

# THE WHISTLEBLOWER PROTECTION ACT (JAPAN) 2004: A CRITICAL AND COMPARATIVE ANALYSIS OF CORPORATE MALFEASANCE IN JAPAN

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*This article is a critical analysis of Japan's Whistleblower Protection Act 2004 ('WPA') insofar as this law bears upon corporate malfeasance and especially corporate fraud. This legislation has become the fulcrum of the legal apparatus that bears upon whistleblowing in that country. The domestic aspect of the discussion assesses the WPA in its corporate and cultural contexts and its international aspect compares the WPA to legislation in other countries, including the US, the UK and Australia. Although there is little research on this legislation, the authors conclude that even though it has largely been ineffective, it has had some success in both protecting whistleblowers and in making whistleblowing more acceptable in corporate Japan. The article concludes with amendment proposals that could make the WPA considerably more effective.*

## I INTRODUCTION

Olympus Corporation was in big trouble.<sup>1</sup> The yen's relentless rise during the 1980s had dramatically reduced the profits of the iconic Japanese camera manufacturer. Aiming to maintain profitability, Olympus invested heavily in risky financial products. These investments failed, saddling Olympus with losses of US\$1.5 billion.<sup>2</sup> Accounting rules required the public disclosure of the losses but this was not done. Instead, senior management created a complex shell-company scheme in which the losses were illegally concealed. A small group within senior management, including three consecutive CEOs and the chairperson, concealed the losses for over 20 years. After accounting standards changed in 2005 in response to accounting fraud at another large corporation, Olympus devised a M&A scheme to avoid compliance with the new standards. Independent accountants who raised concerns about the scheme in 2009 were dismissed and replaced.<sup>3</sup> Two years later, convinced that the losses were buried and in order to

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1 Bruce E Aronson, 'The Olympus Scandal and Corporate Governance Reform: Can Japan Find a Middle Ground between the Board Monitoring Model and Management Model?,' (2012) 30 *University of California Los Angeles Pacific Basin Law Journal* 93, 106–7. This article informs much of our discussion of this case.

2 Olympus Corporation Third Party Committee, 'Investigation Report Summary' (Report, 6 December 2011) 6.

3 Olympus Corporation Third Party Committee, 'Investigation Report' (Report, 6 December 2011) 174–5 ('*Olympus Third Party Investigation Report*').

further internationalise Olympus' operations, Chairperson Tsuyoshi Kikukawa appointed the first non-Japanese CEO, Englishman Michael Woodford.

Soon after arriving in Tokyo, Woodford read a media report which raised suspicions about Olympus' M&A scheme. Unable to obtain clear answers internally at Olympus, Woodford engaged external accountants to investigate. They concluded that the scheme was probably illegal. He unsuccessfully attempted to discuss his concerns with senior management. On 14 October 2011, Woodford convened a board meeting to discuss the matter, only to be summarily dismissed by a unanimous vote at the beginning of the meeting. He was then escorted from the building. Woodford promptly disclosed the fraud to the authorities and the media. In doing so, he became the first ever CEO of a major corporation to 'blow the whistle' on his own company.<sup>4</sup>

The Olympus saga provides a snapshot of the importance of corporate whistleblowing in Japan where the *Whistleblower Protection Act* (Japan) is the most wide-ranging statute in this field.<sup>5</sup> This article critically analyses this Act, which came into effect in 2006 after a series of corporate scandals. The *WPA*, which applies to both private and public sectors, is analysed in its corporate context, and suggested amendments that emerge from the analysis are proposed. Central to the analysis is detailed discussion of corporate malfeasance in Japan, especially fraud. The comparative aspect of the paper is pursued through discussion of the law in other jurisdictions, mainly but not exclusively the United States of America ('US'), the United Kingdom ('UK') and Australia. The Japanese context of the analysis is the gradual cultural and corporate transformation of post-bubble Japan such that international norms are increasingly embraced.<sup>6</sup> The changes contributing to this transformation are contested terrain — foreign investors, international organisations such as the Organisation for Economic Co-operation and Development ('OECD'), and consumers are amongst interests that tend to advocate such change whereas Japanese companies, bureaucrats and conservative politicians tend to oppose it. The *WPA* was enacted in this context and is part of the slow, tentative and incomplete transformation of Japanese law and society since the 1990s.

## II THE INTERNATIONAL CONTEXT: WHISTLEBLOWER LAWS AND THE DETECTION OF CORPORATE FRAUD

Miceli and Near describe whistleblowing as the disclosure by former or current company insiders of activities alleged to be 'illegal, immoral or illegitimate'

4 Michael Woodford, *Exposure: Inside the Olympus Scandal: How I Went from CEO to Whistleblower* (Penguin, 2012).

5 <公益通報者保護法> [Whistleblower Protection Act] (Japan) Act No 122 of 18 June 2004 ('WPA').

6 Alan Dignam traces the corporate contours of these pressures at the global level in Alan Dignam and Michael Galanis, *The Globalization of Corporate Governance* (Ashgate, 2009).

and which are under the control of the company.<sup>7</sup> Within the private sector, whistleblowing has become a valuable tool in uncovering corporate wrongdoing, especially fraud. The prospect of whistleblowing puts pressure on companies to improve their governance and effective whistleblowing tends to reduce the need for expensive public oversight and investigation. The broad aim of legislation is to promote organisational integrity by encouraging and protecting those who disclose wrongdoing.

This Part is a general and comparative discussion of the significance of whistleblowing laws for the detection of corporate fraud in several jurisdictions, including Australia. The systems in the US and UK are internationally recognised as exemplars.<sup>8</sup> These foreign laws (along with their underlying policy considerations) are discussed as models against which the *WPA* can be assessed in a comparative fashion.

Corporate fraud is usually difficult to detect by its very nature. Empirical research strongly suggests that the most effective way to uncover it is whistleblowing.<sup>9</sup> The main reason for this is that ‘[i]nternal informants represent one of the most significant sources of evidence of corporate fraud’.<sup>10</sup> There is little hope of uncovering long duration frauds without whistleblowers.<sup>11</sup> Regulators using traditional monitoring methods rarely uncover frauds,<sup>12</sup> especially long-standing ones.

Whistleblower laws that apply to corporations are a relatively new phenomenon.<sup>13</sup> This novelty means that assessments of their effectiveness are necessarily tentative, and in particular, that there is no universally accepted ‘best practice’ model for such laws.<sup>14</sup> Nevertheless, commentators consider that two main ‘templates’ for

