



the Australia and New Zealand
School of Government

**Transparency International Australia Whistleblowing
Conference**

Whistleblowing: opportunity or threat?

**Understanding the corporate governance and
public sector reforms.**

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Introduction

In 2002, three women working for quite different organisations – Enron, World.Com and the FBI - were made TIME Persons of the Year to acknowledge their bravery in speaking up in regard to corporate malpractices and oversights. It is a sign of the importance of the role of the whistleblower in today's society, where increasing emphasis is placed on corporate governance in a direct response to corporate collapses. Indeed, the fact that these three women were so acknowledged, represents the emergence of a significant cultural shift to the attitude of the informant, as society recognises the costs associated with corporate malpractice both in financial terms, risks to public safety and other ramifications that can arise.

Whistleblowing in the United States is an accepted part of the cultural landscape¹. It has been a theme in Hollywood films such as Serpico, Silkwood, Marie, and The Insider. In addition as Johnson points out Whistleblowers are often treated as heroes and experts on news shows.

Whistleblowing has been on the increase in the United States. According to Johnson the reasons are: changes in the bureaucracy which is more educated and professional; the wide range of laws that encourage whistleblowing; federal and state whistleblower protection; institutional support for whistleblowers; and a culture that often values whistleblowing.

There has been some increase in the amount of and support for whistleblowing in Australia in recent years but we are nowhere near the United States position.

I would like to talk today about the current focus on corporate governance and public sector reforms generally, but also in relation to my past role as Chairman of the Australian Competition and Consumer Commission and its predecessors the Trade Practices Commission and the Prices Surveillance Authority, for the past 14 years.

I will also talk about some areas of the Commonwealth Law and Economic Reform Program's Corporate Disclosure Whistleblower Protection.

In addition, I would like to share with you some first-hand experiences in dealing with investigations involving whistleblowers.

Corporate Governance and Public Sector Reforms

Corporate governance is about setting up structures and behaviours to regulate internal and external relationships and interactions with stakeholders.

In the case of government regulators, an important aspect of this is the balance between independence and government control, between transparency and accountability, on the one hand, and the need to respect privacy and commercial confidentiality on the other hand.

Government competition regulators have had a significant degree of independence for a number of reasons, including the need for decisions about businesses to be made by bodies which are not answerable to electorates and to various united groups.

Notwithstanding this, the Australian corporate governance environment for regulators is considerable – and exercises both formal and informal constraints on regulatory bodies such as the Commission.

¹ See Roberta Ann Johnson, *Whistleblowing When it Works – and Why*, Lynne Rienner Publishers, London 2003 (P. 4)

The Dawson Review ('Dawson') into the Trade Practices Act, which released its findings in April this year, mainly addresses operational issues rather than Ministerial and Government oversight. Dawson mainly addresses issues of transparency, information and process, and does not in any view suggest fundamental changes in the way the Commission functions.

An initial view of Dawson's, and the Government's recommendations, is that the major proposed change to the Commission's corporate governance arrangements is to have a dedicated parliamentary committee for the ACCC, to have a media code and to have a stronger and more independent consultative committee.

The Uhrig review of statutory corporations more directly considers the relationship between the Government and its independent business regulators, such as the Commission.

Current formal constraints on Commonwealth agencies & the Commission

The current structural control mechanisms include:

- The Courts and the Australian Competition Tribunal. The ACCC is unable to affect anyone's legal rights against their will without first proving the matter the Federal Court of Australia. Regarding its own decisions to authorise anticompetitive behaviour these can be appealed and often are to the Australian Competition Tribunal.
- Parliament – including the various committees (ie Hawker, Estimates etc.)
- The Treasurer and other responsible Ministers. This includes the Minister for Finance, as his Department is involved in the financial management and control of Government agencies.
- The Auditor-General – who is responsible to Parliament.
- Public service boards both at federal and state level. These have an interest in the financial matters relating to personnel and departmental operations.
- The Commonwealth Ombudsman
- Administrative law mechanisms, – particularly since the advent of FOI, ADJRA etc

These structures, with the support of some key Acts, ensure a considerable degree of restraint on Government agencies.

