Courage Without Mateship

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November 2004

Introduction

In 1998 when visiting Washington DC, I met Tom Devine, legal director of the Government Accountability Project. Tom was the architect of the False Claims Act amendments of 1986 and is the author of *Courage Without Martyrdom: The Whistleblower's Survival Guide.* On introduction, Tom commented that it was pleasing to meet an Australian whistleblower and, as a corollary, added that *"Whistleblowers require courage, but Australian whistleblowers require more."*

I have often reflected on this comment, in part because I am asked to compare the whistleblowing experience in the United States with that in Australia. By implication, I am being asked whether Australia has comparable legislation, whether the nature of whistleblowing problems is the same, and whether Australian whistleblowers are equally protected. In sum, "Do Australian whistleblowers survive as well as their US counterparts?"

The comparison with the United States is a legitimate question. The United States has a similar legal framework to Australia, it has similar corporate governance problems, it has similar public interest vis a vis private interest concerns, and there has been a similar evolution in economic deregulation.

But the question of comparison is not always framed legitimately. Sometimes I am asked whether the whistleblowing experience is any different in Australia, reflecting an implicit assumption that corruption exists everywhere and that Australia is no different. Indeed, for most non-whistleblowing Australians, Australia is so much better than other countries because it is open, there is a spirit of fair go, and there is mateship.

Mateship is a defining characteristic in Australia. Mateship is a pseudonym for networking and, in Australia, tightly controlled networks dominate. Mateship, not merit, is often the main prerequisite for employment, for promotion, for contracting and for acceptability. For a whistleblower, mateship becomes an anathema. By blowing the whistle, the whistleblower ceases to be a mate. The whistleblower becomes the outsider and the whistleblower's world inverts. Secrecy replaces openness, unfairness replaces fairness, and the network replaces true mateship. The outsider is never protected in such a world. Most Australians never see the Australia that whistleblowers see. As a consequence, there is a substantial divergence of opinion between non-whistleblowers

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* Paper presented at the National Conference of Whistleblowers Australia. November 28, 2004. Melbourne.
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and whistleblowers as to the state of our nation. Mick Skrijel, one of Australia's most significant whistleblowers, summed up his experience this way.

"I survived Fascism, I survived Communism, but (Australian) democracy is killing me."

Most Australians could never identify with this sentiment, yet most whistleblowers would have no such problem. It is the divergence of opinion between whistleblowers and non-whistleblowers that makes Australia different in terms of whistleblowing. And it is this divergence of opinion which has made it so difficult to enact and enforce effective whistleblowing legislation.

In this paper, I consider the question "*Is Australian Whistleblowing Different?*.

The Rise of Whistleblowing

Whistleblowing emerged in the second half of the 20th century as one of the important phenomena of our times. Roberta Ann Johnson, author of *Whistleblowing: When It Works-And Why* recently provided some insights into the frequency of whistleblowing in the US

"*Every day more than 1,000 people send e-mails to the Securities and Exchange Commission and every month an average of 2,000 people contact the U.S. Department of Defense Hotline. Almost every morning newspaper contains articles featuring whistleblowers…. More people blow the whistle in the United States than anywhere else in the world."* R.A. Johnson (2004)

Contemporary use of the term whistleblowing is often attributed to Ralph Nader who titled his 1972 book *Whistleblowing: The Report of the Conference on Professional Responsibility.* Whistleblowing, however, is not new. It had underscored much of the environmental and health and safety regulation which preceded the regulations and protections of the late 20th century. Whistleblowing also has long and rich antecedents. Many of the defining moments of history were written by whistleblowers. Jesus blew the whistle on the "robbers" in the temple; Mohandas Gandhi blew the whistle on those who denied voting rights to Indians in South Africa; Rosa Parks blew the whistle on racial segregation in Alabama. All were whistleblowers, albeit of different forms. But they had one commonality. They shared a commitment to the truth, a commitment that Gandhi termed satyagraha.

