

***“LISTENING TO THE WHISTLERS”***

*(The Facilitation of Internal Whistleblowers within Organisations)*

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Introduction

Among the many current media and finance industry comments on the need to improve corporate governance one of the most powerful mechanisms, facilitation of whistleblowers, is hardly being mentioned.

The predominant commentary is on the structure of boards, the payment of chief executives and the need for enhanced internal auditing along with demonstrable independence among external auditing and accounting providers.

This current low level of interest in whistleblowers is in spite of the fact that the majority of the well known corporate scandals and collapses both here and abroad came to light through legitimate internal whistleblowers.

The lack of emphasis on this element of governance seems even more odd when one considers the U.S. Sarbanes Oxley Act, the Australian Stock Exchange principles of good governance and the Standards Australia governance documents all identify the need to utilise whistleblowers and recommend specific mechanisms to do so.

This paper examines the incidence, formalisation, benefits and misunderstandings relating to whistleblowing and the facilitation of internal whistleblowers. It also outlines how they can be an effective tool in detecting and deterring organizational fraud, corruption and misconduct.

Interpretation

In the Macquarie Dictionary whistleblower is defined as: “a person who alerts the public to some scandalous practice or evidence of corruption on the part of someone else”. It is simple plain English and in my experience those are the best definitions to use.

Security Threat

In a recent discussion a group of people with considerable experience in Safety and Security were speaking about the matters presenting the greatest threat to the security of senior citizens in an ageing community. Gangs, weapons and increasing violence were raised along with view on the negative perceptions created by graffiti and other vandalism. Then Emeritus Professor W.G. (Kit) Carson made the point that in his view the issue that was impacting most negatively on the security of our community was recent corporate collapses and the resultant fall in the value of their superannuation and their expectation to be able to live comfortably in their now lengthening twilight years.

## US Experience and Action

This view is shared by the President of the United States. In public comments made after the WorldCom, Tyco and Enron scandals George W Bush in a speech to Wall Street (July 2002) said,

*“These scandals have hurt the reputations of many good and honest companies. They have hurt the stock market. And worst of all they are hurting millions of people who depend on the integrity of businesses for their livelihood and their retirement, for their peace of mind and for their financial wellbeing.”*

As a result of the impact of those same corporate scandals the US Congress passed the Sarbanes-Oxley Act which has significant implications for audit committees, management, auditors, attorneys and analysts. The Act applies to all publicly traded companies listed with the US Stock Exchange.

## In the UK

The UK has the Public Interest Disclosure Act (1998) which applies to both the public and private sector.

Their combined code requires that a whistleblower process be put in place within all public and private sector entities.

Theo Blackwell in a survey of the UK disclosure legislation on its third anniversary said,

*“Transparent, well-run organisations will have nothing to fear by providing their employees with an encouraging environment in which they can raise their concerns. It is high time organisations learnt to support, and not suppress such participation as an early-warning against the corporate governance failings witnessed in the US.”*

## International Concerns

With the recent corporate fraud at Parmalat in Italy, with Canadian publisher Conrad Black and a range of other business scandals the OECD is stepping up efforts to establish common global guidelines to improve corporate governance.

## Here in Australia

The result of these corporate catastrophes has been the rapid heightening of interest and discussion on good governance, including the facilitation of whistleblowers. The Federal government has spoken about the possibility of legislation albeit the corporate sector would clearly prefer self-regulation. Democrat Senator Andrew Murray certainly has floated a Public Interest Disclosure bill relevant only to the Commonwealth public sector. I have corresponded with Senators Campbell and

Murray in an effort to give them the benefit of our experience and views on whistle blowing.

In all but the Northern Territory Australian jurisdictions have legislation impacting upon the public sector. The Whistleblowers Protection Act 2001 in Victoria is as comprehensive and potent as any we have encountered but surprisingly the State Government has largely failed to inform their citizens that anyone can make a disclosure against any public officer or public body. As I described it in one media interview the Act is “a whistle without a pea”. It is an empowerment opportunity missed.

Interestingly the Victorian Parliamentary Drugs and Crime Prevention Committee report on its Inquiry into Fraud and Electronic Commerce recommended that “*the Whistleblowers Protection Act 2001 (Vic) be extended to individuals who report suspected fraud and offences committed in the private sector (Recommendation 31, p220)*”. Clearly such a recommendation would do little for private sector entities who operate in more than a single state or territory. If legislation is to be applied to the private sector it must be enacted by the Commonwealth.

