Forum

Should whistleblowing be encouraged and protected, and is it?

Following is the edited text of a presentation by Commissioner Sitesh Bhojani at Whistleblowing: betrayal or public duty, *a conference held by Transparency International Australia, August 2002, Sydney.*

Commissioner Bhojani began by commenting on the definition of whistleblowing and drawing parallels between whistleblowing in criminal and trade practices law and ethical standards in the professions. He also discussed the importance of the professions leading the way by supporting a whistleblowing policy including protection of whistleblowers.[1]

ACCC approach to assistance from the public

In its enforcement of the competition and consumer protection laws the Commission is concerned to ensure that an environment that supports and protects people who come forward with information on possible contraventions is created and maintained. That is, one that encourages genuine complaints, provides confidence to complainants by preserving confidentiality and follows a leniency or immunity policy. That is unless, and until, disclosure becomes necessary for the proper performance of the Commission's duties or functions.

The Commission aims to encourage people who may have engaged in conduct that amounts to a contravention or been involved in a contravention in an 'accessorial' capacity to come forward and disclose the conduct. The Commission has often granted immunity from legal proceedings to people if they agree to provide full and frank disclosure to the Commission. In *TPC v CC (NSW) Pty Ltd & ors* (1994) ATPR 41-352, even after proceedings had been instituted against an individual, the Commission was prepared to support the individual for providing full and frank information on the contravention. This helped the Commission enforce the Trade Practices Act, for example, by joining key parties against whom evidence may not otherwise have been available. This approach has had judicial support. For example, in *ACCC v Alice Car & Truck Rentals Pty Ltd & ors* (1997) ATPR 41-582 the Commission acted against some car rental companies and their managers for price fixing. Mansfield J commented on one of the managers as follows:

> In the case of Mr Hunter, I should note the following. In May 1997 after the trial date had been set, Mr Hunter approached the Commission and admitted being knowingly concerned in making the arrangement and putting it into effect. He then had a number of lengthy meetings with the Commission, during which he fully and frankly detailed his role in the contravening conduct and that of the other respondents to his knowledge. I accept that his evidence was then the basis upon which the Commission subsequently joined the eighth and ninth respondents to the proceedings. They have each subsequently admitted that conduct. Accordingly since May 1997 he has fully cooperated with and assisted the Commission and its legal advisers in relation to these proceedings and it was proposed that he would give evidence for the Commission at any trial. The Commission's view is that his information and his assistance and cooperation were substantial factors in the decisions of all the other respondents not to contest these

1 See previously expressed views on the topic of 'the professions and whistleblowing in *The Professions and Whistleblower Protections* by S. Bhojani in 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 Ltd, Aldershot, England 2002).

proceedings and to admit the contraventions set out in the further amended statement of claim. I accept the view put by the Commission, with the support of Mr Hunter, that there is a considerable public benefit in recognising and encouraging persons with relevant information to approach and assist the applicant in enforcing the Act. Mr Hunter's actions are properly so characterised.

The joint submission of the Commission and Mr Hunter proposes that no penalty be imposed on him.

It will not be common for the Court to be satisfied that that is an appropriate order but in the particular circumstances and for the reasons identified in the joint submission which I accept, and which I have briefly referred to above, I am prepared to so conclude in this instance. In particular in my view there is considerable public benefit in persons with relevant information concerning breaches of the Act to provide that information to the Commission. I have also had regard to Mr Hunter's personal circumstances in reaching that view.

Since 1998 the Commission has dealt with the issue of leniency and indemnity for individuals or corporations involved in a contravention on a case-by-case basis. It has published flexible guidelines on the issue, now known as its cooperation policy for enforcement matters. That policy has been the subject of judicial consideration.[2]

In *ACCC v SIP Australia Pty Ltd & ors* (1999) ATPR 41-702 Goldberg J noted that the policy was not binding on the court but did regard the issues raised as relevant to the court's assessment of an appropriate penalty. His judgment relevantly said:

Mr Peters, who appeared for the Commission, said that the Commission had received a very full and high level of cooperation from Baker Bros and its directors and that the case was one that warranted the application of the Commission's leniency policy. In October 1998 the Commission published its leniency policy in relation to co-operation in enforcement matters. The Commission presented the policy as one which is 'flexible and intended only as an indication of the factors the Commission will consider relevant when considering leniency'. The Court, of course, is not bound by the policy nor is it required to take it into account in any given case. Nevertheless the matters which the policy takes into consideration are matters relevant to a determination of the appropriate penalties to impose for contraventions of Pt IV of the Act.