The OECD's *Principles of Corporate Governance 1999*, which focus on the private sector² refer to corporate governance as being:

- ...a set of relationships between the company's management, its board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined.³

One of the key OECD principles is ensuring the strategic guidance of the organization, effective monitoring of management by the board and board accountability to the organization and its stakeholders.

Another view is that of the Government, as set out one of its 1997 CLERP (Corporate Law Economic Reform Program) papers:

² The principles are to be reviewed by the OECD in 2004.

³ OECD Ad Hoc TaskForce on Corporate Governance 1999, *OECD Principles of Corporate Governance*, p.2.

- ... the term used to describe the rules and practices put in place within a company to manage information and economic incentive problems inherent in the separation of ownership from control in large enterprises. It deals with how, and to what extent, the interest of various agents involved in the company are reconciled and what checks and incentives are put in place to ensure that managers maximize the value of the investment made by shareholders...

CLERP 9: Corporate Disclosure “Whistleblower” Protection

The ninth stage of the Commonwealth Law Economic Reform Program (CLERP 9) released in September last year, places the primary focus on the disclosure itself rather than on the whistleblower. Whilst the act of whistleblowing centres on the significance and ramifications of the information provided, effective mechanisms need to be in place to ensure that the consequences for the informant are minimised.

The value of good corporate governance

In theory, the reform program demonstrates a balanced approach to the implementation of a Whistleblower Protection Scheme. But in reality, it will be difficult to get private enterprise to adopt such protective measures under the umbrella of corporate governance unless there is some value to them.

Perhaps the value lies in giving a corporation an opportunity to deal with any problems identified in-house, away from the glare of public scrutiny. But this would require a highly developed framework to be in place to ensure an informant does not endure any reprisals, such as their career prospects being jeopardised or that they are viewed as a liability by management. Certainly there is a need for such processes to be adopted in the interests of promoting and developing the fundamentals of good corporate governance. But the seriousness of the impact of allegations made within a company about alleged malpractice cannot be overestimated.

At the end of the day, the cost and risks to the whistleblower must be weighed up and the system of corporate governance be so effective that they are encouraged and comfortable in stepping forward. Appropriate checks and balances on the efficacy of the internal procedures must also be considered.

The CLERP 9 reforms places an onus on the recipient of protected disclosures, including those made anonymously, to investigate them, except if they believe they are “...trivial, frivolous, vexatious or stale”. It is not so easy to readily classify information into such categories as the informant will often test the water and begin revealing small amounts of information to gauge their response and build their trust in the recipient of the information before revealing all. The mechanisms by which an organisation assesses the validity of information must be carefully crafted.

Understanding the motive

Clearly there is a need for new global standards as endorsed by Transparency International’s submission on the Reform Program. However in discussing *the legitimacy in disclosing malpractice*, the submission states that it is “...*preferable that the scheme treat’s the person’s reasons for making a disclosure as irrelevant, provided the disclosure is not know by the person to be false*”.

On this issue, I must submit a qualification. For a scheme to be effective, understanding the motive of the whistleblower is sometimes crucial to assessing its credibility. From this perspective, the motive needs to be known, studied and understood. Indeed, the motive is

often a direct indicator of the truth of the information provided. Subject to that qualification, the motive is irrelevant.

There have been some important ACCC cases where the whistleblowers' motives for incriminating their employer were not especially altruistic. In one of our most important cases our whistleblower was an employee who discovered that his wife was having an affair with his boss. Angered by this he let us know about meetings his boss was attending where unlawful arrangements were being entered in to with competitors. Likewise there are occasions where a competitor may be the whistleblower. The aim of the competitor may simply be to improve their own position at the expense of their competitor but it still persists with the process of more enforcement.

Having said this it is important that whistleblowing information should be carefully assessed before being acted on.

In an organisation where the disclosure mechanisms are in-house, the consequences of wrong information could be magnified and may result in a disruptive process for all staff due to the impact such action could have on the workplace.

Accountability

Anonymous sources create a further problem for organisations in limiting their accountability mechanisms. One needs to ask does the whistleblower need or indeed want recognition? Again, if the motive for coming forward is understood, the information can then be placed in a correct context.

I agree with Transparency International's belief that accountability can only be achieved where information is readily available through effective disclosure.

