Editorial

Blowing the Whistle – No Rewards, please!

One of the major policy debates in corporate governance is should we promote an aggressive whistle-blowing culture so as to weed out wrongdoers, or should we create a whistle-blowing regime that principally focusses on protecting whistle-blowers from retaliation by powerful corporate actors? In Australia, this is a hot issue, with new whistle-blowing legislation currently before the Senate. In answering this question, we need to think about what should be the objectives of the whistle-blowing legislation and how a system of rewards fits into such goals.

There are three possible goals of any whistle-blowing legislative regime. The first and the most important aim is to provide effective legal protection to whistle-blowers who disclose misconduct or an improper state of affairs in relation to a corporation or non-compliance with an important law such as taxation laws. Effective protection requires the criminalisation of reprisals against whistle-blowers who act in the public interest; it also requires a system of compensation for losses suffered from whistle-blowing conduct. The second aim is to encourage whistle-blowers to disclose intelligence, information and evidence of corporate misconduct and tax crimes to regulators and law enforcement agencies. That is, whistle-blower laws should have a prophylactic effect so that the regulators are given early warning signs of inappropriate conduct. The third aim arises from the enforcement reality that government bodies will never have the resources to investigate every whistle-blower complaint to the satisfaction of whistle-blowers. Here, the private sector has an important role to play in that corporates should have whistle-blowing policies and a culture that encourages employees to report misconduct to management within the corporation. How to create such a corporate culture in a modern business setting is not clear. What is required is that the management positively acts on the reported misconduct, and if it does not, that regulators are responsive to whistle-blower complaints.

A highly contested issue is whether countries should provide a system of rewards so as to incentivise whistle-blowers to file reports with government authorities. Although there is no international best practice requiring countries to have bounties for whistle-blowers, the USA is frequently cited as the best example of why there should be rewards. However, an understanding of the history of rewards in the USA provides another perspective. Bounty schemes have been a part of the enforcement of laws since the foundation of an independent republic. Bounty schemes proliferate at every level of government – federal, state and local. But the bounty system is tied to a unique US tradition of privatisation of law enforcement which does not exist to the same extent as in countries such as Australia. It is also intimately linked to the aggressive litigation culture in the USA which is fuelled by a contingency fee system for lawyers, who relentlessly pursue their clients' whistle-blower claims, not necessarily for public interest but rather for their own private, personal benefit. In extreme cases, unethical lawyers will advise their whistle-blowing clients as to what information should be stolen from their employers or which computer should be hacked so as to maximise profit-making recovery. There are a myriad of crimes that may be committed by whistle-blowers including theft, criminal trespass and illegal penetration of computer systems and devices.

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That some prosecutors in the USA are prepared to turn a blind eye as to how whistle-blowers have obtained the vital information is an indication of the pragmatism of the US law enforcement system. There is a delicious irony in that as long as the government authorities are not involved in the illegality in securing the information, the evidence is admissible in a court of law; but if the authorities engage in illegal conduct in obtaining the information, then it is likely to be ruled as inadmissible under the Fourth Amendment to the United States Constitution. Unfortunately, unscrupulous privateers and bounty hunters can exploit the US system as do criminals who become "turncoat whistle-blowers" to save their skins.

What is interesting is that the vast majority of whistle-blowers in the USA do not obtain any reward for their disclosures. Headline cases, such as Bradley Birkenfield's US$104m reward from the Internal Revenue Service because of his assistance in disclosing the UBS misconduct, are exceptional – they do not prove the necessity or desirability of rewards. This does not mean that whistle-blower rewards have not been important. Several US scholars have argued that whistle-blower rewards have been the impetus to changing corporate culture and facilitating significant recoveries. For example, under the False Claims Act, the United States Department of Justice has recovered over US$34bn since 2009, with more than 84 per cent of new cases in 2017 based on "whistle-blower referrals or qui-tam suits". Although the False Claims Act applies in a limited arena, essentially government-related frauds such as health-care and defence-contracting frauds, it is an attractive policy mechanism to those who wish to minimise government waste and fraud.

What does this mean for countries, such as Australia, where whistle-blowing policy has been the subject of numerous parliamentary enquiries, Senate hearings and various internal government reviews? With the exception of a 2017 Joint Parliamentary Committee Enquiry, which recommended the enactment of a limited system of discretionary rewards for whistle-blowers, the Australian Federal Government and state governments have historically been opposed to rewards for whistle-blowers. In addition, regulators or law enforcement in Australia have not called for whistle-blower rewards. Moreover, there is a specific objection to rewarding whistle-blowers in tax cases because this would mean a violation of the legal tradition and fundamental practice that tax matters are private. With massive data leakages of financial information by anonymous and unpaid whistle-blowers, from Panama Papers to Paradise Papers, and increased transparency in cross-border sharing of information through the Common Reporting Standard, the case for whistle-blower rewards has just got weaker.

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