Truth is the most important asset for the whistleblower, and the most important liability for those who have to respond to them. The offence of the whistleblower is that they ***commit a truth***, a phrase used by Fred Alford (2001), in his book *Whistleblowers: Broken Lives and Organizational Power*. The truths that whistleblowers commit are the truths that others would like to cover-up. Those that cover-up the truth employ three strategies. The main strategy is to ensure that the truth is not tested, at least not independently. This is normally achieved by appointing an inquiry where the outcome is known apriori. Only the processes are to be determined. The second strategy for covering–up the truth is to create uncertainty, usually by invoking technicalities. Technicalities, rather than truth, become the testing ground. The third strategy is to create a diversion by smearing the

whistleblower. The seriousness of a whistleblowing problem is then relatively simple to determine by asking the following questions

(i) Has the truth been independently tested?
(ii) Are technicalities or truth being tested?
(iii) Has the whistleblower been smeared?

A respondent with nothing to hide will test the truth independently, will not use technicalities and will not smear the whistleblower. In longstanding whistleblower problems, the truth is never independently tested. Whistleblowers persist many years after blowing the whistle in search of the truth.

The rise of whistleblowing in the second half of the 20th century is attributable to five main factors. First, monetary values have replaced other values in importance. The values that whistleblowers regard as important (truth, integrity, loyalty) are not priced on the stock exchange. If they were, they would probably trade at less than par value. Certainly, the truth pays low dividends. Secondly, we have seen significant institutional change in recent decades. Public entities accountable to taxpayers have become publicly listed corporations accountable to shareholders. And shareholders are principally concerned with return on equity and the cost of capital, not ethics. Thirdly, our systems have become more complex. Complexity enhances fraud, and weakens the role of auditors and internal controls. It is not surprising that in the most recent Ernst and Young global survey of fraud, whistleblowers now uncover more fraud by value than auditors. There is also the bystander problem. Our increasingly anonymous society is creating an ever-growing class of bystanders, who do not want to be involved. The bystanders betray the whistleblower when they do nothing. Finally, our society has evolved as a series of networks. Networks often depend on favour and fear for their existence, and it is favour and fear that whistleblowers often expose.

The smearing of a whistleblower is a prelude to the discrimination which follows. In my submission to the first Senate Inquiry on Public Interest Whistleblowing in 1994, I characterized whistleblowing as follows

"The exercise of whistleblowing is really akin to removing a cancer that is growing in a public institution. The cancer depends for its existence on a number of pre-conditions, typically a highly discretionary environment, weakness in the host institution, and finally that the cancer is sufficiently embedded, that is, it exists at the very core of the institution. The whistleblower identifies the cancer, attempts to remove it, and then is attacked by it."

The cancer which whistleblowers fight has all the attributes of a cancer. It targets particular individuals just as a cancer targets a particular area of the body. It is usually invisible to all except those whom it targets. And it can only be fully treated by removing it. There is a further complication. Unlike others who fight a cancer, the whistleblower receives little support from bystanders.

The effects on whistleblowers have been well documented. As I cited in a recent article *Professional Responsibility: Whistleblowing,* a 1990 study of US whistleblowers given in Grace and Cohen (1998) *Business Ethics: Australian Problems and Cases* found that for 233 whistleblowers, 90% had lost their jobs or were demoted, 27% faced lawsuits, 26% had psychiatric/medical referrals, 25% alcohol abuse, 17% had lost their homes, 15% got divorced, 10% attempted suicide and 8% were bankrupted. Alford (2001) interviewed several dozen whistleblowers and found that most had been dismissed.

The Rise of Legislation

In most countries, governments have moved to protect whistleblowers for a number of reasons. First, the discrimination against whistleblowers is now so well defined that there is a compelling case for specific legislation, rather than general workplace legislation. Secondly, the need to protect whistleblowers has arisen because whistleblowers are the representatives of other stakeholders. When introducing the US False Claims Act, the first whistleblower protection legislation, Abraham Lincoln suggested that legislation was required so that citizens could be the *"eyes and ears of the government"*. The notion that whistleblowers are the eyes and ears of the government would be anathema to many today. But whistleblowers do represent the interests of taxpayers, shareholders, employees, customers, and most importantly future generations. Thirdly, whistleblowers confer substantial economic benefits. In the US, fraud amounts to 5-6% of government outlays, and is growing at 7% annually. Since the 1986 amendments to the US False Claims Act, more than $6 billion has been recovered in nearly 4000 False Claims Act cases in the US. Whistleblowers also generate substantial policy benefits. Every whistleblower can cite a number of policy changes that result from their actions. The benefit of such policy changes has not been estimated, but it cannot be insubstantial. Finally, whistleblowers are often reliable predictors of financial failure, as the collapse of Enron, WorldCom, HIH, State Bank Victoria, and OneTel have shown. Whistleblowers are the canaries in the coalmine[1]. They are the first to smell the gas.