Loyalty

The whistleblower may feel they face a conflict between loyalty to their organisation and loyalty to the public. The fact is that loyalty to an organisation stems from an acceptance of its objectives. However if the objectives involve breaking the law it is difficult to see that there's any loyalty obligation. The public interest comes first.

Far reaching effects of whistleblowing

When one whistleblower comes forward with some information about a business indicating unlawful behaviour this can have massive far reaching effects. I hope to illustrate this with some examples from the ACCC experience later in this paper.

Reliability and responsibility

It is not always the case that information given by whistleblower is accurate. There have been cases where information has been supplied to the ACCC, it has been checked and found it is not reliable or not verifiable or not likely to be verifiable.

The spread of whistleblowing

Where an enforcement agency such as the ACCC gets serious and follows up whistleblowers complaints or information and achieves good outcomes this encourages other employees to come forward. When I started the ACCC did not have a reputation for being particularly formidable. When we had a few wins however we noticed many more whistleblowers coming forward. Whistleblowers are not prepared to come forward and take any risks if they think it's unlikely there will be results. When they see an organisation like the ACCC getting results they are more encouraged to come forward.

Cases

During my time as Chairman of the Australian Competition and Consumer Commission, we instigated a number of proceedings which arose from information provided by whistleblowers direct to the Commission.

I shall describe some cases the Commission has been involved in. I would like to draw attention to more general treatments of the topic by Commissioner Sitesh Bhojani in a speech to Transparency International Australia entitled “Should Whistleblowing be Encouraged and Protected and Is It?” Tuesday 6 August 2002, and also “The Profession and Whistleblower Protections” Australian Institute of Criminology Conference “Crime in the Professions”, 21-22 February 2000 now published in “Crime in the Professions” Russell G Smith, Australian Institute of Criminology published by Ashgate Publishing Limited, Aldershot, England 2002. These papers discuss a number of topics including the current legal protections for whistleblowing that are available under the Trade Practices Act and discusses whether they could be strengthened or improved. It also discusses leniency policy for people who come forward and disclose the fact of unlawful behaviour. It also discusses cases in which courts have had to take decisions about whether penalties should be applied or not in cases where there has been whistleblowing.

For my part I will stick mainly to an account of some important cases we have been involved in.

Price-fixing and Cartels

The role of the whistleblower in relation to the most seriously harmful form of anti-competitive behaviour mainly cartel behaviour is crucial. The essence of cartels is their secrecy, they involve secret arrangements between businesses to increase prices and reduce competition in various ways at the expense of customers and consumers. It is virtually impossible to detect let alone prove the existence of a cartel without having inside information. This information will not be forthcoming voluntarily from a firm. Time and time again it has been whistleblowers who have drawn the Commission’s attention to unlawful behaviour. Sometimes it has not been possible to proceed with using the information because it is insufficient to build a case or there would be harm to the whistleblower or because the information may be wrong or false, but for the most part it has been invaluable.

Early Days

In some of our early price-fixing cases namely the Glucose and Tube Makers cases the tip off came from whistleblowers.

Mayne Nickless – TNT

This was one of the most important price-fixing cases of all time. It was the first where multimillion dollar penalties of over \$12m were imposed. Their behaviour was a very serious and economically harmful breach of the law. The ACCC investigations were kicked off but were initiated as a result of whistleblowing by an employee of Mayne Nickless.

Boral CSR Pioneer

The Boral CSR Pioneer price-fixing case is also one of the most important matters that the ACCC has had to deal with and the impact of this decision on behaviour in corporate Australia has been very considerable. Once again the tip off came from an employee inside the organisation. As a result of receiving that information the Commission began to make somewhat discreet enquiries. Often for example the Commission asks customers for information that may be relevant. In this case word of our enquiries, which were not meant to

be secret, got back to one of the smaller players in the cartel, Hymix, who came forward and gave further information to the Commission which enabled it to proceed with a matter where eventually fines of \$21m were imposed.

Animal Vitamins – an International Cartel

In March 2001, the Federal Court imposed penalties of \$26 million against Roche Vitamins Australia, BASF Australia and Aventis Animal Nutrition. These pharmaceutical companies were major players in an international cartel that met in secret and agreed to increase vitamin costs by seventy five percent over a ten year period.

