-3.

69 Public reaction after the attack on the World Trade Center on 11 September 2001 should not authorise government overreaction in the name of the 'War Against Terror' to limit freedom of expression and the freedom of the press, such as Australia's proposed Criminal Code Amendment (Espionage and Related Offences) Bill 2001 (Cth), which has been soundly criticised by many parties, including Whistleblowers Australia, and seems destined for further redrafting: Benjamin Haslem, 'Spy laws "will limit freedom of speech"', *The Australian*, 4 February 2002, 4.

may be true.[70] False, misleading or frivolous reporting could be discouraged with penalties under the template;

10. codes of conduct and whistleblowing procedures should be mandatory for all organisations to facilitate the making of disclosures and to stipulate how they will be dealt with;
11. an independent whistleblowers authority or agency should be established to receive, screen and investigate disclosure; communicate its decision within a fixed time scale; ensure that advisory and counselling services are available; give advice and assistance, and educate the public about the legitimacy of whistleblowing in a democratic society;
12. the whistleblowers template should be reviewed and refined in the light of experience.

Whistleblowers: To Conclude

Australia's State and Territory whistleblower laws have provided little reported case law since the first enactment in South Australia in 1993. In their place, whistleblowers are well protected with important whistleblower regulation in statutory disclosures and protections mandated by legislation in non-whistleblower regulation in areas such as the accounting profession, *Corporations Act 2001* (Cth), *Financial Transaction Reports Act 1988* (Cth), *Proceeds of Crime Act 1987* (Cth) and *Trade Practices Act 1974* (Cth).

Some commentators, such as Goode, urge caution in advancing further whistleblower regulation, stating:

> We will continue to learn as time goes by. Despite the rhetoric of increasingly vested interests in the whistleblowers industry, the appropriate requirements of this particularly difficult part of the re-enforcement of public and private sector ethics require careful and thoughtful responses.[71]

This article supports building on the experience of the financial services examples by expanding the current limited operation of the specific whistleblower legislation, and questions the apparent fear of disclosure that runs counter to the strong existing Australian whistleblower regulation in the area of financial services.

70 Eg *Whistleblowers Protection Act 1993* (SA) s 5(2).

71 Goode, above n 4, 49.