SQUIRE PATTON BOGGS

Protection of Corporate Whistleblowers in Australia

Guidance From *Flori v Winter [No 3]* [2023] QCA 229

Australia – December 2023

In 2019, Part 9.4AAA of the *Corporations Act 2001* (Cth) (*Corporations Act*) was strengthened to protect eligible whistleblowers in the corporate sphere. These were important reforms, with the provisions performing a critical role in preventing and uncovering corporate misconduct and criminal activity, and are weighted towards protecting whistleblowers from potential significant personal harm and financial loss.

However, unfortunately, on occasion the whistleblower protections are abused.

Corporate entities that are confronted with questionable claims to whistleblower protections can face an unpalatable situation of adverse publicity and legal costs if they reject the claim to protections (even if successful) and potential criminal sanctions if they are found to have made the wrong call.

While the whistleblower protections that apply in government are, in many cases, very different, the comments of the Queensland Court of Appeal in the recent case of *Flori v Winter [No 3]* [2023] QCA 229 are informative.

Summary of the *Corporations Act* Provisions

Part 9.4AAA of the *Corporations Act* provides protections to eligible whistleblowers who make a disclosure about a disclosable matter in relation to a regulated entity to an eligible recipient, ASIC, APRA or a prescribed Commonwealth authority. The definition of regulated entities is broad and includes companies. Eligible whistleblowers include employees, officers, suppliers of goods or services, volunteers, associates, trustees, custodians and investment managers, as well as spouses, relatives and dependants of such persons.

Importantly, to be a disclosable matter, the discloser must have "reasonable grounds to suspect that the information concerns misconduct, or an improper state of affairs or circumstances" in relation to the regulated entity (or its related body corporate). This can include reasonable grounds to suspect the regulated entity, its officer or its employee has engaged in conduct that constitutes an offence or contravention of specified legislation (including the *Corporations Act*).

If the criteria are met, the whistleblower is given a number of protections, including from detriment caused or threatened when there is a belief or suspicion that a protected disclosure has or will be made and where that belief or suspicion forms part of the reason for the detriment. Detriment is broadly defined and includes dismissal, alteration of duties, discrimination, psychological harm, damage to reputation and any other damage.

Contraventions of the provisions is an offence and the court has broad powers, including to award compensation and issue injunctions. Further, a person who brings proceedings relating to the protections, even if unsuccessful, will not face an adverse costs order unless the proceedings are found to be vexatious or without reasonable cause, or if unreasonable conduct caused the costs to be incurred.

The Facts in *Flori v Winter*

In 2010, a letter was received by the Crime and Misconduct Commission (CMC) that alleged that a senior male police officer and a junior female police officer had engaged in improper sexual conduct (Letter). The Letter was signed in the name of another serving police officer, Mr. McGrath.

Following an investigation into the leakage of confidential Queensland Police Service (QPS) CCTV footage to the media in 2012, the home of Mr. Flori (a serving police officer) was searched. The search resulted in the discovery of a copy of the Letter on his computer (under Mr. McGrath's name). When interviewed, Mr. Flori denied writing the Letter. However, upon further questioning, he did admit to writing it.

Following the interview, Mr. Winter, who led the investigation regarding the leaked CCTV footage, circulated a briefing note and a subsequent report that recommended disciplinary proceedings be brought against Mr. Flori based on the dishonest signing of the Letter and being untruthful to the investigating officer. A disciplinary notice was issued to Mr. Flori but later withdrawn when criminal charges regarding the CCTV footage were brought against Mr. Flori. The prosecution of the criminal charges was unsuccessful, and Mr. Flori was transferred to a new police station. In 2015, he took leave without pay and then resigned from the QPS in 2017.

Mr. Flori then brought a claim against Mr. Winter under Queensland's whistleblower protection laws on the basis that the Letter was a protected disclosure and the briefing note, report and the recommendation to the CMC that disciplinary proceedings be brought were reprisals.

The relevant legislation was section 40(1)(a) of the P*ublic Interest Disclosure Act 2010* (Qld) and the then repealed *Whistleblower Protection Act 1994* (Qld). These provided that a person must not cause detriment (which was defined as including intimidation or harassment; adverse discrimination, disadvantage or adverse treatment about career, profession, employment, trade or business; threats of detriment; financial loss from detriment; and damage to reputation) to another person because that person has made a public interest disclosure. The definitions that applied at the relevant time in order to constitute a public interest disclosure involved "if the person honestly believes on reasonable grounds" that it is information that tends to show someone else's official misconduct.