The vitamins industry is a massive global industry, worth over \$20 billion which provides vitamins to food producers and processors.

The companies were caught in the USA largely because of leniency programs where the first member of the cartel to disclose its existence receives no penalty.

The companies in Australia acted to set prices for animal feed vitamins in the domestic market. In doing so, they implemented the anti-competitive agreement that existed between the parent companies. The Australian arrangements started in 1994 and continued until 1998. The participants admitted collusion and cooperated with the Commission after being exposed by the US Department of Justice. So by the time the matter reached Australia there was no 'classic' whistleblower in this matter.

In addition to the fines imposed in Australia, they were also fined overseas. In the United States, Roche has paid fines of \$US500 million and the total fines collected exceeded \$US1 billion.

Vitamin C

Not long after the animal vitamins case was closed, the Commission was approached by an organisation which informed the Commission in regard to allegations concerning a Vitamin C cartel. No proceedings were instituted against the informant company. In August 2001, the Commission instituted proceedings against five foreign corporations based in Switzerland, Singapore, Germany, Hong Kong and Japan.

The Commission alleged that the companies entered into an agreement outside Australia to allocate the market shares for and fix the price of Vitamin C used for human consumption on an international basis, including for Australia as part of Oceania.

On 27 November 2002, the Commission was granted leave of the Federal Court to serve additional respondents. The matter is ongoing.

The Transformers Cartel

These cartels involved price fixing and bid rigging in the electricity market for power and distribution transformers and involved the main manufacturers and suppliers in both markets. The collusion that was admitted in the power transformer market ended in late 1995 and was orchestrated in an extensive series of covert meetings and phone conversations designed to manipulate the market. Similar collusive conduct was admitted in the distribution transformer market, but this conduct did not cease until early 1999.

In this matter, the Commission was approached by email by a person who identified himself as 'dibber dobber'. Initially, contact with 'dibber dobber' appeared fruitless, but after

approaching us a second time, the informant was persuaded by Commission staff to identify himself to them. He was a former employee of one of the companies involved.

After a lengthy investigation, in May 2002, the Federal Court imposed injunctions and penalties exceeding \$20 million on a number of companies and their senior executives to date, while Court action continues against some other companies and executives.

These are just some examples of instances where anti-competitive conduct in the market place was brought to the attention of the Commission through the actions of whistleblowers.

Ballarat Petrol case

In May 2002, the Commission instituted proceedings against seven companies and seven individuals in the Ballarat region alleging that they entered into arrangements to fix retail prices in breach of the *Trade Practices Act 1974*. The respondents were involved in the distribution, or retailing of petrol in the Ballarat area under the Swift, Apco, Mobil, BP, Shell and Ampol /Caltex brands and they were part of a long-standing price-fixing arrangement between distributors and retailers of petrol.

The Commission alleged the companies arranged to raise prices by telephoning one another and communicating the size and approximate time of the price rise. It is alleged they then contacted retail sites to implement the rise. It is also alleged that when one became aware that a service station had not raised its price, further calls were made to each other to try to have the site raise its prices.

The investigation began after receiving complaints from a whistleblower, Mr Trevor Oliver. Just before Easter, Mr Oliver, a Buangor service station owner, alleged on talkback radio, that he had been telephoned by his supplier, Leahy Petroleum Pty Ltd, about a rise in retail petrol prices of about 10 cents at 10 a.m. that day. Several weeks after Mr Oliver made his allegations, Leahy Petroleum ceased supplying his business.

Caltex

The Commission's most well publicised recent case in dealing with a whistleblower, involved the oil raids last year. The anonymous whistleblower contacted the Commission by telephone and later by fax but declined to identify herself at any stage of the investigation. This left the investigating officers captive to the whistleblower's few approaches to the Commission and without any ability to further understand the motive of the whistleblower's actions or indeed its veracity. Having come into possession of such information, which included documents of concern, the Commission had an obligation to investigate.