- 7 Janet P Near and Marcia P Miceli, ‘Organizational Dissidence: The Case of Whistle-Blowing’ (1985) 4 *Journal of Business Ethics* 1, 4.
- 8 Paul Latimer and A J Brown, ‘Whistleblower Laws: International Best Practice’ (2008) 31 *University of New South Wales Law Journal* 766, 791; Mark V Vlasic and Peter Atlee, ‘Myanmar and the Dodd-Frank Whistleblower “Bounty”: The US Foreign Corrupt Practices Act and Curbing Grand Corruption Through Innovative Action’ (2014) 29 *American University International Law Review* 446, 463.
- 9 Transparency International, ‘Global Corruption Report 2009: Corruption and the Private Sector’ (Report, Transparency International, 14 September 2009) 94 (*Transparency International Report*). See also Alexander Dyck, Adair Morse and Luigi Zingales, ‘Who Blows the Whistle on Corporate Fraud?’ (Working Paper No 12882, National Bureau of Economic Research, February 2007) 30–2 <<http://www.nber.org/papers/w12882>>; Vivienne Brand, Sulette Lombard and Jeff Fitzpatrick, ‘Bounty Hunters, Whistleblowers and a New Regulatory Paradigm’ (2013) 41 *Australian Business Law Review* 292, 292; Richard Alexander, ‘The Role of Whistleblowers in the Fight against Economic Crime’ (2004) 12 *Journal of Financial Crime* 131, 131.
- 10 Tom Faunce et al, ‘Because They Have Evidence: Globalizing Financial Incentives for Corporate Fraud Whistleblowers’ in A J Brown et al (eds), *International Handbook on Whistleblowing Research* (Edward Elgar Publishing, 2014) 381, 381.
- 11 Dyck, Morse and Zingales, ‘Who Blows the Whistle on Corporate Fraud?’, above n 9, 3.
- 12 *Ibid* 2.
- 13 Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Edward Elgar Publishing, 2012) 239.
- 14 Latimer and Brown, above n 8, 793.

whistleblower laws have emerged: the American and British models.<sup>15</sup> These are models in the sense that other jurisdictions have quite recently used them as the basis for their reforms.

### A The American Model

The collapse of Enron and other massive private sector frauds at the turn of the century alerted Americans to the importance of corporate whistleblowing. The US enacted the *Sarbanes-Oxley Act of 2002* ('US-SOX'), an unprecedentedly wide-ranging market regulation and corporate governance framework.<sup>16</sup> US-SOX contains whistleblower provisions which were later supplemented by the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (together 'US-SOX/Dodd-Frank').<sup>17</sup> These laws forbid reprisals against employees who blow the whistle and impose severe punishments for reprisals. Additionally, these statutes facilitate detection by requiring the establishment of internal whistleblowing systems and encourage it by offering financial incentives ('bounties') to whistleblowers.

Apart from the *False Claims Act*,<sup>18</sup> US-SOX/Dodd-Frank is the main example of the American model. These statutes permit employees who have discovered actual or even possible corporate wrongdoing to elect to report it through three different channels: to their employer, to a regulator or to the media. For all three avenues of disclosure the protection is equally rigorous,<sup>19</sup> thus the choice between the three is sustained as a genuine one for the potential whistleblower. This means that there is no express or implicit legislative preference for internal reporting as there is with 'softer' approaches such as in the UK and under the *WPA*.

The policy emphasis of the American model is more on the reporting of malfeasance to public authorities and the deterrence of wrongdoing and less on the promotion of companies' internal compliance.<sup>20</sup> Laws based on this model usually do not require or prioritise internal reporting as doing so is considered to encourage cover-ups, destruction of evidence and recrimination against potential witnesses within the business.<sup>21</sup> US-SOX/Dodd-Frank principles have been

15 Vaughn, above n 13, 247–8. See also Jenny Mendelsohn, 'Calling the Boss or Calling the Press: A Comparison of British and American Responses to Internal and External Whistleblowing' (2009) 8 *Washington University Global Studies Law Review* 723, 742.

16 *Sarbanes-Oxley Act of 2002*, Pub L No 107-204, §806, 116 Stat 745, 802–4 (2002).

17 *Dodd-Frank Wall Street Reform and Consumer Protection Act*, Pub L No 111-203, § 922, 124 Stat 1376, 1842–50 (2010) ('Dodd-Frank').

18 31 USC §§ 3729–3733 (1863). This Act relates only to fraudulent claims made against the US government and contains *qui tam* provisions which permit private persons to obtain a share of monies recovered by the government from parties which have made such fraudulent claims.

19 Vaughn, above n 13, 248.

20 Elletta Sangrey Callahan, Terry Morehead Dworkin and David Lewis, 'Whistleblowing: Australian, UK, and US Approaches to Disclosure in the Public Interest' (2004) 44 *Virginia Journal of International Law* 879, 904–5.

21 Vaughn, above n 13, 324.

replicated in many whistleblower provisions throughout the US.<sup>22</sup> However, only a few other countries have followed this model.<sup>23</sup>

*US-SOX/Dodd-Frank* has had some notable successes. Significant instances of fraud have been uncovered. The US Securities and Exchange Commission ('SEC') received a total of 3,620 whistleblower reports in 2014 under the *US-SOX/Dodd-Frank* regime, including many reports of fraud.<sup>24</sup> Within the SEC there is a separate body called the Office of the Whistleblower which administers the law, and which has emphasised that the bounty provisions have been relied upon to disclose critical 'inside information' that would not have been revealed but for the bounties offered. Since 2011 over \$50 million has been paid as bounties to 18 whistleblowers; the most recent payment was \$3 million announced in July 2015.<sup>25</sup> The largest bounty so far was \$30 million announced in 2014, which was awarded to a whistleblower outside the US, confirming the international reach and importance of these laws.<sup>26</sup>

## B The British Model

The UK's *Public Interest Disclosure Act 1998* (UK) ('*PIDA*') created the current British whistleblowing system.<sup>27</sup> As with the American model, the *PIDA* and laws based on it permit employees who have discovered corporate wrongdoing to choose between reporting internally or externally to the authorities or the media. However, unlike the American laws, the British model sets strict requirements for media disclosures which whistleblowers must satisfy to be protected.<sup>28</sup> The *PIDA* does not offer bounties or require companies to establish whistleblowing systems.

The stricter requirements for external disclosures implicitly encourage internal reporting and mean that the policy emphasis of the *PIDA* is promotion of good corporate citizenship.<sup>29</sup> This model emphasises the promotion of the speedy and 'in-house' resolution of allegations of wrongdoing.<sup>30</sup> Weight is thus given to the corporate interest in internal and 'quiet' investigation and resolution of reports

22 Ibid 152.

23 Donald C Dowling Jr, 'Global Whistleblower Hotline Toolkit: How to Launch and Operate a Legally-Compliant International Workplace Report Channel' (2011) 45 *International Lawyer* 903, 914–15. Norway's *Working Environment Act of 2007* (Norway) ss 2-4–2-5, 3-6 enables employees to report their employers' wrongdoing and requires employers to establish procedures for such reports. In West Africa, *Liberia Executive Order #62 of 2014* required private companies to establish procedures for handling disclosures by employees about company malpractices.

24 US Securities and Exchange Commission, '2014 Annual Report to Congress on the Dodd-Frank Whistleblower Program' (Report, 2014) 20–1.

25 US Securities and Exchange Commission, 'SEC Pays More Than \$3 Million to Whistleblower' (Press Release, 2015-150, 17 July 2015) <<https://www.sec.gov/news/pressrelease/2015-150.html>>.

26 US Securities and Exchange Commission, 'SEC Announces Largest-Ever Whistleblower Award' (Press Release, 2014-206, 22 September 2014) <<https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370543011290>>.

27 *Public Interest Disclosure Act 1998* (UK) c 23.