Notwithstanding the absence of current legislation in regard to the private sector there is much activity by the various regulatory and advisory bodies in regard to good governance including the facilitation and protection of whistleblowers. By way of examples;

- Corporate Law Economic Reform Program (CLERP) Issue paper 9, which is now a Bill to amend the Corporations Act. (With notable limitations as it focuses on auditing and accounting issues).
- Australian Stock Exchange (ASX) Corporate Governance Council guidelines.
- Standards Australia papers; AS8001 Fraud and Corruption Control and AS8004 Whistleblower protection programs for entities.
- The Australian Securities and Investments Commission (ASIC) are seeking more protection for whistleblowers.
- The Australian Prudential Regulation Authority (APRA) has called for a boost to its powers and significant reforms including protection for directors and executives acting as whistleblowers.

Another significant driver in the push for ethical conduct within companies is the intention to make directors and auditors more accountable for their actions, or in many cases inaction. The fact is that shareholders are demanding good governance through enhanced ethical and honest conduct.

The Business Council of Australia and the Australian Institute of Company Directors report that there are clear signs that Australians are becoming disillusioned with big business and its leadership. These groups warn that growing scepticism is threatening to erode consumer and investor confidence which in turn could impact on the economy. (Remember that ageing population and their shrinking superannuation mentioned earlier).

So whether the current motivation to be, and seen to be, highly ethical is driven by altruistic or utilitarian reasons strictly speaking does not matter. It is now a clear corporate imperative and a key tool in the process is the harnessing of whistleblowers.

### Australian Institute of Company Directors (AICD) survey:

A recent survey of company directors found that:

- 13% believed the ASX code would improve corporate performance, 62% were worried that investors would snub their stock if they did not comply!
- While 68% of the 371 responding directors supported the 10 ASX guiding principles, 70% believe they were too prescriptive and only 44% planned to adopt them this year!

### Anonymity: Shield or Mask?

The best way to protect a whistleblower is to provide them with anonymity, something the Queensland, Victorian and Tasmanian legislation and the Sarbanes-Oxley Act all do. Other jurisdictions, such as New South Wales do not provide anonymity or for the making of disclosures by non public servants. Western Australia is even worse. In that state public sector whistleblowers are required to fill out and sign a two page form. Not surprisingly the disclosure business under such models is less than brisk.

In attending to cases under the Victorian legislation we have had public sector employees who are prepared to identify themselves to us as long as they are accorded anonymity in dealings with their parent organisation.

We are also encountering this stance within the private sector. It is usually driven by their lack of confidence in their entities capacity to retain confidentiality in regard to the subject of their “whistle blast” and/or their identity. They are also conscious of the fact that organisations, sometimes their own, do tend to “kill the messenger”. As one wag said in an anonymous quote: “Confession might be good for the soul but it’s bad for the career prospects”.

It is worth noting that the provision of specific offences and severe penalties for those conducting acts of recrimination against whistleblowers provides little genuine protection. Much of the action taken against identified whistleblowers is itself anonymous or difficult to shelf home sufficiently clearly to achieve a court conviction. Some reprisals are also subtle and seemingly innocuous yet hurtful and disturbing to the recipient.

### Myths & Misunderstandings

*“Malice and Mischief”* - My own experience in two jurisdictions with police organisations, Crime Stoppers and now with STOPline is that very few callers are vexatious. Some are misinformed or mistaken and these, along with the odd

vexatious whistle blower, are usually readily identified. This is predominantly through the skill and experience of the call taker coupled with the fact that once assured of anonymity most callers will discuss their disclosure (and themselves) in detail.

A recent survey of the Victorian public sector by the Office of Public Employment found 97% of employees believed that those who report corruption are not troublemakers. Sad to say that 65% believed those that made the reports are likely to suffer as a result and 30% were not aware of the appropriate place to report the problem (In spite of the introduction of the Whistleblower legislation on 1<sup>st</sup> January 2002.)

*“Issues will be Petty”* - Research and results overseas and here shows that more internal fraud was detected by “tips from employees” than any other means. The US Association of Certified Fraud Examiners in their 2002 report encourages “hotlines to permit the reporting of fraud without reprisals”. In the most recent Ernst & Young global business survey it was found that the second most effective tool for detecting fraud was whistleblowers.

In the recent “rogue trader” expose at the National Australia Bank (NAB) a staff member blew the whistle to his line management in January 2004. The subsequent investigation identified losses of \$360M. The practice of concealing losses by the traders had commenced in September 2001. A whistle blast in say August 2003 would have cut the loss to approximately \$5M. Even in a huge corporation losses of even this lesser amount would hardly be considered trivial.

If a holistic approach to good governance is taken then disclosures about unsafe work practices, bullying and harassment can, and in the authors view, should all be facilitated through such a hotline. Apart from giving management the capacity to address forms of workplace misconduct and inappropriate behaviour it demonstrates to the workforce that their safety and treatment is a matter of organisational concern.

*“Australians don’t Dob”* - Crime Stoppers has been in Australia since 1987 and nationally approximately 120,000 calls a year are now taken. During 2002 there were over 2,000 arrests and 11,000 charges laid. What is little known is that in spite of the availability of cash rewards very few callers claim them.