In the US, Alford (2001) has identified hundreds of laws protecting US whistleblowers. In general, legislation relevant to whistleblowers can take many forms, inter alia

1. Laws conferring basic rights, in particular those associated with freedom of speech. Tom Devine has expressed the view that the 1968 amendment to the First Amendment (Freedom of Speech), which gave first amendment rights to employees, was critical legislation for whistleblowers. Uniform defamation laws in Australia are similarly important.
2. Regulations relating to standards, health, safety and the environment which are important for public sector whistleblowers. In the US, more than 50% of whistleblower cases relate to health and human services, including the environment.
3. Employment law, including but not limited to, statutes relating to equal opportunity, anti-discrimination and bullying. The most recent Australian example is the Workplace Relations Act passed in July this year.

[1] Jean Lennane used this designation at a 1995 conference on whistleblowing at the University of Melbourne.

4. Corporate law, in particular the US Sarbanes-Oxley Act of 2002, and the Australian Clerp 9 (Audit Reform and Corporate Disclosure Bill (2003).
5. Whistleblower Protection Acts such as the US Protection Acts of 1989 and 1994, and the various Australian Whistleblower Protection acts.
6. The False Claims Act. Under the US False Claims Act, the whistleblower can initiate lawsuits on behalf of the government against fraudulent claimants on the government. This law permits fraud recovery with penalties of treble damages. The whistleblower is entitled to 15% of the cost that is recovered, and is entitled to protection.

There is likely to be considerable discussion at this conference, and in future conferences, as to the efficacy of legislation. From a whistleblower's perspective, the following criteria are relevant in assessing whistleblower laws.

1. Credibility

Laws have at least two roles; to penalise offenders and to deter potential offenders. Deterrence is often the main benefit conferred by legislation. In a 1996 study of the False Claims Act, William Stringer estimated deterrent effects at more than 80% of the economic benefit of the 1986 False Claims Act amendments. Deterrent effects, however, only exist when a law is credible. A law becomes credible when it is enforced and is seen to be enforced. A whistleblowing law becomes credible when there is evidence that whistleblowers are protected, that those who target whistleblowers are prosecuted, and that the truth is independently tested. Australian laws lack credibility because there is no evidence of any prosecution for victimisation under existing laws. There is little evidence that Australian whistleblowers are being protected, little evidence that truth is being uncovered.

2. Transparency

One of the main recommendations of the first Senate Inquiry into Public Interest Whistleblowing was to provide evidence of client satisfaction and to maintain files, records and statistics. More generally, those who enforce whistleblowing laws should, within the limits of confidentiality, provide appropriate disclosure. Apart from particularly well-profiled cases, there is limited disclosure relating to whistleblower cases in Australia.

3. Uniformity

Whistleblowing issues occur in all types of organizations, and at all types of levels. For example, Johnson (2004) advocates that protection legislation be extended to nonprofit organizations. I concur and would advocate similar legislation in Australia. More generally, there should be uniform laws across the country.

But there is another issue. There are two levels of whistleblower problem. The first exists at the local level, in divisions of firms or organizations. These types of problem are not necessarily systemic. However, when whistleblowing problems occur in a number of divisions of an organisation, there suggests a systemic problem. It is this

class of problem which leads to the extreme failures such as those at HIH, at Enron, and State Bank of Victoria. Australian laws are designed to protect the first type of whistleblower, the whistleblower at the local level. They are not designed to protect whistleblowers in systemic problems. They will not prevent another HIH.

4. Monitoring

One of the principles of whistleblowing legislation must be to continually monitor and revise legislation. For example, the *New York Times* of October 2 this year reported that "the US Congress is now moving to increase protections for federal employees who expose fraud, waste and wrongdoing inside the government." One of the reasons for new legislation is, as the *Times* reported,

"The terrorist attacks of Sept. 11, 2001, have made the government more secretive, but have also prompted whistleblowers to come forward in greater numbers. 'They feel they can no longer stand by knowing that people's lives are at risk,' said Danielle Brian, executive director of the Project on Government Oversight, another watchdog group."