28 Callahan, Dworkin and Lewis, above n 20, 893–4.

29 Mendelsohn, above n 15, 737.

30 Callahan, Dworkin and Lewis, above n 20, 906.

rather than the public interest in exposure of fraud to public authorities and the punishment of wrongdoing.<sup>31</sup> Globally, most corporate whistleblower laws are based on the British model, including Japan's *WPA*.<sup>32</sup>

The UK has had some success with the *PIDA*. Research suggests that employees are twice as likely to blow the whistle on corporate wrongdoing after the introduction of the *PIDA* as they were previously.<sup>33</sup> Whistleblowing about financial misconduct is in the top two categories of whistleblower reports.<sup>34</sup>

### C The Australian Experience

Part 9.4AAA of Australia's *Corporations Act 2001* (Cth) ('*Corporations Act*') protects whistleblowers who report breaches of this legislation from civil and criminal liability that may arise from the disclosure if such reports are made in good faith. The Australian system is a hybrid, combining features of both the American and British models. For example, pt 9.4AAA contains one simple evidentiary requirement of 'reasonable grounds' for all disclosures<sup>35</sup> (a feature of the American model) but it does not require the establishment of whistleblower systems or offer bounties to whistleblowers (both central to the American model). As reports of wrongdoing other than breaches of the *Corporations Act* are not covered, the protection afforded is very narrow indeed. In principle, even a report of criminal activity would not be protected if that activity did not also breach the *Corporations Act*.

The Australian record has been dismal. Virtually no use has been made of the *Corporations Act* whistleblower provisions; whistleblowing in corporate Australia has been and remains rare.<sup>36</sup> The approach of the Australian Securities and Investments Commission ('ASIC') to corporate whistleblowing was the subject of a Senate inquiry after revelations that ASIC took nearly 18 months to act on whistleblowers' reports alleging serious misconduct at Commonwealth Financial Planning Limited, a part of the Commonwealth Bank group.<sup>37</sup> The *Public Interest Disclosure Act 2013* (Cth), which protects public sector whistleblowers, took effect from January 2014, and reignited debate about whether revamped private sector whistleblower laws are needed in Australia.

Globally, legislative regimes specifically covering corporate whistleblowing have existed for less than two decades and as such there is limited research into their

31 Ibid.

32 Vaughn, above n 13, 248.

33 John Bowers et al, *Whistleblowing: Law and Practice* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 8.

34 Ibid.

35 *Corporations Act 2001* (Cth) s 1317AA(1)(d). See also Janine Pascoe, 'Corporate Sector Whistleblowing in Australia: Ethics and Corporate Culture' (2009) 27 *Company and Securities Law Journal* 524, 527.

36 Sulette Lombard and Vivienne Brand, 'Corporate Whistleblowing: Public Lessons for Private Disclosure' (2014) 42 *Australian Business Law Review* 351, 351–2.

37 Senate Economics References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) ch 8.

effectiveness. In any case, the significance of recorded malfeasance is difficult to gauge because it is obvious that only a fraction of wrongdoing is detected or reported.<sup>38</sup> Estimates of the proportion of reported cases to the total number vary enormously. Existing data to date paints a rather mixed picture of the effectiveness of private sector whistleblower laws, for example, the American laws are utilised much more than most others, including the Australian and Japanese laws, and are far more rigorous.<sup>39</sup>

Notwithstanding the inconclusive evidence at a global level on the question of effectiveness, private sector laws are increasingly being enacted around the world.<sup>40</sup> This increase is due partly to evidence that whistleblowing is a major reason — perhaps *the* major reason — that corporate fraud is uncovered.

### III THE WPA: AN OVERVIEW

Public outcry in Japan arising from corporate scandals in the 1990s and early 2000s led to the enactment of the *WPA* which came into effect in April 2006.<sup>41</sup> Article 1 sets out the *WPA*'s objectives, which include the invalidation of dismissals and other disadvantageous treatment of employees in the private and public sectors who make protected disclosures, and the promotion of compliance with laws concerning the protection of life, body and property.<sup>42</sup> This particular focus on health and safety arises from the numerous recent corporate cover-ups concerning product defects that carried threats to the welfare of consumers and employees. The stated objectives do not expressly mention the uncovering of fraud or other malfeasance per se, which seems strange from the robust Western, especially US perspective.

The Consumer Affairs Agency ('CAA'), a body within the Cabinet Office, administers the *WPA*. The CAA's explanatory notes regarding the objectives of the *WPA* — which are administrative only — state that there are inherent limitations on companies' internal compliance capacities and on the resources of

38 Amitai Etzioni and Derek Mitchell, 'Corporate Crime' in Henry N Pontell and Gilbert Geis (eds), *International Handbook of White-Collar and Corporate Crime* (Springer, 2007) 187, 188.

39 See Zenichi Shishido and Sadakazu Osaki, 'Reverse Engineering SOX versus J-SOX: A Lesson in Legislative Policy' in Zenichi Shishido (ed), *Enterprise Law: Contracts, Markets, and Laws in the US and Japan* (Edward Elgar Publishing, 2014) 349, 349–51; Rachel Beller, 'Whistleblower Protection Legislation of the East and West: Can it Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China' (2011) 7 *NYU Journal of Law & Business* 873, 878–80; Jason MacGregor and Martin Stuebs, 'The Silent Samaritan Syndrome: Why the Whistle Remains Unblown' (2014) 120 *Journal of Business Ethics* 149; Phillip Lipton, Abe Herzberg and Michelle Welsh, *Understanding Company Law* (Lawbook, 18<sup>th</sup> ed, 2016) 546.

40 Vaughn, above n 13, 239.

41 荒木尚志 男澤才樹 鴨田哲郎 [Araki Takashi, Otokowaza Saiki and Kamota Tetsuo], «内部告発・公益通報の法的保護—公益通報者保護法制定を契機として» [Legal Protection of Whistleblowing and Public Disclosures: The Whistleblower Protection Act], *ジュリスト*[Jurist] (Japan) 1 January 2006, 148.

42 *WPA* art 1.

external corporate monitors to regulate conduct.<sup>43</sup> Even if this is so, the Act could have specified uncovering of corporate malfeasance as an objective.

Article 2 defines whistleblowing (which in Japanese is four characters read as ‘public interest disclosure’) as the disclosure of ‘relevant disclosure information’ by a ‘worker’ to either the worker’s employer or a government agency with relevant jurisdiction.<sup>44</sup> Disclosures may also be made to any other person considered necessary to prevent the wrongdoing from taking place or continuing.<sup>45</sup> The disclosure must not be for an illegitimate purpose such as self-enrichment.<sup>46</sup> ‘Relevant disclosure information’ means information pertaining to criminal violations or statutory violations by an employer in relation to legislation stipulated by the *WPA*.<sup>47</sup> There are currently 456 such statutes, including a number which prohibit a range of corporate fraud offences.<sup>48</sup> These include the *Penal Code 1907* (Japan),<sup>49</sup> the *Financial Instruments and Exchange Act 1948* (Japan) (‘*J-SOX*’),<sup>50</sup> the *Companies Act 2005* (Japan),<sup>51</sup> the *Prohibition of Private Monopolization and Maintenance of Fair Trade Act 1947* (Japan)<sup>52</sup> (Japan’s main anti-trust statute), and the *Unfair Competition Prevention Act 1993* (Japan).<sup>53</sup> ‘Worker’ is defined as an employee under Japanese labour law.<sup>54</sup> Directors are excluded, unless they serve concurrently as employees, which is common in Japan.<sup>55</sup> Business partners such as subcontractors are generally excluded.<sup>56</sup>

Articles 3 to 5 set out the substantive protective provisions. If employees report ‘relevant disclosure information’ to their employers, they are protected from dismissals, demotions, and other disadvantageous treatment provided the employees simply ‘think’ that such wrongdoing has occurred.<sup>57</sup> As such, disclosures based on misconceptions are protected.<sup>58</sup> If employees wish to make disclosures outside of the company, they must satisfy additional requirements. If they disclose to a government agency, they must demonstrate ‘reasonable

43 公益通報者保護法逐条解説 第1条(目的) [Whistleblower Protection Act: Explanatory Notes, Article 1 Objectives, 2].