Despite the Commission placing advertisements in daily newspapers in the hope of attracting the whistleblower's attention and in an effort to gain greater information, the whistleblower decided to go to the Daily Telegraph newspaper in the belief that the Commission were not responding to the claims. This was due to a lack of understanding of the length and complexity of the investigative process and the Commission's inability to keep the whistleblower informed of the progress of the ongoing investigation.

The whistleblower's actions put pressure on the Commission to act before fully investigating the matter. The Commission entered a number of offices of major oil companies in Melbourne and Sydney simultaneously and inspected and copied documents. In approaching the media, the whistleblower had forced the Commission to show its hand prematurely, ultimately hampering the success of the investigation. Ironically, the whistleblower's eagerness to highlight the allegations contributed greatly to an inability to proceed further with the investigation.

Even though there was no result, it can be said that to fail to investigate the matter would have been a dereliction of public duty.

This matter did not proceed largely due to a paucity of evidence combined with the Whistleblower's decision to take an alternative means of drawing attention to the allegations. This outcome of this matter demonstrates the need for greater education of whistleblowers, in understanding what it means for an organisation when they make the decision to broadcast allegations of corporate malpractice.

What if protection such as that proposed in the CLERP 9 Reform Program had been available to the Whistleblower in the Caltex matter? Would an employee feel comfortable approaching senior management to express concerns about allegations of conduct as serious as price-fixing? How would management respond? The risks to the informant would surely be great.

Bread

The Commission is currently involved in a major case concerning alleged price-fixing by Safeway in relation to the price of bread, and also alleged misuse of market power. This matter was sparked off by information from a whistleblower.

Books

The role of the whistleblower has been important in other areas of the law besides cartels. In the ACCC investigation into the price of books a key breakthrough in understanding the industry in the short time available before the inquiry was provided by disclosures by Mr Ken Wilder formerly managing director of W H Collins. Mr Wilder came forward during the inquiry and disclosed extremely important information to the Prices Surveillance Authority which enhanced its understanding of the industry which in particular enabled it to do meaningful comparisons of prices of books in different countries. This had a major impact on the outcome of the investigation.

ACCC Leniency Policy

In recognising the benefits of whistleblowing as a positive and constructive force⁴ in 1998, the Australian Competition and Consumer Commission published a guideline dealing with cooperation and leniency in enforcement in the ACCC Journal. The cooperation policy was applied to all potential civil contraventions of the Act.

The cooperation policy has often been criticised as lacking the necessary degree of certainty and incentive required to encourage whistleblowers, particularly corporate whistleblowers, to come forward and voluntarily report the most serious and difficult contraventions of the Act, such as cartels.

The Commission released its draft leniency policy in relation to cartel conduct in July 2002. This policy aims to facilitate the detection of, and to dismantle, cartels fostering secret collusive behaviour such as price-fixing, market sharing and bid rigging. This policy aims to complement the Commission's revised *Cooperation in Enforcement Guidelines* published in 1998 that relate to non-cartel civil contraventions of the Act.

On June 27 this year, just prior to my departure from the Commission, I launched a leniency policy aimed at exposing and stopping secret corporate cartels operating in Australia. The policy encourages corporations and their executives to reveal the most serious contraventions of competition law such as price-fixing, bid-rigging and market sharing.

⁴ Dempster Quentin, *Whistleblowers*, ABC Books for the Australian Broadcasting Corporation, 1997, pp 1-2.

The policy makes corporate lawbreakers and their executives an offer to cease the illegal conduct and report it to the ACCC in return for a clear, transparent and certain offer of leniency. However the catch is that the policy only applies to the first cooperative company or executive to come forward. The others will be exposed, investigated and if the evidence permits, brought before the Courts. In adopting this approach, the policy operates to undermine collusive behaviour as it creates a risk to co-offenders blowing the whistle on them and avoiding prosecution by being the first in the door.

The key principles of the policy are as follows: Where the ACCC is unaware of a cartel, the first company or individual to come forward will receive an offer of conditional 'immunity' from ACCC-instituted Court proceedings. Whereas if the ACCC is aware of a cartel but has insufficient evidence to institute Court proceedings, the first company or individual to come forward will receive an offer of conditional 'immunity' from pecuniary penalty.