Legislation must make provision for monitoring existing legislation and its effectiveness. The first Senate Inquiry into Public Interest Whistleblowing recommended a Public Interest Disclosure Board to which the Public Interest Disclosure Agency would report. This would have imparted accountability and a monitoring role. The recommendation has never been enabled.

There is a further monitoring role. The career paths of whistleblowers are typically inverted, relative to those on who they blow the whistle. It remains important to monitor the two career paths long after the blowing of the whistle.

5. Net Economic Benefits

Finally, it is important to measure the economic benefits of whistleblowing legislation. I am a proponent for False Claims Act legislation because it confers benefits which are measured, and because it provides a stronger measure of deterrence. Whistleblowing legislation should be designed not to impose excessive regulatory costs on business.

The above principles of credibility, transparency, uniformity, monitoring and net economic benefit are the principles that I would use to evaluate legislation.

The Response to Legislation

There have been two general responses to legislation. A group of 22 US firms, "the fraud lobby", launched a campaign in 1993 to emasculate the False Claims Act, a campaign which continues to the present time. As Senator Grassley, Chairman of the US Congressional Committee on Finance observed "They hate the Act because it is very effective at exposing their fraud." There has been no campaign against Australian legislation.

A second, and obvious response, is to make the targeting of whistleblowers less obvious. In Alford's 2001 study, he found

*"The average length of time between blowing the whistle and being fired was **about two years.** Little of this time was taken up with appeals. Rather, most time was spent waiting for time to pass until management could adequately disconnect the act of whistleblowing from the act of retaliation."*

Precise and invisible targeting is the contemporary response to whistleblowing legislation. There is an almost unlimited number of ways to target a whistleblower, or indeed any employee. They are, of course, smeared as they have always been smeared. They are given work for which they are unsuited. They are given no credit for work they do well. They are given reduced discretionary power. They are harassed, but as invisibly as possible, so that not even their fellow workers know of the harassment. Essentially, whistleblowers are being put on the slow drip.

There is a final strategy being used against whistleblowers. There are now good whistleblowers and bad whistleblowers. The good whistleblower is the whistleblower who lives in another country, or who works for another firm (preferably a competitor), or who blew the whistle 50 years ago. The bad whistleblower is the whistleblower in your own firm who blows the whistle now.

Is Australia Different?

Whistleblowers in general face problems. Australian whistleblowers face special problems. Some of these are the following

1. Australia appears to have experienced more institutional change than most countries. Relatively more Australian public companies have become shareholder owned companies than in other countries. There has been a relatively higher growth of corporate restructuring (mergers, divestitures, buybacks) in Australia than other countries. And our public service has experienced relatively more change, with accountability to the government replacing accountability to the people. With institutional change, it is not simply the bottom line that changes. Accountability and reporting structures change. Employee contracts change. The case of Alwyn Johnson, a whistleblower at the State Bank of Tasmania, who testified before the first Senate Inquiry into Public Interest Whistleblowing, exemplifies the effect of institutional change. Alwyn Johnson reported anomalies within the bank when it was government owned. He reported them to the government of Tasmania. The problem was resolved. Alwyn kept his job. When the bank was privatized, and irregularities appeared again, Alwyn felt compelled to report anomalies again. He reported them to the Reserve Bank. Alwyn was not protected. He lost his job. Institutional change means that whistleblower laws have to be uniform, in the sense of offering uniform protection across all sectors and all types of companies, public, private and nonprofit making.

2. The nationalisation of so many of our institutions and companies over the last 30 years is also relevant to whistleblowers. In areas as diverse as banking, in tertiary education and sport, we have gone national. Wesfarmers was once a West Australian company founded by Western Australian farmers. It is now a national

company. However, our governance structures have not followed the national model. The James Hardie case is a national case, yet it is fought out of the NSW Supreme Court. Whistleblowing legislation has followed state jurisdictions. We should have national uniform whistleblowing legislation. Instead, we have a patchwork quilt of different state legislations.

3. The lack of knowledge of Australian policy makers has also been a problem. Australian policy makers do not seem to be aware of a range of statutes which would enhance accountability. Many of these can simply be copied from similar statutes overseas, and which have been implemented in response to previous problems; for example, the codes and statutes relating to public officials in all US states and the student Honour court system in US universities.