44 *WPA* art 2.

45 *Ibid.*

46 *Ibid.*

47 *Ibid.*

48 <公益通報者保護法の対象となる法律の一覧(456本)> [List of Laws Subject to the Whistleblower Protection Act (456 laws)] 5 October 2015.

49 <刑法> [Penal Code] (Japan) Act No 45 of 24 April 1907 (‘*Penal Code*’).

50 <金融商品取引法> [Financial Instruments and Exchange Act] (Japan) Act No 25 of April 1948.

51 <会社法> [Companies Act] (Japan) Act No 86 of 26 July 2005 (‘*Companies Act*’).

52 <私的独占の禁止及び公正取引の確保に関する法律> [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade] (Japan) Act No 54 of 14 April 1947.

53 <不正競争防止法> [Unfair Competition Prevention Act] (Japan) Act No 47 of 19 May 1993 (‘*Unfair Competition Act*’).

54 *WPA* art 2.

55 Hideo Mizutani, ‘Whistleblower Protection Act’ (2007) 4(3) *Japan Labor Review* 95, 104; Takashi Araki, ‘Changing Employment Practices, Corporate Governance, and the Role of Labor Law in Japan’ (2007) 28 *Comparative Labor Law & Policy Journal* 251, 264.

56 Mizutani, above n 55, 104.

57 *WPA* arts 2–5.

58 Mizutani, above n 55, 110.



grounds' for any allegation.<sup>59</sup> For external whistleblowing to non-governmental entities including the media, as well as 'reasonable grounds', at least one of the following must also be satisfied:

1. a reasonable belief must be held that dismissal or other disadvantageous treatment would occur if the disclosure was made internally or to a government agency; or
2. a reasonable belief must be held that evidence may be concealed or destroyed if the disclosure was made internally; or
3. the employer had unreasonably demanded the employee not to report to a government agency.<sup>60</sup>

Article 10 requires that government departments receiving disclosures must act upon them.<sup>61</sup> Under art 6, the *WPA* does not affect the operation of the doctrine of abusive dismissal in circumstances where the doctrine may apply to whistleblowing.<sup>62</sup> There are guidelines which supplement the *WPA* in its application to the private sector.<sup>63</sup> These *Guidelines* set out details about the objectives of the Act, how to set up whistleblower systems and how to handle disclosures. Notably however, the *Guidelines* have no legal force.<sup>64</sup>

In many jurisdictions, including the US and Australia, whistleblower law administration is vested in corporate regulators — the SEC and ASIC respectively. From a Western perspective, it seems unusual that the *WPA* is administered by the CAA rather than Japan's main corporate regulator, the Financial Services Agency. The fundamental reason for this is that the major Japanese scandals during the 1990s and early 2000s were characterised politically as consumer protection rather than as regulatory failures and the agitation for reform prior to passage of the *WPA* followed this line.<sup>65</sup> The *WPA* was one part of a package of consumer protection measures that came into effect in the mid-2000s, with the Cabinet Office clearly portraying whistleblowing as a consumer issue rather than one of corporate regulation.<sup>66</sup> Corporate malfeasance that does *not* involve threats

59 *WPA* art 3.

60 *Ibid.* There are two additional grounds: the first is that the employer failed to advise the whistleblower within 20 days that the employer will investigate the complaint or advises the worker, without any good reason, that the complaint will not be investigated. The second is that a person's life or body is at risk.

61 *Ibid* art 10.

62 *WPA* art 6. The doctrine of abusive dismissal in Japanese law is basically equivalent to unlawful or illegal dismissal under common law systems.

63 Consumer Affairs Agency (Japan), «公益通報者保護法に関する民間事業者向けガイドライン» [Whistleblower Protection Act Guidelines for Private Sector Entities] (19 July 2005) 1 ('*Guidelines*').

64 Yasuhiro Fujii, *New Whistleblower Protection Law* (7 September 2005) International Law Office <<http://www.internationallawoffice.com/Newsletters/Employment-Benefits/Japan/Baker-McKenzie-GJB-J-Tokyo-Aoyama-Aoki-Law-Office-Gaikokuho-Joint-Enterprise/New-Whistleblower-Protection-Law>>.

65 See Jeff Kingston, *Japan's Quiet Transformation: Social Change and Civil Society in the Twenty-First Century* (RoutledgeCurzon, 2004); Luke Nottage, *Product Safety and Liability Law in Japan: From Minamata to Mad Cows* (Routledge, 2004).

66 Mark D West, *Secrets, Sex, and Spectacle: The Rules of Scandal in Japan and the United States* (University of Chicago Press, 2006) 44–52.

to health and safety, such as Olympus and the US\$1.2 billion Toshiba accounting fraud that came to light in 2015, though certainly gaining notoriety, does not seem to carry sufficient political weight to move whistleblowing oversight into the jurisdiction of the corporate regulator. Reinforcing this point is that shareholder activism is far less intense and corporate cross-shareholdings more common in Japan than in Western countries like the US.

The *WPA* is based on the British model in that its main focus is the protection of whistleblowers and it mainly relies upon companies' internal governance.<sup>67</sup> The *WPA* does not require the establishment of whistleblower systems or offer bounties.<sup>68</sup> It contains no penalty provisions or punishments for companies which breach the *WPA* by retaliating against whistleblowers.<sup>69</sup> Although it may seem that this 'soft' approach is consistent with Japanese corporate and social cultures, the authors argue, especially in Part VII, that these cultures are in transition, that reforms are needed to modernise the law and make it effective, and that such changes are consistent with a process of gradual and broad though modest judicialisation of Japanese society.<sup>70</sup> Not only are people more willing to use the law to protect or advance their interests, there is more appreciation for the law, not as something necessarily oppressive, but as a positive social force.

#### IV JAPANESE CORPORATE GOVERNANCE

Detection of fraud and other malfeasance in modern economies involves several regulatory bodies and corporate governance actors.<sup>71</sup> The *WPA* is only one part of the whole Japanese corporate governance regime.<sup>72</sup> In order to assess the effectiveness of the Act in uncovering misconduct, we briefly consider the other components which bear upon the *WPA*'s operation.

67 Araki, Otokowaza and Kamota, above n 41, 161.

68 *Guidelines*, above n 63.

69 Herbert Smith, 'Guide to Anti-Corruption Regulation in Asia: 2010/2011' (June 2010) 30.

70 Leon Wolff, Luke Nottage and Kent Anderson (eds), *Who Rules Japan? Popular Participation in the Japanese Legal Process* (Edward Elgar, 2015).

71 Rachel Beller, 'Whistleblower Protection Legislation of the East and West: Can It Really Reduce Corporate Fraud and Improve Corporate Governance? A Study of the Successes and Failures of Whistleblower Protection Legislation in the US and China' (2011) 7 *New York University Journal of Law & Business* 873, 878.