The Environment Protection Authority in Victoria received 14,300 reports of smoky vehicles (2000/2001) and just over 7500 calls for litter offences. We have recently seen the introduction of hotlines for the building industry and in relation to suspected terrorist activities. All these models work because in the main genuinely concerned people call them and competent personnel assess and follow up the information.

*“But I have an Open Door Policy”* - As a member of a Management Audit Unit, a CEO and latterly a consultant, I have stopped being surprised at how much people from within a workforce will tell an “outsider” when given assurances about confidentiality. The discomfort, disappointment and sometimes hurt evident in their line managers when apprised of the issues is also quite consistent. Never the less it is important to tap into your greatest source of workplace knowledge and information – your personnel. They know the organisations strengths and weaknesses just as you

did when you were closer to the action. And just like you did they are waiting for “someone” to fix “it”.

*This is more of a look good, feel good thing.*”- Fraud continues to be a major problem for business. According to one national Fraud survey the average fraud loss per organisation was \$1.4m. Bullying, harassment and unsafe work practices cost corporate entities huge amounts in lost productivity as well as industrial and legal actions. Detecting such misconduct and dealing with it promptly saves time as well as money and also creates a deterrent effect that reduces the unacceptable behaviour by others in the same workplace.

There are sound business reasons for adopting an “ethical” approach to business. According to management consultants Mc Kinsey a focus on social and environmental governance can improve share prices by about 18 per cent.

They also found 50 per cent of investors regard corporate governance as equal in importance to financial performance when making an investment and 75 per cent said they’d be willing to pay a premium for companies with good governance.

In March 2004, Standard & Poor’s Vicki Tillman said, “Our research suggests links between stronger corporate governance practices and higher, more sustainable share performances”.

Standard & Poor’s in that same month dropped the long term credit rating on NAB and related entities from AA to AA-. This surely has to be a blow to the NAB’s corporate status and standing in addition to the economic losses mentioned earlier.

### The Challenges

Firstly, having Company Boards and senior managers accept the fact that facilitation of internal whistleblowers is one of the most productive tools in the good governance tool kit. It is also necessary to disabuse people of their perceptions flowing from the myths and misunderstandings already mentioned.

Next, there is the large and influential middle management cohort. Many of these people fear enhanced scrutiny and accountability, particularly with an anonymous whistleblowing system. Their concerns mostly flow from the notion of enhanced accountability. Whether because of their own culpability, either by direct involvement in the improper behaviour alleged or much more frequently their failure, inability or unwillingness to detect and address the misconduct in their area of organisational responsibility. Such a group of fearful middle managers, often lacking in “corporate courage”, have the potential to be quite negative in regard to the adoption, implementation and work place acceptance of a whistleblowing model. . This statement is based on the authors experience in both the public and private sectors.

A final hurdle is convincing corporate entities that a safe and confidential conduit for whistleblowers should report in at company secretary level, and/or to the audit committee. Such a deviation from the usual “chain of command” in a tiered structure is frightening to many.

## Conclusion

Enhanced good governance including the facilitation and protection of whistleblowers is very much in vogue and will need to be addressed by the private sector. It will occur either as the result of the adoption of the recommendations of industry bodies or by edict by oversight bodies and/or the government. At the moment the choice is proactive or reactive but one way or the other it will happen. For instance all overseas companies listed on the US Stock exchange have until the 31<sup>st</sup> of July 2005 to comply fully with the Sarbanes Oxley Act.

But surely it should not all be about compulsion. It is good business to take steps that reduce negative impacts on your entities assets, people and reputation. In virtually all of the recent high profile corporate collapses, loyal and committed employees tried to alert management to their suspicions and concerns without success.

What would have been the impact to all involved if Jeffrey Simpson of HIH had been able to effectively and safely report his concerns earlier? Would the collapse of Enron and WorldCom have reached the proportions it did if the concerns of Sherron Watkins and Cynthia Cooper had been heard, and acted upon earlier?

There is no doubt that our ageing community and the large and growing number of shareholders in this country have had their confidence in their financial security severely shaken as a result of the corporate excesses identified in the past few years. The reputations, competence and integrity of some previously respected international accounting and auditing companies are now also in question.

Where an organisation facilitates and encourages whistle blowing every employee potentially becomes an asset protection and a human resources department representative. Each staff member has a stake in protecting their employer's assets, people and reputation. Many, if not most, have an interest in such matters for practical reasons if not altruistic ones. Either way motivation to act can be easily engendered. What is predominantly lacking is a confidential and secure conduit for staff to safely convey information and concerns to senior managers who possess the corporate courage to tackle the matters reported.

Such a pipeline for whistleblowers will not insure against poor decision making or bad business choices, but it will provide a system for the receipt of information about an issue before it ends up on the front pages of the daily newspaper, the evening news or before a formal enquiry.

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