4. Australian whistleblowing has lacked a consistent political voice. While not minifying the role of Christabel Chamarette, Jocelyn Newman, Shane Murphy, and Andrew Murray, we have not had the dominant voice of a Charles Grassley, the Chairman of the Congressional Finance Committee, influential in all changes in whistleblowing laws since 1978. He is the 17th highest ranked member in the US senate and prominent on his website is this statement

"Grassley also champions whistleblowers in government and private industry who put their job security on the line to come forward and expose fraud or wrongdoing for the public good. Speaking out for native Iowan Coleen Rowley at a Senate Judiciary Committee hearing, Grassley praised her courage and code of ethics for coming forward with information that helped trigger management reforms at the FBI after 9-11. The senator successfully fought to include whistleblower protections for employees of publicly traded companies in the new corporate accounting law to encourage revelations of corporate wrongdoing. He also worked to make sure federal employees in the new Homeland Security Department could come forward with information regarding national security and public safety."

5. Australia lacks a team of lawyers dedicated to whistleblowing cases. The Government Accountability Project in Washington, and the National Taxpayers Against Fraud Centre in Washington are both strong advocacy centres for whistleblowers, as is the law firm Phillips Cohen. Whistleblowers in Australia have not had this same level of advocacy. We do not have a National Whistleblowing Centre. We need one.
6. Australian whistleblowers are rarely consulted on the introduction of, or revisions to, whistleblower laws. It reinforces a view that policy makers believe there are good whistleblowers and bad whistleblowers. And the good whistleblowers all live overseas.
7. Australia has a well-documented anti-dobbing culture which is contrary to whistleblowing. Crime-stoppers and other anonymous hotlines are acceptable, but it is not acceptable to dob in your work mates.

And finally there is mateship. All countries value mateship, but few countries value it more than Australia. Certainly, few national leaders would want to insert it into the preamble of the Constitution. What is mateship? In its most benign form, it is simply friendship. But mateship is often more than benign. Mateship often implies a joint monetary interest. Mates form companies, award contracts to each other, appoint each other, protect each other and honour each other. The corporatisation of mateship is one of the most profound principles of Australia. Australia is neither a democracy, nor a meritocracy. It is a mateocracy.

One of the principal returns to mateship is a job. Mates appoint each other for three main reasons. First, a mate can be relied upon to act with fear and with favour; fear of offending their mates and favour towards their mates. Secondly, when a mate is appointed, an obligation is created, an obligation that must be repaid. An appointment of a mate is a contingent future claim on that mate. Thirdly, mates appoint each other because it minimises their risks. Mates are mates because they often think the same. With a mate, there are fewer risks.

Enter the whistleblower. The whistleblower commits a truth, and a truth normally offends a mate. By offending a mate, the whistleblower offends the network of mates. The whistleblower is the outsider. Australian whistleblowers line-up against tight, well-controlled networks of mateship which extend into all areas of governance. If Australian whistleblowers survive, they must survive without mates.

This snapshot of Australian whistleblowing should not suggest that there has not been progress. There have been some notable achievements. First and foremost, Whistleblowers Australia has remained a strong advocacy group for whistleblowers for more than a decade. The publication, *The Whistle,* and the website have chronicled Australian whistleblowing history. Secondly, legislation exists in all Australian states and Federally. Thirdly, other entities which assist whistleblowers, such as STOPlineand your-call.com.au, have emerged. Finally, the term whistleblowing is now well known and understood by most Australians, and it is no longer a pejorative term. When I first blew the whistle, I had never heard of whistleblowing. I look forward to the day when it will be "cool" to be a whistleblower.

A Prospectus

So to the future. What is required now?

1. First and foremost, we need to see evidence that whistleblower laws are credible. We need to see evidence that the truth is tested, that whistleblowers are protected, and that those who target whistleblowers are prosecuted. A prosecution in a whistleblowing case would be a defining point for whistleblowing in Australia.

2. A new Senate inquiry on Public Interest Whistleblowing is long overdue It is 10 years since the last Senate inquiry, at a time when most legislation had not been enabled. A Senate inquiry will allow whistleblowers to reveal how legislation is working.

3. The most effective deterrent in the portfolio of US legislation is the False Claims Act. Australia should have a False Claims Act.

4. A National Whistleblowing Centre, like the Government Accountability Project in Washington, should be established. This centre could draw on the expertise of whistleblowers, lawyers and other parties.

And we need a new attitude to mateship. Real mates don't sell out future generations.