72 Sayuri Inoue, 'Corporate Governance and Ethics in Post-Industrial and Developing Economies: Japanese Reforms and the US Model' (Occasional Paper No 08-03, Harvard University, 2008) 6 <<http://dev.wcfia.harvard.edu/us-japan/research/pdf/08-03.Inoue.pdf>>.

## A Companies Act Hotlines and the Corporate Governance Code

A 2006 amendment to Japan's *Companies Act* obliged company boards to 'consider' 'building up internal controls'.<sup>73</sup> These 'internal controls' included the establishment of hotlines linked to boards of directors and compliance departments which whistleblowers may use to internally report malfeasance. However, the amendment did not apply to small-and-medium sized businesses, that is, it only applied to large corporations, and some of these have been slow to set up hotlines pursuant to this guidance.<sup>74</sup> Historically, Japanese companies have had noticeable differences from those in the West, especially the US, with fewer independent directors, lower turnover of board members, higher levels of cross-shareholdings and passive shareholders. These features of the Japanese system account, at least in part, for the aversion to both outside intervention and whistleblowing. They contribute to an understanding of these aversions not only primarily as cultural, but as structural and legal phenomena. In this non-essentialist perspective, the historical and thus contingent character of any particular arrangement is much more visible.

In early 2015 there were two regulatory changes that bear upon corporate whistleblowing. From May 2015, amendments to the *Companies Act* mean that large companies are now required to 'consider' establishing hotlines linked directly to the statutory auditors of the company as an alternative to hotlines linked to the board of directors or compliance department.<sup>75</sup> The key point is that reports to ordinary directors and compliance departments have all too often 'leaked' and resulted in retaliation — the Olympus scandal is a case in point. The amendments also require these companies to 'consider' establishing systems to protect internal informants from detrimental treatment.<sup>76</sup> This appears to reflect the objective of the *WPA* to protect whistleblowers from adverse treatment.<sup>77</sup>

In addition, from June 2015, Japan introduced its *Corporate Governance Code* ('the *Code*').<sup>78</sup> The *Code* generally embraces OECD principles of corporate

73 *Companies Act* art 362; *Enforcement Regulations of the Companies Act* art 100; Consumer Affairs Agency (Japan), «公益通報者保護法民間事業者向けQ&A» [Whistleblower Protection Act Q&A for Private Sector Entities] (2013) questions and answers 12–14 ('*WPA Explanatory Notes*').

74 日野 勝吾 [Hino Shogo], «公益通報者保護法の現状と課題» [The *Whistleblower Protection Act*: Current Trends and Issues] (2011) 47(2) 法政論叢 [*Japanese Journal of Law and Political Science*] 53, 57.

75 *Companies Act* arts 362(4)–(5); *Enforcement Regulations of the Companies Act* art 100; Akemi Suzuki, Akihisa Shiozaki and Peter Coney, 'Recent Changes to Japan's Whistleblower Law Regime' (Japan Legal Update, Nagashima Ohno & Tsunematsu, November 2015) <[http://www.noandt.com/en/publications/2015/documents/japan\\_no03.pdf](http://www.noandt.com/en/publications/2015/documents/japan_no03.pdf)>.

76 *Enforcement Regulations of the Companies Act* art 100(5).

77 Ibid.

78 Japan's Corporate Governance Code, Tokyo Stock Exchange, 2015.

governance,<sup>79</sup> including those relating to whistleblowing.<sup>80</sup> Going beyond the requirements of the *Companies Act*, the *Code* states that listed companies should establish whistleblower contact points ‘independent of company management’,<sup>81</sup> such as a panel consisting of independent directors and independent statutory auditors.<sup>82</sup> The *Code* adopts a ‘comply or explain approach’. Consequently, although a company is not required to establish an ‘independent’ whistleblower contact point pursuant to the *Code*, if a company does not do so, it must explain its rationale for not doing so in compulsory annual disclosure reports. Failures to provide such explanations are subject to regulatory sanction. ‘[T]he first such disclosures are due at the end of 2015’.<sup>83</sup>

Although neither of these regulatory changes compel the establishment of whistleblower hotlines, these changes show reformers are having some success in promoting awareness of the role of whistleblowing in corporate governance and exerting pressure to establish adequate systems.<sup>84</sup>

## B Company Auditors

Japan’s stock exchange listing rules and its *Companies Act* establish rules for the structure of companies and contain provisions geared to detect fraud.<sup>85</sup> In most corporations, legal risk monitoring is done by company auditors.<sup>86</sup> These auditors are appointed by the board, but half of the board members are usually long-serving employees.<sup>87</sup> Auditors have no voting rights, cannot dismiss directors or impose sanctions on them, and are poorly paid.<sup>88</sup> This lack of power and independence means monitoring of management is patchy and unreliable.<sup>89</sup> In practice, auditors rarely disclose malfeasance.<sup>90</sup> The recent amendments to the *Companies Act* have tightened the eligibility requirements for statutory auditors in an attempt to

79 Organisation for Economic Co-operation and Development, *OECD Principles of Corporate Governance* (2004) <<http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf>>

80 Ibid.

81 The *Code* Supplementary Principle 2.5.1.

82 Ibid.

83 Ibid.

84 Ibid.

85 Takeshi Watanabe, ‘Japan’ in Ira Millstein and Holly Gregory (eds), *Corporate Governance: Board Structures and Directors’ Duties in 35 Jurisdictions Worldwide* (Law Business Research, 2013) 118, 118.

86 Aronson, ‘The Olympus Scandal’, above n 1, 116.

87 Ibid 116, 141.

88 Gen Goto, ‘The Outline for the Companies Act Reform in Japan and Its Implications’ (2013) 18(35) *Journal of Japanese Law* 13, 18.

89 See Ronald J Gilson and Curtis J Milhaupt, ‘Choice as Regulatory Reform: The Case of Japanese Corporate Governance’ (2005) 53 *American Journal of Comparative Law* 343, 348; Aronson, ‘The Olympus Scandal’, above n 1, 141.

90 岩崎 将基 [Iwazaki Masaki], «内部告発の法と経済学：公益通報者保護法の検討» [Whistleblower Laws and Economic Theory: A Consideration of the Whistleblower Protection Act] (2008) 3 東京大学法科大学院ローレビュー [University of Tokyo Law Review] 30, 42.

increase their effectiveness.<sup>91</sup> External accountants also monitor compliance with laws by examining external financial disclosures. However, they too are often thought to over-accommodate management interests.<sup>92</sup>

These amendments initially included a proposal that one company auditor be selected directly by employees on the basis that employees would be more comfortable reporting wrongdoing to an auditor they themselves had chosen. This proposal was ultimately excluded from the amendments which were adopted.<sup>93</sup>

### C Independent Directors

The role of independent directors in Japanese companies is controversial.<sup>94</sup> Currently, around half of listed companies have no independent directors.<sup>95</sup> Directors are often appointed from amongst veteran employees.<sup>96</sup> In the West, independent directors are regarded as normal and desirable in public companies, and this Western norm has prompted debate over recent decades in Japan about whether this trend should be embraced domestically. Foreign investors and OECD norms favour such a move, as do reformers in Japan.<sup>97</sup> Domestic corporate opposition to change is partly due to concerns that outsiders will be more willing to uncover and reveal malfeasance — as if such revelations are undesirable. Japanese corporate interests argue that a higher number of independent directors will not improve compliance and that the traditional system has actually prevented fraud.<sup>98</sup> In any event, the evidence is that the number of independent directors is steadily increasing.<sup>99</sup> Recent regulatory reforms underline this change — the *Code* recommends that listed companies appoint at least two independent directors (however, as explained above, compliance with the *Code*'s principles is not mandatory).<sup>100</sup> This trend should lead to a more open boardroom atmosphere, and ultimately, to better corporate governance.