In relation to corporations, the policy states that leniency is most likely to be considered for a corporation which:

- comes forward with valuable and important evidence of a contravention of which the Commission is otherwise unaware or has insufficient evidence to initiate proceedings
- upon its discovery of the breach, takes prompt and effective action to terminate its part in the activity
- provides the Commission with full and frank disclosure of the activity and all relevant documentary and other evidence available to it, and co-operates fully with the Commission's investigation and any ensuing prosecution
- has not compelled or induced any other corporation to take part in the anti-competitive agreement and was not a ringleader or originator of the activity
- is prepared to make restitution where appropriate
- is prepared to take immediate steps to rectify the situation and ensure that it does not happen again, undertakes to do so and complies with the undertaking
- does not have a prior record of Act [Trade Practices Act], or related, offences.

I regard these matters as relevant to be taken into account in the Court's consideration of the appropriate penalties to impose in respect of the contraventions of the Act.

The parties submitted that Baker Bros has substantially satisfied these requirements and that accordingly the penalties recommended by the parties to the Court are at a relatively low level.

Blowing the whistle on hard-core collusion—a proposed leniency policy for cartel conduct

There is one important enforcement priority of the Commission for which its current flexible cooperation policy may not be delivering the best possible outcomes from a community or Commission perspective. That is, in detecting, stopping and deterring cartels that harm consumers, the economy and Australian business by increasing input prices. The lack of certainty and existence of significant discretions is said to be a deficiency in the cooperation policy for enforcement matters—in the reporting of hard-core cartels.

[2] The *ACCC cooperation policy for enforcement matters* is available on the ACCC website at <http://www.accc.gov.au>.

Significant cartels operating in Australia usually require the elements of collusion, secrecy and deception. The requisite secret cooperation between participants often enables the existence of arrangements or understandings with little documentary evidence or third party awareness. This means discovering cartels and documenting proof that they exist can be more difficult than other forms of corporate misconduct. Therefore a leniency policy for cartels is even more justified to encourage insider information and to penetrate the cloak of secrecy.

The Commission's proposed leniency policy for cartel conduct does not offer a reward to 'good corporate citizens'. It is a compliance tool for delivering benefits to all Australians by identifying, stopping and deterring harmful and illegal behaviour.

It gives corporations and their executives who have been involved in cartels an opportunity to come forward to the Commission with evidence that will enable it to take action to stop the conduct and protect consumers. If the business or individual meets the conditions set out in the draft policy then they are guaranteed lenient treatment by the Commission. The policy will not apply to the clear leader in the cartel. The level of certainty provided by the draft policy has increased significantly and the level of discretions retained for the Commission decreased significantly. The essential terms of the policy are:

- if the Commission is unaware of an alleged cartel, the first company or individual to come forward will receive conditional 'immunity' from Commission-instituted court proceedings
- if the Commission is aware of an alleged cartel but has insufficient evidence to institute court proceedings, the first company or individual to come forward will receive conditional 'immunity' from pecuniary penalty.

Public interest underpinning of proposed leniency policy

Commissioner Bhojani then referred to some criminal law cases to emphasise that the Commission's leniency policy is consistent with the public interest and public policy views acknowledged and accepted by the courts in Australia in the context of criminal law.

R v Ellis[3] *(armed robbery)*

Chief Justice Street with whom Justices Hunt and Allen agreed said:

> ... Where it was unlikely that guilt would be discovered and established were it not for the disclosure by the person coming forward for sentence, then a considerable element of leniency should properly be extended by the sentencing judge. It is part of the policy of the criminal law to encourage a guilty person to come forward and disclose both the fact of an offence having been committed and confession of guilt of that offence.
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> The leniency that follows a confession of guilt in the form of a plea of guilty is a well recognised part of the body of principles that covers sentencing. Although less well recognised, because less frequently encountered, the disclosure of an otherwise unknown guilt of an offence merits a significant added element of leniency, the degree of which will vary according to the degree of likelihood of that guilt being discovered by the law enforcement authorities, as well as guilt being established against the person concerned.[4]

Ryan v R[5]

In this recent High Court case all five judges accepted the principles of *R v Ellis*. Kirby J went on to comment on the public interest aspect:

> Clearly, it is in the public interest that the law should encourage offenders to acknowledge, and bring to official notice, offences not previously known to the authorities. In part, this interest derives from the saving of costs in the investigation and prosecution of criminal offences. In part, it is because it helps to improve the clear-up rate for crimes and vindicates the public process of punishing and deterring crime.[6]
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> ... Accordingly, both from the point of view of society and of the victims of crime, there are strong reasons of policy why the law should encourage offenders to make full confessions. It should certainly not discourage them.[7]

3 (1986) 6 NSWLR 603

4 (2001) 179 ALR 193

5 ibid at p. 604

6 id at para [92]

7 id at para [94]

International views on using leniency to fight cartels

The Organisation for Economic Co-operation and Development (OECD) has undertaken research into hard-core cartels[8] and the use of leniency programs to fight them.[9] It certainly supports using leniency to fight hard-core cartels.

In a recent presentation at the Commission's inaugural Competition and Consumer Protection Law enforcement conference, Mr James Griffin, Deputy Assistant Attorney-General of the US Department of Justice Antitrust Division, summarised the fundamental elements of an effective leniency policy in the following terms:

> So what are the core essential elements of a successful corporate leniency program? I believe that there are six critical elements, operating in an enforcement environment that contains severe penalties, realistic fear of detection, and transparency in enforcement policy, that are necessary to such a program. The first, and most important, is that transparency and predicability must be the guiding principle of the wording and application of each element and, to the greatest extent possible, prosecutorial discretion must be written out of the wording and the application of the policy. Second, the policy should provide the maximum possible reward for those who qualify. Third, the benefits of the program must be limited to the first to qualify and those benefits should be automatic if the matter is reported to the authority prior to the authority opening an investigation. Fourth, the policy should provide for full protection for cooperating corporate executives if, under the competition law, they are exposed to individual liability. Fifth, the cooperation requirements of the policy should be clear and not subject to subjective assessment of the 'value' of the evidence provided. And finally, the policy should provide for early notification to the applicant whether it qualifies for the leniency program. We also highly recommend that amnesty be available to the first to qualify even after an investigation is under way, if applied for prior to the time that the enforcement agency has obtained sufficient evidence to bring proceedings against the applicant.

At the same conference Mr Adrian Walker-Smith, Director of Cartel Investigations, Office of Fair Trading, UK made the following comments:

> The UK's leniency policy has three objectives.
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> First, to discourage the formation and continuation of cartels by increasing the probability of detection and punishment and decreasing the element of trust between the members of a cartel.
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> Second, to bring to the attention of competition authorities the existence of cartels, which they might not have discovered otherwise.
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> Third, to facilitate the process of investigation and the subsequent judicial or administrative process of imposing penalties, by encouraging the former members of the cartel to provide maximum cooperation to the authorities.
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> The United Kingdom's leniency program is modelled closely on the program devised by the Department of Justice of the United States. It is not, however, identical. There are significant differences between legal systems in the USA and the UK, not least with respect to the concept of plea bargaining, that require the operation of the program to be modified even though the basic concept remains the same.
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> A full description of our leniency policy is given in Part 3 of the OFT publication, *Director General of Fair Trading's Guidance as to the Appropriate Amount of a Penalty,* available on our website at <http://www.oft.gov.uk>.
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> The main points are as follows.
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> - Automatic remission of 100% of fine is given to the first undertaking to approach OFT with evidence of a cartel if OFT has not started an investigation.
> - Discretionary remission of 100% of fine may be given to first undertaking to approach OFT with evidence of a cartel if OFT has started an investigation.
> - Discretionary remission of up to 50% of fine may be given to the second and subsequent undertakings to approach the OFT.

Anonymous whistleblowers

Quite often the Commission gets allegations of breaches of the Act from anonymous whistleblowers. This can be particularly difficult.

One obvious issue with anonymous whistleblowers is that it is difficult to test their bona fides and the accuracy of their information. Often this can be done only by making further inquiries in an effort to identify them, or to verify their sources.

Although we would hope this would not be the case, actions that the Commission must take to

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8 *Leniency programmes to fight hard core cartels*, 2001 <http://www.oecd.org/daf/clp/CLP_reports/Leniency-e.pdf>.

9 *Hard core cartels*, 2000 <http://www.oecd.org/daf/clp/CLP_reports/hcc-e.pdf>.

identify a whistleblower or substantiate their information might inadvertently reveal their identity to the very persons from whom they were seeking to remain anonymous.

