Culture of silence: does Australia's whistleblower regime need reform?

When it comes to lifting the lid on corruption in the private sector, Australian legislation does little to protect whistleblowers. Has the sage advice *hear no evil, see no evil, speak no evil*, taken hold and created a culture of silence in Australia's corporate environment?

A lonely place for whistleblowers

Foreign bribery investigations in Australia are conducted primarily by the Australian Federal Police (AFP) which has responsibility for the investigation of these offences under the Criminal Code (Cth). However, unlike many of its overseas counterparts, the Code offers no statutory protection for whistleblowers.

The Corporations Act 2001 (Cth) (the Act) offers the only legislative protection for whistleblowers in Australia. The protection is limited, covering disclosure only of offences against "*corporations legislation*".

The process for reporting in Australia is also restrictive as the whistleblower is only protected if they report to the Australian Securities & Investments Commission (ASIC), an auditor or specific persons within a company. These protections do not extend to anonymous complaints. Once a complaint is made, legislative protections include the confidentiality of identity and information, protection against litigation, a prohibition against victimisation and compensation as a result of any victimisation.

ASIC will only become involved in investigations of foreign bribery in limited circumstances, such as where issues of disclosure, breaches of directors duties and possibly the adequacy of books and records are raised. Thus, responsibility for investigations of foreign bribery allegations fall mainly with the AFP.

A whistleblower who approaches ASIC with allegations of foreign bribery involving senior officers of their company will be protected by the Act. However, if ASIC decides the subject matter does not properly fall within their jurisdiction and refers the matter to the AFP, the whistleblower will lose the protection of confidentiality and anti-retaliation.

Culture of silence

The April 2016 Senate Economics References Committee issues paper described as "*unacceptable*" the perceived "*cultures of silence*" which are said to plague the corporate sector in Australia. Employees told the Committee how they "*had to sacrifice their careers in order to expose greed, dishonesty and gross misconduct*". Subsequent political debate about Australia's legislative regime has not ruled out the US style "*reward*" system. The Federal Government has acknowledged that whistleblower protection laws could be strengthened.

Key issues

- Australia offers limited protection to whistleblowers.
- A whistleblower is only protected if they report to ASIC, an auditor or specific persons within a company.
- If ASIC decides the subject matter falls outside its jurisdiction, the whistleblower may lose protection.
- The Australian government has not ruled out the possibility of a regime that allows whistleblowers to receive a percentage of the funds recouped as a result of a tip.
- Organisations should have adequate reporting frameworks and whistleblowing procedures in place.

A louder whistle

In contrast to the Australian system, where very few actions are taken on the basis of whistleblower complaints,

the US Securities and Exchange Commission has received thousands of whistleblower tips each year, which have yielded results. Their programme allows whistleblowers who help recover amounts in excess of US$1 million to receive up to 30% of those recouped funds.

Interestingly, Australians appear to have an appetite for the US system. The latest report on the Dodd-Frank Whistleblower Program shows that the SEC received whistleblower tips from 95 countries outside the United States. The highest number of non-US whistleblower tips last year came from (in order) the UK, Canada, PRC, India and Australia.

The US legislation also provides for more protection of private sector whistleblowers. There are prohibitions against retaliation, avenues the whistleblower may take if retaliation occurs (including further financial implications for the company) as well as greater confidentiality safeguards. Whilst Australian legislation affords these protections on paper, they are more restrictive and have been criticised since their introduction.

Blowing the whistle

Whistleblowers, regardless of the legislative framework, should always consider taking legal advice prior to any disclosures. The assessment of whether a person qualifies for whistleblower protections under relevant legislation must be considered and weighed against the ramifications for that individual, such as alleged breaches of confidentiality and relevant legislation. The whistleblower must realise the gravity of the forces and institutions they may be taking on.

From an organisational perspective, it is important to have adequate reporting frameworks and appropriate whistleblowing procedures in place to encourage employees to protect the integrity of the company. Policies and programs that provide regular training and internal checks should be developed. Due diligence on third parties must be undertaken regularly to ensure compliance with Australian standards, particularly where these third parties operate in countries with corporate compliance laws that fall short of the Australian standards. Finally, appropriate action in accordance with established practices must be undertaken when an employee reports suspicious activity.

Creating an environment of compliance is essential regardless of the legislative protections afforded to those who lift the lid on corruption.

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