### D J-SOX

*J-SOX* aims to improve corporate governance by requiring management and auditors to attest to the rigour of internal controls over financial reporting and

91 *Companies Act* arts 2(15)–(16); Suzuki, Shiozaki and Coney, above n 75.

92 Kurt Desender et al, 'Foreign Ownership and Corporate Governance Patterns: The Board-Auditor Relationship in Japan' (Paper presented at the Society for the Advancement of Socio-Economics, University of Milan, 27 June 2013) 10.

93 Goto, above n 88, 30–1.

94 Gilson and Milhaupt, above n 89, 358.

95 Aronson, 'The Olympus Scandal', above n 1, 118.

96 Bruce E Aronson, 'Learning from Comparative Law in Teaching US Corporate Law: Director's Liability in Japan and the US' (2003) 22 *Pennsylvania State International Law Review* 213, 219.

97 Aronson, 'The Olympus Scandal', above n 1, 98–9.

98 Desender et al, above n 92, 8.

99 Ibid.

100 The *Code* Principle 4.8; Suzuki, Shiozaki and Coney, above n 75.

requires that external accountants assess internal controls.<sup>101</sup> Unlike *US-SOX*, *J-SOX* contains no whistleblower hotline provisions.<sup>102</sup> While it is too early to make definitive conclusions about the effectiveness of *J-SOX* in uncovering malfeasance, doubts have already been expressed. Corporate law academic, Zenichi Shishido, has recently argued that Japanese corporations are not serious about disclosure requirements under *J-SOX*. He puts it bluntly: ‘*J-SOX* has failed to improve the corporate governance of publicly traded Japanese companies’.<sup>103</sup> Shishido, a professor at Hitotsubashi University, is an experienced and perceptive observer of corporate Japan so his views should be taken seriously.

## E Other Whistleblower Laws

Before the *WPA* there was already other legislation aimed at protecting whistleblowers in Japan’s private sector. The most well-known of these are the provisions within the *Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors Act 1999* (Japan).<sup>104</sup> This Act creates criminal penalties for employers who retaliate against whistleblowers.<sup>105</sup> These provisions have been largely unused despite retaliation against whistleblowers being common in the nuclear sector.<sup>106</sup>

Some protection for whistleblowers is provided in employment case law developed over recent decades.<sup>107</sup> In general, it is extremely difficult under Japanese law to dismiss workers.<sup>108</sup> This is due to the case law doctrine of abusive dismissal, which is applied by the courts to resolve typical cases of disputed dismissals.<sup>109</sup> However, it is also applied in cases where employees are terminated or disciplined because of whistleblowing. The government considered that the content and application of the doctrine was not entirely clear, and this was one reason for the enactment of the *WPA*.<sup>110</sup> The doctrine involves an assessment of the ‘reasonableness’ of the employee in making the disclosure and whether the method and recipient

101 Shishido and Osaki, above n 39, 356–8.

102 Dowling, above n 23, 914.

103 Shishido and Osaki, above n 39, 366.

104 ≪核原料物質、核燃料物質及び原子炉の規制に関する法律≫ [Regulation of Nuclear Source Material, Nuclear Fuel Material and Reactors Act] (Japan) Act No 166 of June 1957 art 66(2) (‘*Nuclear Regulation Act*’).

105 Ibid art 78.

106 海渡 雄一 [Kaito Yuichi], ≪原子力の安全性に関する内部告発から見た公益通報者保護法の課題≫ [The Whistleblower Protection Act in the Context of Whistleblowing in the Nuclear Industry], 消費者ニュース[Consumer Law News] (Osaka), 2012, 14.

107 Araki, Otokowaza and Kamota, above n 41, 148.

108 Ryuichi Yamakawa, ‘From Security to Mobility? Changing Aspects of Japanese Dismissal Law’ in Daniel H Foote (ed), *Law in Japan: A Turning Point* (University of Washington Press, 2007) 483, 488–9.

109 Ibid 486–7. In 2003, the doctrine was codified as an amendment to the ≪労働基準法≫ [Labour Standards Law] (Japan) Act No 49 of 7 April 1947

110 *WPA Explanatory Notes*, above n 73, 2; Araki, Otokowaza and Kamota, above n 41, 152; 上村秀紀 [Uemura Yuki], ≪公益通報者保護法≫ [The Whistleblower Protection Act], ジュリスト[Jurist] (Japan), 1 September 2004, 66.

of the disclosure were appropriate in the circumstances.<sup>111</sup> Even after enactment of the *WPA*, the doctrine is still applied by the courts when the whistleblowing relates to matters not covered by the 456 statutes stipulated in the *WPA*.<sup>112</sup> In most cases, application of the doctrine results in employer retaliation being declared unlawful, that is, the employee wins.<sup>113</sup> This is consistent with the broader results of most litigation concerning employee dismissals or disciplinary action given that Japanese employment law generally favours workers compared to jurisdictions in Europe and North America.

## **V WHISTLEBLOWING, CULTURE AND CORPORATE FRAUD IN JAPAN**

This Part discusses the cultural and structural influences on whistleblowing in Japan and analyses recent major frauds, in particular the Olympus scandal. It then identifies key characteristics of fraud in Japan which helps in assessing the effectiveness of the *WPA*. In particular, the prevalence of frauds of long duration is considered.

### **A Cultural and Labour Market Influences on Whistleblowing**

Whistleblowing and laws to facilitate it seem not to fit comfortably within Japanese corporate culture.<sup>114</sup> Generally, Japanese society is highly group-oriented, personal interests are subordinated to those of the groups to which people belong, and harmony and conformity are prized above individuality and assertion.<sup>115</sup> Most employees' foremost public loyalty is to their employer, which is typically a company.<sup>116</sup> The company is a vital social unit which employees feel duty-bound to support and protect. This has been called the 'company community' norm, a major feature of which is the so-called life-time employment system, under which employees give primary loyalty to the company and in exchange are supposedly guaranteed a job for life.<sup>117</sup> Loyalty to the company can manifest as toleration of

111 Mizutani, above n 55, 100–1.

112 山本 雄大 [Yamamoto Takehiro], «公益通報者保護法見直しの現状» [Reconsidering the Whistleblower Protection Act], 消費者法ニュース[Consumer Law News] (Osaka), October 2012) 22–3.

113 Ibid.

114 Yukiko Miki, 'The Position in Japan' in Richard Calland and Guy Dehn (eds), *Whistleblowing Around the World: Law, Culture & Practice* (ODAC & PCaW, 2004) 153, 154.

115 Nobuo Komiya, 'A Cultural Study of the Low Crime Rate in Japan' (1999) 39 *British Journal of Criminology* 369, 383.

116 Zenichi Shishido, 'Japanese Corporate Governance: The Hidden Problems of Corporate Law and Their Solutions' (2000) 25 *Delaware Journal of Corporate Law* 189, 202, quoted in Henry N Pontell and Gilbert Geis, 'Black Mist and White Collars: Economic Crime in the United States and Japan' (2007) 2 *Asian Journal of Criminology* 111, 121.