A second difficulty is that very often the information a whistleblower provides is incomplete. Many of the provisions of the Act are complex and require proof of numerous elements. And it may be impossible for the Commission to act further on the information provided by a whistleblower. So, despite a person having no doubt expended considerable mental energy on deciding to blow the whistle, and having possibly placed themselves at personal or financial risk, it has all been for nothing.

A third difficulty with anonymous whistleblowing is that it is impossible to update the whistleblower on the progress of inquiries, and perhaps to warn them about particular steps in the investigation that it might be helpful for them to know about.

For these reasons, the Commission strongly encourages whistleblowers to approach the Commission in person with their information. The Commission will take all steps that it possibly can to preserve their anonymity. To take a recent example, in the power and distribution transformer cases the Commission was informed of the unlawful cartel conduct by a whistleblower.[10]

The whistleblower initially wanted to remain anonymous but later agreed to meet with Commission staff. That informant wasn't directly involved in the unlawful conduct but provided tremendous leads for the Commission's investigation. As a result the Commission obtained evidence and instituted two proceedings. To date penalties totalling more than $20 million have been imposed on some of the respondents to those cases with other respondents currently contesting the Commission's allegations. The Commission has not to this day revealed who the whistleblower was.

Another issue for the Commission in dealing with whistleblowers is the risk that it is not the only person to whom the whistleblower has given the information. This is particularly so when the whistleblower remains anonymous and we cannot ask them about it. For example, a whistleblower may have informed several law enforcement agencies, each of which may be following up inquiries simultaneously without, at least initially, realising the others' involvement.

For example, a matter may be simultaneously within the jurisdiction of the Commission and a state or territory fair trading office. The whistleblower may provide the information about a company to its commercial competitors and this can affect the investigation. And, as the Commission is only too well aware, the whistleblower may go to the media. This can create difficulties for an agency such as the Commission, which normally seeks to conduct its investigatory activities on a confidential basis. The chance that information about the allegations will be made publicly available can put the whole course of an investigation at risk.

In the case experienced by the Commission, the whistleblower sent a newspaper a letter that not only revealed some aspects of the allegations, but also accused the Commission of not taking any action on previous complaints. What the whistleblower did not know, because the Commission had not been able to contact them, was that in fact quite a bit of work had been undertaken by the Commission behind the scenes. The Commission was placed in the difficult position of having to assure the journalist that it had not in fact failed to respond to an important allegation, while attempting not to prejudice future investigative steps. It would have been so much easier if only we could have had a private conversation with the whistleblower.

Legislative support for whistleblowing about the Act

The Trade Practices Act expressly deals with the issue of protection of a person who provides information or documents to the Commission or to the Australian Competition Tribunal. The relevant provision is s. 162A which is headed 'Intimidation etc' and provides as follows:

> A person who:
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> (a) threatens, intimidates or coerces another person; or
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> (b) causes or procures damage, loss or disadvantage to another person; for or on account of that other person proposing to furnish or having furnished information, or proposing to produce or having produced documents, to the

[10] See for example *ACCC v ABB Transmission & Distribution Ltd (No. 2—Power Transformers)* (2002) ATPR 1-871 and ACCC *v ABB Transmission & Distribution Ltd (No. 2—Distribution Transformers)* (2002) ATPR 41-872 and related cases.

> Commission or to the Tribunal or for or on account of the other person proposing to appear or having appeared as a witness before the Tribunal is guilty of an offence punishable on conviction;
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> (c) in the case of a person not being a body corporate—by a fine not exceeding $2000 or imprisonment for 12 months; and
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> (d) in the case of a person being a body corporate—by a fine not exceeding $10 000.

So the Act does not specifically focus on whistleblowers. However, the Australian position under the Trade Practices Act is to protect whistleblowers by creating a criminal offence. The provision has not yet been tested before the courts.

The Commission takes its obligations to protect members of the community who disclose information about potential breaches of the competition and consumer protection laws seriously. It has generally found that informants aware of unlawful conduct (but usually not personally involved in engaging in the conduct or acting at the direction of more senior officers of the corporation) are publicly minded rather than focused on self-interest. The Commission will not disclose the identity of informants unless required to do so by law. When it can properly do so the Commission will claim 'public interest immunity' as being a lawful reason for not disclosing certain information (for example in response to subpoenas or discovery orders of the court). It should be noted that the Commission has sometimes found that the bona fide of a whistleblower has been questionable.