At first instance, in *Flori v Winter* [2023] QDC 110, the Queensland District Court dismissed the claim.

Key Findings

On 21 November 2023, the Queensland Court of Appeal upheld the decision in *Flori v Winter [No 3]* [2023] QCA 229. Of particular note, the Court of Appeal found no error by the trial judge in its findings that:

a. Mr. Flori did not have an honest belief on reasonable grounds that the Letter was a public interest disclosure, and so did not constitute a public interest disclosure
b. Mr. Flori failed to prove that the detriment he suffered was due to the contents of the Letter rather than the use of dishonest means to communicate the allegations and subsequently lying about his involvement
c. The protection does not extend to independent wrongs or wrongdoings merely because they happen to be in a document that contains a public interest disclosure
d. No detriment was caused (or attempted to be caused)

In considering whether Mr. Flori had an honest belief on reasonable grounds (as opposed to a subjective belief), it was considered relevant that:

1. The alleged conduct in the Letter, even if proved, would not have amounted to official misconduct
2. Mr. Flori was a witness of poor credit
3. Mr. Flori did not seek whistleblower protection at the time he wrote the Letter
4. Instead of putting his own name on the Letter, Mr. Flori used Mr. McGrath's name
5. Mr. Flori did not have firsthand knowledge of the matters alleged in the Letter and no witnesses corroborated his allegations
6. The evidence given by the persons he identified as the source of the allegations contradicted his evidence

In relation to detriment, the Court of Appeal indicated that it considered the District Court was correct on the evidence that Mr. Winter had not caused or attempted to cause detriment to Mr. Flori. Instead, the court characterised Mr. Winter's investigation and report, including the recommendation for disciplinary action, as simply doing his job. It was noted that it was not pleaded or proved that anything Mr. Winter said about the Letter was reckless, inaccurate or inappropriate.

Discussion

There are both similarities and significant differences between the wording of the then applicable Queensland legislation and the *Corporations Act*.

For one, while both require "reasonable grounds", the *Corporations Act* does not have the same express subjective requirement of an "honest belief". Another is that in prohibiting detriment to the discloser, both pieces of legislation require a causative connection between the detrimental conduct and the disclosure. However, the *Corporations Act* provisions expressly cover it only being part of the reason for detrimental conduct, whereas the court accepted that under the Queensland legislation it had to be a "substantial ground" for so acting.

This means that while entities may look to *Flori v Winter* for some indirect guidance, caution must be taken and a close analysis of whether the relevant finding would apply is required.

While the finding that Mr. Winter in conducting the investigation, preparing the briefing report and recommending disciplinary action did not amount to causing or attempting to cause detrimental conduct may give entities some reassurance that they are able to appropriately investigate matters, the findings were strongly influenced by the particular factual circumstances and cannot be extrapolated far. *Flori v Winter* involved an investigation and recommendations primarily connected with the unrelated CCTV release issue, and the relevant findings about the Letter were very focused on the dishonesty. It is well accepted in the context of other protective legislation around workplace bullying and harassment that commencement of an investigation into the conduct of an employee can, in certain circumstances, constitute adverse action in the form of injury or alteration of the employee's position under the relevant statutory definition. It follows that a cautious approach is warranted.

Dealing with whistleblowers and those claiming protections as whistleblowers will likely remain a complex and sometimes vexing process. Companies should take great care in handling such matters and, given the potential consequences, seek advice if they have doubts as to whether the protections apply and if they intend to take action. We have experience in guiding entities through whistleblower investigations, providing advice on the *Corporations Act* whistleblower provisions, and assisting with the management of sensitive situations with difficult employees and officers.

Contacts

Rebecca Heath
Partner, Litigation
T +61 8 9429 7476
E rebecca.heath@squirepb.com

Hamish Donovan
Associate, Litigation
T +61 8 9429 7421
E hamish.donovan@squirepb.com

Kim Hodge
Partner, Labour & Employment
T +61 8 9429 7406
E kim.hodge@squirepb.com

Nicola Martin
Partner, Labour & Employment
T +61 2 8248 7836
E nicola.martin@squirepb.com