117 Shishido, above n 116, 202–3. Wolff has pointed out the many respects in which 'life-time employment' is a misnomer: Leon Wolff, 'The Death of Lifelong Employment in Japan?' in Luke Nottage, Leon Wolff and Kent Anderson (eds), *Corporate Governance in the 21<sup>st</sup> Century: Japan's Gradual Transformation* (Edward Elgar, 2008) 53, 53.

the misconduct and even criminality of superiors such as supervisors, managers and directors.<sup>118</sup> In a recent survey, 43 per cent of Japanese workers said they would not report a colleague or superior they knew was involved in misconduct.<sup>119</sup> This attitude mixes with certain labour market factors to discourage whistleblowing.

Until recent years there was very low labour mobility in Japan, especially in big companies.<sup>120</sup> This meant that employees stayed with a single employer for the long term (often for life) and were extremely reluctant to jeopardise their jobs by doing things like whistleblowing.<sup>121</sup> The ‘company community’ norm does not easily allow individuals to change employers.<sup>122</sup> Mobile employees in Japan are often regarded with suspicion that borders on aversion, with the intensity of such feelings rising with the level of seniority of the employee. This is particularly the case in large companies.

Nevertheless, cultural norms and patterns are not rigidly fixed over long periods; they do change, but usually in a gradual way rather than suddenly. Japan is no exception.<sup>123</sup> Wolff has detailed how ‘life-time employment’ substantially emerged only after World War II, and then only for a small part of the workforce.<sup>124</sup> The ‘company community’ norm has been breaking down since the burst of the 1980s ‘bubble’ economy as the protections carried by life-time employment gradually fell away. This process has been accelerated by labour market reforms from the early 2000s that led to a dramatic expansion of the part-time and casual workforce.<sup>125</sup> This created more mobility in the labour force generally, although mobility remains low at middle and senior management levels.<sup>126</sup> This has substantially increased the number of workers who do not fit the ‘company community’ mould. One effect has been that employee loyalty is tending to decline. Although the aversion to whistleblowing remains as a common attitude, its power has been reduced by these structural shifts, which is consistent with a general though slow trend to judicialisation, involving not just toleration for using the law to solve problems, but a willingness to pursue such action and even positive valuation of it.<sup>127</sup> Anticipated deregulation of employment laws by the

118 See James Lloyd Bierstaker, ‘Differences in Attitudes about Fraud and Corruption Across Cultures: Theory, Examples and Recommendations’ (2009) 16 *Cross Cultural Management* 241, 246; Harold R Kerbo and Mariko Inoue, ‘Japanese Social Structure and White Collar Crime: Recruit Cosmos and Beyond’ (1990) 11 *Deviant Behavior* 139, 146.

119 Hino, ‘The Whistleblower Protection Act: Current Trends and Issues’, above n 74, 56.

120 John O Haley, ‘Economic Organizations and Corporate Governance in Japan: The Impact of Formal and Informal Rules (Review)’ (2006) 32 *Journal of Japanese Studies* 235, 239.

121 See also Miki, above n 114, 154–5.

122 Shishido, above n 116, 203–4.

123 Wolff, ‘The Death of Lifelong Employment in Japan?’, above n 117.

124 *Ibid* 53–60.

125 Araki, above n 55, 254–5.

126 Thomas Bredgaard and Flemming Larsen, ‘External and Internal Flexicurity: Comparing Denmark and Japan’ (2010) 31 *Comparative Labor Law & Policy Journal* 745, 760.

127 Souichirou Kozuka, ‘Competition Law in Japan: The Rise of Private Enforcement by Litigious Reformers’ in Leon Wolff, Luke Nottage and Kent Anderson (eds), *Who Rules Japan? Popular Participation in the Japanese Legal Process* (Edward Elgar, 2015) 164, 165.



current Shinzo Abe administration will, if enacted, likely further weaken the aversion to whistleblowing and the attitudes that reinforce this aversion.<sup>128</sup>

## **B The Olympus Scandal and Other Major Corporate Frauds**

Japan's financial 'bubble' was partly a product of corporate malfeasance.<sup>129</sup> After the 'bubble' burst, significant cases of fraud came to light, including the 12 year cover-up of Daiwa Bank losses.<sup>130</sup> From 2004 to 2008, there were no fewer than 16 cases of major accounting fraud involving listed Japanese companies, the most notable being Kanebo's concealment of ¥80 billion in losses.<sup>131</sup> These incidents often involved the collusion of company auditors and external accountants.<sup>132</sup> In the 2000s, there were other significant cases of corporate malfeasance including the 23 year cover-up by Mitsubishi Motors of automobile defects.<sup>133</sup> Most recently, several large Japanese manufacturers and banks have paid huge fines for engaging in transnational cartels. Some of these cartels stretch back decades.<sup>134</sup> Employee whistleblowing uncovered some of these abuses, as well as the Olympus fraud.<sup>135</sup> Olympus was probably the most egregious accounting fraud in Japan's history.<sup>136</sup> Further consideration of this case is worthwhile as it illustrates the current limitations of the *WPA*.

As noted earlier, Woodford, the Olympus CEO, was dismissed for revealing this accounting fraud which had been concealed for two decades. After speaking publicly to the press, a global media frenzy ensued. At first, Olympus denied Woodford's claims. Senior management asserted that Woodford had been dismissed for problems with his 'management style'.<sup>137</sup> Eventually, Olympus admitted illegally concealing the US\$1.5 billion of losses. Olympus' stock value dropped nearly 80 per cent within days and the corporation came close to being delisted.<sup>138</sup> Senior executives have been convicted of criminal fraud and Olympus and its former managers are the subject of ongoing civil and criminal proceedings

128 Hiroko Tabuchi, 'Layoffs Taboo, Japan Workers Are Sent to the Boredom Room', *The New York Times* (New York), 17 August 2013, A1.

129 Henry N Pontell, Stephen M Rosoff and Jason Lam, 'The Role of Fraud in the Japanese Financial Crisis: A Comparative Study' in Henry N Pontell and David Shichor (eds), *Contemporary Issues in Crime and Criminal Justice: Essays in Honor of Gilbert Geis* (Prentice Hall, 2001) 321, 321–2.

130 Aronson, 'Learning from Comparative Law', above n 96, 222–6.

131 Ibid. See also Iwazaki, above n 90, 51–3.

132 See, eg, Konishi Tokikazu, 'Fraud by Certified Public Accountants in Japan and the United States' (2010) 5 *Asian Journal of Criminology* 99, 102–4; Henry N Pontell and Gilbert Geis, 'Introduction: White-Collar and Corporate Crime in Asia' (2010) 5 *Asian Journal of Criminology* 83, 87.

133 Leon Wolff, 'New Whistleblower Protection Laws for Japan' (2004) 9(17) *Journal of Japanese Law* 209, 210.

134 Michael Vincent, *ACCC Says Price Fixing by Japanese Auto-Parts Manufacturers Has Pushed Up the Cost of Some Cars*, (27 September 2013) Australian Broadcasting Corporation <<http://www.abc.net.au/news/2013-09-27/japanese-auto-parts-manufacturers-plead-guilty-to-us-price-fixi/4984104>>.