Strengthening statutory protection for whistleblowers who inform the ACCC of breaches of the Act

The Commission is aware that there are calls for the current statutory protection for whistleblowers who inform the Commission of breaches of the Act to be strengthened. The submission by the National Association of Retail Grocers of Australia (July 2002 at pp. 143–146) to the Committee of Inquiry into the competition provisions of the Act—chaired by Sir Daryl Dawson includes the following comments:

> NARGA proposes that the statutory protection for whistleblowers who inform the ACCC of breaches of the Act be considerably strengthened.
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> Given the difficulties of securing evidence to substantiate breaches of the Act, it is readily apparent that whistleblowers can play an extremely valuable role in the enforcement of competition laws.

NARGA proposes that the Trade Practices Act be amended to enable the identity of the whistleblower to be kept confidential (where requested by the whistleblower) and to protect, in appropriate circumstances, an employee whistleblower from being dismissed, suspended, demoted, harassed or otherwise disadvantaged or denied a benefit of employment.

The protection currently provided under the Trade Practices Act for those giving evidence is somewhat limited in scope. For example, some protection is provided under s. 162A of the Trade Practices Act.

NARGA notes that this provision does not operate to protect the identity of the whistleblower nor an employee whistleblower with their employment context. If whistleblowers are to be protected against the considerable risks to them personally and their career, then further specific statutory protection must be afforded to them. Employee whistleblowers often have very credible, first hand experience of the entity's wrongdoing and such evidence may be crucial in bring successful proceedings against the entity under the Trade Practices Act.

International precedent—Canada

NARGA points to the Canadian Competition Act as providing an appropriate international precedent in support of its proposal for strengthening the statutory protection for whistleblowers. The relevant provisions state:

> 66.1 (1) Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under the Act, may notify the Commissioner of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.
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> (2) The Commissioner shall keep confidential the identity of a person who has notified the Commissioner under subsection (1) and to whom an assurance of confidentiality has been provided by any person who performs duties or functions in the administration or enforcement of this Act.
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> 66.2 (1) No employer shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage an employee, or deny an employee a benefit of employment, by reason that (a) the employee, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the employer or any other person has committed or intends to commit an offence under this Act; (b) the employee, acting in good faith and on the basis of reasonable belief, has refused or stated an intention of refusing to do anything that is an offence under the Act; (c) the employee, acting in good faith and on the basis of reasonable belief, has done

> or stated an intention of doing anything that is required to be done in order that an offence not be committed under the Act; or (d) the employer believes that the employee will do anything referred to in paragraph (a) or (c) or will refuse to do anything referred to in paragraph (b).
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> (2) Nothing in this section impairs any right of an employee either at law or under an employment contract or collective agreement.
>
> (3) In this section, 'employee' includes an independent contractor and 'employer' has the corresponding meaning.

NARGA commends this international precedent to the Committee.

In the light of the recent corporate collapses the US Government has also seen fit to expressly legislate to protect whistleblowers. On 31 July 2002 US Attorney-General Ashcroft issued a press release about a directive he had issued to the 94 US Attorney's offices and all 56 FBI Field Offices ordering immediate implementation of the *Sarbanes–Oxley Corporate Fraud and Accountability Act of 2002* to combat corporate fraud.

The press release also said in part:

> Yesterday, President Bush signed the Act into law, giving federal prosecutors the ability to seek new criminal penalties for ... retaliating against whistleblowers.

I note that US Senator Patrick Leahy produced a sectional analysis of the *Corporate and Criminal Fraud Accountability Act 2002*. At section 7 of his analysis the following comments are included:

> **Section 7. Whistleblower protection for employees of publicly traded companies**
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> This section would provide whistleblower protection to employees of publicly traded companies, similar to those currently available to many government employees. It specifically protects them when they take lawful acts to disclose information or otherwise assist criminal investigators, federal regulators, Congress, supervisors (or other proper people within a corporation), or parties in a judicial proceeding in detecting and stopping fraud. Since the bill's provisions only apply to 'lawful' actions by an employee, it does not protect employees from improper and unlawful disclosure of trade secrets.
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> In addition, a reasonableness test is also set forth under the information providing subsection of this section, which is intended to impose the normal reasonable person standard used and interpreted in a wide variety of legal contexts. See generally *Passaic Valley Sewerage Commissioners v. Department 17 of Labor*, 992 F. 2d 474, 478. Certainly, although not exclusively, any type of corporate or agency action taken based on the information, or the information constituting or leading to admissible evidence would be strong indicia that it could support of [sic] such a reasonable belief. If the employer does take illegal action in retaliation for lawful and protected conduct, subsection (b) allows the employee to elect to file an administrative complaint or to bring a case in federal court, with a jury trial available in cases where the case is an action at law. See United States Constitution, Amendment VII; Title 42 United States Code, Section 1983. Subsection (c) would require both reinstatement of the whistleblower, double backpay, compensatory damages to make a victim whole, and would allow punitive damages in extreme cases where the public's health, safety or welfare was at risk.
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> I also note that sec 1107 of the *Sarbanes–Oxley Act of 2002* provides: sec. 1107. retaliation against informants.
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> (a) in general—Section 1513 of title 18, United States Code, is amended by adding at the end the following: '(e) Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offence, shall be fined under this title or imprisoned not more than 10 years, or both.