The policy was prepared with reference to leniency policies that have been successfully used to break cartels in other jurisdictions such as the UK, the US, Canada and the European Commission. The ACCC has introduced the policy following an extensive period of public consultation on a draft version that was released in July last year. It will now operate in conjunction with the existing ACCC cooperation policy in enforcement matters.

Hard core cartels are the very worst violations of competition law. They always hurt consumers and businesses by artificially inflating the price of goods and services. They also act like an anchor upon the economy by preventing innovation, reducing the competitiveness of Australian industries, limiting employment opportunities and stunting economic growth.

In recent years the ACCC has successfully broken major cartels in industries such as vitamins, concrete, freight, fire protection, transformers and many others. Some of these cartels were brought to the attention of the Commission by whistleblowers. In these cases numerous executives and their companies were brought before the Courts, where they have faced multi-million dollar penalties.

Under the existing civil regime corporations involved in cartels face pecuniary penalties of up to \$10 million per contravention, whilst their executives face penalties of up to \$500,000 per contravention.

The recent review of the competition provisions of the Trade Practices Act ("the Dawson Review") concluded that tougher sanctions, including the possibility of jail terms for executives and bigger fines, should be introduced to deter the most serious hard core cartels. It also concluded that an effective leniency policy would be a potent means of uncovering cartel behaviour. However, it is important to note that the leniency policy will only apply to the existing civil regime.

It should be noted that the leniency policy will apply to cartel conduct only. It applies to both corporate and individual "whistleblowers" provided they are the "first through the door" and meet the other conditions. The policy basically "protects" whistleblowers from ACCC Court proceedings or pecuniary penalties, depending on the circumstances.

However in some instances an individual whistleblower may wish to have his or her identity protected also. The policy does not specifically deal with this situation, but the general principle is that the Commission would take all reasonable and legal steps to protect an individual's identity if it is in the public interest to do so. However, if a Court orders the

Commission to release this information then it would be obliged to do so. Though I suspect any judge presiding on such a matter would take the need to protect the informant into consideration and may even accept an arrangement for a closed court if the informant was required to give evidence.

Other Options and Possibilities

It is worth considering whether more radical measures should be introduced in order to provide encouragement to whistleblowers. In some parts of the United States for example the law has provided not only for better protection of whistleblowers but also for substantial rewards to be paid to them. This has been the case in relation to occupational health and safety. There has been a considerable stepping up of law enforcement as a result. I understand that the main user of this law has been trade unions. However it seems to be accepted that there are powerful effects on compliance with the law.

Private Right of Action

Suggestions that there should be reliance upon whistleblowing are not such a radical proposal. In this regard it is worth considering the philosophy and structure of the Trade Practices Act. A key element of the Act from its inception has been the availability of a private right of action. This means that an individual whether it be a consumer or a business, whether a customer, supplier or competitor can institute their own action under the Trade Practices Act for injunctions and/or damages and/or other orders (although not for penalties). It is generally accepted that the private right of action has had a valuable effect in making the Act work far more effectively. It is not such a radical departure from that philosophy for whistleblowers to have rights to institute action by way of reporting unlawful behaviour to the authorities, and possibly also to receive reward.

Conclusion – Opportunity or Threat

Perhaps Australia could consider following the lead of other countries such as Canada and New Zealand, who have passed legislation specifically designed to protect whistleblowers by making it an offence to reveal their identity.

The Commonwealth should follow the lead of the states in establishing broad-based whistleblower protection schemes applicable to individual State public sectors.

Defined mechanisms providing protection for whistleblowers within their respective organisation, be it public or private, gives them an opportunity to demonstrate strong ethical practices which promote transparency. The greatest challenge is in finding a balance between a policy which guarantees certainty and a system that discourages people from speaking out. Whilst the greatest threat to an organisation would be in its failure to recognise and develop any such reforms, leaving the informant floundering for direction and ultimately taking action which could perhaps unfairly damage the organisation's reputation. For the organisation, the opportunity awaits but for the whistleblower, regardless of good systems in place, the threat is ever-present. However, good corporate governance reduces the level of the threat.

In my new role as Dean of the Australia New Zealand School of Government, I will strive to promote the benefits of the strong foundations corporate government principles provide, in my role of developing future government leaders.