

Don't dob on your mates

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Date: 01/03/2004

Words: 1947

Source: AST

Publication: Asset

Section: News

Page: 70

Australia lacks an infallible framework to protect whistleblowers - and it is time the Government did something about it

Two of your administrative assistants are going through the day's paperwork. Each has uncovered false claims in your organisation. One is for Cabcharge vouchers that, against company policy, were used for private purposes. The second involves unauthorised financial and trading activities. What do you do?

1. Ignore both of them - they both involve a talented member of the team who surely wouldn't do that;
2. Chastise the first administrative assistant for being petty and initiate a review of the issues raised by the second;
3. Initiate an immediate review of both issues - small or large, the transgressions are still dishonest; or
4. Ignore the first but reward the second administrative assistant with an all-expenses paid holiday to Disneyland, and leave the company and country before she returns.

What would you do if you were the person that came across these "anomalies"? Would you be un-Australian and dob in the culprit? Would you do nothing - it is none of your business anyway, not your responsibility? Or would you insist on taking the kids with you to Disneyland?

Australia has a culture of mateship that is deeply inbred from birth; you do not dob in your mate. But what about whistleblowing? Is that different? No, it is not different, but it is an important cultural shift that we are starting to get used to.

Compare the cultures of HIH and NAB. It may sound un-Australian, but recent events would suggest that NAB's culture involves dopping in your mates if you think what they did was wrong. At HIH it became okay to dob on your mates, but only after you were found out and on the proviso you had immunity from prosecution.

Whistleblowers are un-Australian. But whistleblowers protect organisations and the savings of ordinary people. Time obviously thought so when it named 2002 as the Year of the Whistleblower.

Three women appeared on the front cover. Two of them were praised for the financial scandals they revealed. They were Time's People of the Year 2002.

To be a whistleblower is expensive; it costs friends, relationships and careers. Just ask Whistleblowers Australia. Yes, there is an organisation in Australia dedicated to the whistleblower. Its web site says it is an association for those who have exposed corruption or any form of malpractice, are thinking of exposing it, or who wish to support those who are doing so.

In the financial services industry, it is a curious thing that dealers are required to whistleblow their representatives and staff. Just look at section 912D of the Corporations Act. This places an obligation on a licensee to notify the Australian Securities & Investments Commission (ASIC) of any behavior that the licensee believes is a breach of the law.

But there is nothing in the law - even the post-Financial Services Reform (FSR) law - that works in the other direction. Sure, licensees must do on themselves, but this is unrealistic. There is no compulsion in the financial services industry to whistleblow an organisation with a poor or corrupt culture.

If they took legal advice on it, many a would-be whistleblower would keep their mouths shut. In fact, many do. The breach of laws and personal liabilities that can follow are enough to bankrupt the would-be whistleblower, financially and emotionally.

Want to do on your company? Go right ahead, but you may have breached your employee duty of fidelity and good faith. This is usually enough to find yourself out of a job - sometimes without redundancy, accumulated sick leave and other payouts.

Even authorised representatives will face a breach of the duty of the fidelity of an agent to their principal if they blow the whistle. This is where FSR has increased the stakes - the nature of the relationship of an authorised representative to their licensee is now one of a clear agent and principal. As a result, the whistleblowing-authorised representative is in actionable breach of their fidelity as an agent.

There may also be a contractual breach; the employment or authorised representative agreement will often include a confidentiality requirement and other restraints on certain activities. A breach of these clauses may not only result in instant dismissal, it may also invoke penalty provisions and demands for compensation.

The most blunt but effective tool, used time and time again against the whistleblowers of the financial services industry, is the threat of defamation. Often this threat is accompanied with a multi-million dollar claim and a willingness to outspend in legal fees, if necessary, to grind the poor whistleblower into the ground. When the near collapse of Estate Mortgage became apparent, some brave souls told their clients to sell. Some of these were slapped with threats of litigation that, if successful, would have seen their life's efforts disappear in a legal bill.

The threat of defamation is a very blunt tool, but it is effective, mostly because the laws of defamation are complex. The truth shall set you free? Not with defamation. There must also be a good purpose to the whistleblowing. But even this is not enough; it must also be for the benefit of the public.