The existing statutory provisions, and the availability of a claim for public interest immunity, have been found by the Commission to provide adequate safeguards for protecting the identity of whistleblowers.

However, that does not allow us to gauge how much the current levels of protection may discourage potential whistleblowers. Especially if the certainty provided by legislative provisions is regarded by potential whistleblowers as a decisive or significant factor in balancing the pros and cons of blowing the whistle on a potential breach of the Act.

A legislative change as suggested would provide greater encouragement for whistleblowers to come forward than the Commission can provide by its determination to protect those who help it uncover and pursue potential breaches of the Act. In that sense I believe the recommendation by NARGA is worthy of serious consideration.

Conclusion

Lawful actions by members of the community who provide truthful information that helps to uncover, stop and deter unlawful conduct (or serious professional misconduct) is significantly in the public interest and should be encouraged. Without the encouragement such unlawful conduct or misconduct will often remain uncovered.

The issue of protecting those who do come forward and help in detecting such behaviour is something that deserves further debate and action. Not only would such action strengthen the protection for such whistleblowers but also provide the recognition by society of the public interest these people serve and therefore the protection they deserve. This too may also encourage them to come forward.

TPA review, the ACCC and the media

Following is a summary of a presentation by Commission Chairman, Professor Allan Fels, to the National Press Club, 31 July 2002. Professor Fels' talk concentrated on modernising the Trade Practices Act, accountability of the ACCC and the ACCC's relationship with the media.

The topics being discussed are related. There has recently been a set of virulent, seemingly semi-coordinated attacks on the administration and the media practices of the Commission.

Driving the attacks are a desire by major elements of the big business community to:

- divert public debate and attention away from sensible reforms that the Commission is proposing
- weaken the effectiveness of the Commission as a vigorous though proper enforcer of the Trade Practices Act.

The Commission will neither be intimidated nor diverted from carrying out its proper functions of applying the Trade Practices Act without fear or favour to whomever it applies, no matter how powerful they may be politically or economically.

The big business lobby opposed the introduction of trade practices law in 1965 and 1974, its strengthening (e.g. on mergers and unconscionable conduct) and of trying to weaken the enforcement of the laws by undermining the position of the regulator as far as possible. If big business had its short-sighted way, Australia would be an economy made up of anti-competitive, inefficient monopolies and cartels. It would be riddled with unfair trading practices and unconscionable behaviour with harm ultimately being done to businesses as much as to consumers. There is no worse nor more ill-judged time than the present to try to undermine the work of an effective regulator. The examples of the damage done by ineffective and weak regulation in cases such as Enron and World Com are sufficient to make the point.

Reforming the Trade Practices Act

To make the Act work better the Commission is seeking several changes most of which would bring it into line with international best practice.

Criminal sanctions

The first change being sought by the Commission is the introduction of criminal sanctions under the Trade Practices Act for hard-core collusion by big business. Collusion is extremely harmful both to business customers and consumers. The gains can be large and it is difficult to detect. The incentives for collusion are high in some areas of the modern economy.

Hard-core collusion, that is, secret price fixing agreements, bid rigging and market sharing is ethically objectionable, a form of theft and little different from classes of corporate crime that already attract criminal sentences. The possibility of criminal sentences is therefore appropriate for this kind of behaviour.

In addition, the system does not provide a sufficient deterrent in all cases. The fear of possible jail sentences is a far more effective deterrent than possible fines. We should join the United States, Canada, Japan, Korea, now Britain and some other parts of the world in having criminal sanctions for collusion. The higher fines in the 1990s, although having had a significant effect, are still not sufficient, as shown by the many serious price fixing cases since then.

Moreover, there is an unusual mismatch in this law. Usually laws with possible multi-million dollar fines provide for jail sentences as an option.