

“Whistleblowers and Corporate Governance”

by R (Bob) Falconer, Chairman STOPline Pty Ltd

Opening

Q. What currently presents the most likely threat to your security?

- (a) A terrorist initiated explosion in the CBD
- (b) Losing your uninsured home & contents in a bushfire
- (c) Your superannuation “dying” before you do
- (d) Being the victim of an assailant in the street as you leave here tonight

A. Lock in (c)

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 aging community was recent corporate collapses and the resultant fall in the value of personal superannuation and peoples expectation to be able to live comfortably in their now lengthening twilight years.

STOPline contends that most companies are not using a critical resource to protect their companies, their shares and our super – more about that shortly.

US Experience and Action

As a result of the impact of the US corporate scandals the United States 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. (Including Australian ones)

Among its many requirements is the mandatory provision of a confidential, anonymous whistle blowers hotline available for use by all company personnel.

This is hardly surprising given that each of the US Corporate scandals came to light through the actions of internal “whistleblowers”, each of whom were forced to go external after failed attempts at getting their own managers to take action.

As a result of the US experience, and the negative impact on share prices Alan Greenspan, Chairman of the US Federal Reserve identified the principal causal factor as:

“the failure for one reason or another to detect and blow the whistle on those who breached the level of trust essential to well-functioning markets”.

In the UK

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

Theo Blackwell of ‘The Work Foundation’, who 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.”

It’s About Protection

One of the critical elements to protect the assets, people and reputation of any organisation is for any employee to be able to report, without fear of being ostracised, concerns on how the organisation is conducting its business.

At STOPline we provide a process that protects both the organisation and the person who sees the need to blow the whistle - we will get to the mechanics of that in a few moments. Meanwhile some more scene setting.

Here in Australia

The result of overseas and local 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 private sector would clearly prefer self-regulation.

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

Notwithstanding the absence of legislation in regard to the private sector there has been 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,
- Australian Auditing Standards 210,
- Australian Stock Exchange (ASX) Corporate Governance Council guidelines which were only released on 31st of March.
- 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.
- Standards Australia released a suite of five papers on governance on 23rd of June, one is dedicated to “Whistleblower protection programs for entities” (AS 8004-2003) and applies to public, private and government entities.

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. But why aren't we using them to protect our companies and our clients?

On Whistleblowers

In the Macquarie Dictionary a whistleblower is defined as: “a person who alerts the public to some scandalous practice or evidence of corruption on the part of someone else”.

The notion that facilitation of whistleblowers is a recent invention is quite wrong. In Management in Australia – Stoner Collins & Yetton (1985) one recommendation for enhancing ethical behaviour in organisations is to “provide a mechanism for whistleblowing as a matter of policy”. Few companies have done so.

Some have managerial in-house telephone hotlines often attended by answering machines. Their results are less than startling. The reason is obvious; the whistleblower’s identity is often readily ascertained by their voice and the career and personal histories of “outed” whistleblowers is not a happy one.

Need for Anonymity

The best way to protect a whistleblower is to provide them with anonymity, something the Victorian legislation the Sarbanes-Oxley Act and we at STOPline all do.

Some other jurisdictions, such as New South Wales do not provide anonymity or provide for disclosures by non public servants. Not surprisingly the disclosure business under such limited models is less than brisk.

At STOPline in 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.

This stance 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 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”*.

The STOPline Process

STOPline was initially established to provide services to the Public Sector in Victoria as required by the Whistleblowers Protection Act (2001). In those cases the requirements are prescribed by legislation and the Ombudsman’s guidelines. Since the development of corporate interest in facilitation of whistle blowers in the private sector we are also addressing those needs. In lieu of legislation the client company’s code of conduct is usually used to define and determine what is unacceptable behaviour for the purpose of a disclosure.

As opposed to only taking information regarding fraud and corruption STOPline promotes a one stop, holistic approach to whistle blowing. Disclosures can also be made

in regard to bullying, sexual harassment and unsafe work practices. These are all issues where there are now higher expectations that employers will genuinely tackle such behaviour by their employees. At STOPline all matters of concern, including those that fall outside the agreed criteria, are taken on board and referred back to the client's disclosure officer.

The process contains the following key elements:

- Calls taken by experienced investigators on a specific 1300 number
- Details and supportive evidence is elicited to enable disclosure to be assessed and classified
- Anonymity provided, no call line identification on STOPline phones
- Coded identification system used to enable subsequent feedback to be provided
- Rapid provision of incident report and advice to client's disclosure officer
- Periodic activity and status reports provided

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.

A recent survey of the Victorian public sector 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 1st 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".

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.

Our catch-cry at STOPline is - *"Protecting your assets, people and reputation"*

“Australians don’t Dob”- Crime Stoppers has been in Australia since 1987 and in 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, Work Safe matters 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 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. So it actually pays to be good!

The Challenges

Firstly disabusing people of their perceptions flowing from the myths and misunderstandings already mentioned.

Next, and perhaps more difficult is to overcome the middle managers fear of enhanced scrutiny and accountability, particularly with an anonymous whistleblowing system. This statement is based on the authors experience in both the public and private sectors.

There is also the problem of their own culpability, either by direct involvement in the improper behaviour alleged or more frequently their failure, inability or unwillingness to detect and address the misconduct in their area of responsibility.

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. In other words well above the normal reporting lines.

Such a deviation from the usual “chain of command” in a tiered structure is threatening to many managers.

Conclusion

The underlying principles of Good Governance are; *integrity, openness and accountability*

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.

In all of the known, celebrated 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 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? Incidentally at the time of their disclosures Watkins and Cooper had no legal protection.

There is no doubt that the security of our ageing community along with the large and growing numbers of shareholders in this country have had their confidence and financial security shaken as a result of the corporate excesses recently identified.

Where an organisation facilitates and encourages whistle blowing every employee potentially becomes an asset protection and a human resources department representative.

Each staff member is empowered to assist in protecting their employer’s assets, people and reputation. In doing so they will also be protecting their own ongoing employment and their personal savings and superannuation.

What they usually currently lack is a confidential and secure conduit for conveying their concerns to senior managers who are competent, committed and possess the will to tackle the problems identified.

But even courageous, honest and ethical leaders cannot tackle problems they are unaware of. It is too late when it when first advice on the issue comes to notice on 60 Minutes, the front page of The Australian or at the company AGM.

By utilising the STOPline process and focussing on the need for integrity, openness and accountability good corporate citizens will not only protect their companies assets people and reputation, they will assist to preserve our societal and individual economic security.

STOPline gives all employees the opportunity to take action and is an essential tool for ensuring that all stakeholders have confidence in your company.

R. (Bob) Falconer.
Chairman, STOPline Pty Ltd
E-mail: bobfalconer@stopline.com.au
PH: (03) 98824550