So, as a whistleblower, you need to know that what you say is true. And you must be confident that it is in the public interest. The problem is, the testing as to the fact and degree of defamation has left many whistleblowers bankrupt from the legal defence fees. And ultimately, if they are proved right, they cannot get their legal defence fees paid for because the company they have fought has gone under.

The Australian legal system and financial services industry is a long way behind the rest of the world in developing a whistleblowing culture. Attempts at defining the culture generally fail because there is no system of protection for the whistleblower. There is, however, an Australian standard on whistleblowing - Australian Standard AS8004-2003: Whistleblower Protection Programs for Entities. It is just one part of a five-part series of national business governance guidelines to help reduce the \$3 billion a year worth of corporate fraud in Australia.

Can the standard work? Of course not. It may be impressive to an ASIC or a PI insurer officer, but it means nothing if it is not backed up with the right culture. And the culture cannot work if the whistleblower lives in fear.

What is the worth of having an un-Australian whistleblowing culture? Where Barings Bank collapsed, the NAB has survived. Reports indicate that a staff member on the trading desk in Melbourne first exposed the initial unauthorised trading losses. Without a culture of dobbing on your mates, the losses at NAB could have been much larger. The difference between Barings Bank and the NAB is that the NAB proved that an early whistleblowing culture means corporate survival and credibility.

Kim Sawyer, an associate professor at the University of Melbourne, advocates the need for whistleblower legislation because only an insider can effectively identify wrongdoing and the regulators are often reluctant to act. For example, a whistleblower testified before the HIH Royal Commission that his advice to the Australian Prudential Regulation Authority (APRA) that the net assets of HIH could be at risk was ignored.

CLERP 9 promises to introduce a range of whistleblower protection mechanisms. But those with experience believe that this will remain ineffective while there is no culture that supports whistleblowing. But at least it goes some way to introducing into the commercial sector (and the financial services industry) laws that have existed on a state and federal level for many years.

Treasury's view of CLERP 9 is grand - a little too grand. "The CLERP 9 paper established a vision for promoting transparency, accountability and shareholder rights. The draft bill provides the mechanism for implementing the vision. Its provisions will enhance auditor independence, achieve better disclosure outcomes and improve enforcement arrangements for corporate misbehavior, while fostering innovation and wealth creation." What a remarkable bill - if only it were true.

If CLERP 9 succeeds, it will introduce the new Part 9.4AAA - Protection for Whistleblowers into the Corporations Act. However, already we have a failure. It will apply to corporations, but apparently not to those industries regulated by APRA or affected by the Australian Competition and Consumer Commission.

New section 1317AA provides the whistleblower with protection where they have a reasonable belief that there may have been a contravention of the Corporations Act. They will enjoy protection, whether they are a director, employee, contractor or even an employee of a contractor to the company that has been "dobbed-in".

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The protection is only available where the whistleblower provides their name to ASIC [proposed Section 1317AA(1)(c)] This is despite the fact that most effective whistleblowing is done where the whistleblower remains anonymous.

The key to protection for the whistleblower lies in Sections 1317AB and 1317AC. They are protected from civil and criminal liability for the disclosure and no contractual remedy such as liability for breach of confidential information can be enforced against them. And if any retaliatory action such as demotion, victimisation or sacking occurs, they are entitled to compensation.

Will the CLERP 9 principles go far enough? The simple answer is no - CLERP 9 merely creates a framework for protection in the limited area of the breach of the Corporations Act. In the areas of misleading and deceptive conduct or the prudential standards that apply to APRA-regulated entities, CLERP 9 does not apply.

The truth of CLERP 9 is that it can only ever be a bandage; it cannot save a business if its culture is already sick. Bob Falconer, chairman of West Australian organisation STOPline, says the emotional risks to the whistleblower - from being frozen out of the office sub-culture to psychological warfare - are too great. Anonymity is the only protection that the whistleblower can secure for themselves. But not under the CLERP 9 reforms.

How do you create an effective whistleblower culture? It is easy: encourage a sense of openness. This will require a revamp of the employment terms, especially the confidential information rules.

The rules of defamation remain, but an structure that encourages whistleblowing will protect itself. A complaint within a system of complaints is a well-known first line of defence. What may have been defamatory in another context is afforded protection under the public interest rules.