135 Mizutani, above n 55, 95; Yamamoto, above n 112, 22–3.

136 Aronson, 'The Olympus Scandal', above n 1, 106.

137 Ibid 111.

138 Ibid 112.

both within and outside Japan.<sup>139</sup> Olympus commissioned a third party committee to investigate and report on the causes of the fraud.<sup>140</sup> Unfortunately for Woodford, as a director and CEO, he was not a ‘worker’ protected by the *WPA*. In any event, he did not use the Olympus whistleblower system to disclose. Nonetheless, the investigation report concluded that the internal whistleblower system, which had not been properly established, was one cause of the fraud insofar as it was part of an organisation-wide breakdown of corporate governance at Olympus.<sup>141</sup> Historically, the system was defective and rarely used.<sup>142</sup> The bulk of the small number of reports made on the hotline were about ‘personality clashes’, not reports of corporate malfeasance.<sup>143</sup> The hotline was linked only to the Olympus compliance department, and notwithstanding numerous attempts to establish a link external to Olympus, this was prevented by a senior manager, who himself was complicit in the fraud.<sup>144</sup> Shortly after the hotline was established, an employee sought to make an anonymous report and despite the employee’s objections, the relevant compliance officer tried to identify the employee. This became known throughout Olympus, causing the use of the system to decline even more.<sup>145</sup>

### **C Characteristics of Corporate Fraud in Japan**

In assessing the effectiveness of the *WPA* it is useful to identify the characteristics of fraud in corporate Japan. The evidence is that there is at least as much corporate crime in Japan as there is in the US.<sup>146</sup> A recent global survey identified three characteristics of white-collar crime shared by Japan and the US. First, both suffer a large number of costly accounting and financial statement frauds. Second, external audits are largely ineffective at detection. Third, the most common way fraud is detected is through whistleblowing.<sup>147</sup> These characteristics were evident in the Olympus scandal and most of the other fraud cases already discussed.

In Japan, many of these frauds have an additional and disturbing characteristic that distinguishes them from fraud in comparable countries — the longevity of the misconduct.<sup>148</sup> Wrongdoing persisted, undetected, for very long periods. Major examples include the Seibu Group’s fraudulent Tokyo Stock Exchange filings made over a 50 year period,<sup>149</sup> over 20 years duration for the Olympus

139 Ibid 114.

140 Ananta Aji Wiguna, *The Role of Corporate Culture and Cultural Background in Olympus Case* (Masters Thesis, University of Tilburg, 2012) 2.

141 Ibid 182.

142 Ibid 128, 133.

143 Ibid 128.

144 Ibid.

145 Ibid.

146 See, eg, *Transparency International Report*, above n 9, 238, 267, 397; J Ralph Byington and Jo Ann McGee, ‘White-Collar Crime in Japan’ (2011) 22(6) *Journal of Corporate Accounting & Finance* 39, 42; Pontell and Geis, ‘Black Mist and White Collars’, above n 116, 117; Kerbo and Inoue, above n 118, 149–50.

147 Byington and McGee, above n 146, 42.

148 Iwazaki, above n 90, 40.

149 Pontell and Geis, ‘Black Mist and White Collars’, above n 116, 122.

scandal, 30 years for the Mitsubishi Motors scandal,<sup>150</sup> 12 years for the Daiwa Bank cover-up,<sup>151</sup> and decades for the global cartels.<sup>152</sup> Empirical research suggests that, at least in the US, it is rare for frauds to persist longer than around two years.<sup>153</sup> Several factors seem to have contributed to the longevity of frauds in Japan. First is the scarcity of independent directors<sup>154</sup> and a company auditor function lacking power, sufficient resources and independence.<sup>155</sup> Second is the ‘company community’ norm promoting conformity amongst employees in the workplace, thus discouraging whistleblowing.<sup>156</sup> The third factor is structural — the low turnover of middle and senior management which arises from the life-time employment system. The combined effect of these factors creates a corporate norm of turning a blind eye to malfeasance so that doing the right thing by reporting it is construed as doing the wrong thing by causing disruption, embarrassment and likely harm to the company.

The absence of ‘alternative’ enforcement tools in Japan such as surveillance operations<sup>157</sup> and amnesty programs reinforces this culture.<sup>158</sup> Miriam Baer argues that traditional ‘noisy’ law enforcement methods probably cause perpetrators of existing frauds — in particular accounting fraud — to continue their wrongdoing.<sup>159</sup> Once a company has lied in its financial disclosures to external actors (for example, shareholders) it becomes extremely hard to resist perpetuating the lie into the future.<sup>160</sup> Changes to ‘noisy’ traditional enforcement approaches will likely only cause the company to increase the magnitude of the fraud — to pay for their additional risk exposure — or invest resources in avoiding the new enforcement approach: in both instances stakeholders are worse off.<sup>161</sup> This happened in the Olympus case when it devised the M&A scheme to avoid compliance with the change to accounting standards in 2005.<sup>162</sup> Baer argues that in order to avoid this failure of ‘noisy’ enforcement methods, ‘alternative’

150 Iwazaki, above n 90, 51.

151 Ibid 43.

152 Vincent, above n 134.

153 Alexander Dyck, Adair Morse and Luigi Zingales, ‘How Pervasive is Corporate Fraud?’ (Working Paper No 2222608, Rotman School of Management, 22 February 2013) 6–7. A survey of frauds in the US from 1996 to 2004 found that the average duration of frauds was around 20 months.

154 Tokyo Stock Exchange, *TSE-Listed Companies White Paper on Corporate Governance 2011* (March 2011) <<http://www.jpx.co.jp/english/equities/listing/cg/tvdivq0000008jb0-att/b7gje60000037hvl.pdf>>, cited in Aronson, ‘The Olympus Scandal’, above n 1, 118.

155 Gilson and Milhaupt, above n 89, 348.

156 Shishido, above n 116, 204.

157 Herbert Smith, above n 69, 28.

158 Tomomi Kawasaki, ‘White-Collar Crime and Reactions of the Criminal Justice System in the United States and Japan’ in Henry N Pontell and Gilbert Geis (eds), *International Handbook of White-Collar and Corporate Crime* (Springer, 2007) 552, 562; Pontell and Geis, ‘Black Mist and White Collars’, above n 116, 118.

159 Miriam H Baer, ‘Linkage and the Deterrence of Corporate Fraud’ (2008) 94 *Virginia Law Review* 1295, 1300.

160 Ibid.

161 Ibid.

162 Aronson, ‘The Olympus Scandal’, above n 1, 108–9.

enforcement methods should be used.<sup>163</sup> Such methods are not available in Japan because authorities are committed to traditional ‘noisy’ enforcement methods.<sup>164</sup>

## VI HAS THE WPA BEEN EFFECTIVE?

The CAA was established in 2009 partly in response to the same scandals that led to the enactment of the *WPA*.<sup>165</sup> In 2013, the CAA conducted a wide-ranging survey of companies and their employees to determine the level of their knowledge and use of the *WPA* and their attitudes to whistleblowing.<sup>166</sup> Part VI reflects on this survey as well as recent litigation to assess the extent to which the *WPA* has been effective.

### A The 2013 Consumer Affairs Agency Survey

One significant finding of the survey was that 69 per cent of employees and 61 per cent of companies have no awareness of the *WPA*.<sup>167</sup> These high numbers suggest that public education about the law has been and remains deficient. Around 95 per cent of whistleblowing to both employers’ hotlines and government agencies were complaints about ‘personality clashes’.<sup>168</sup> Only 4.5 per cent of whistleblowing concerned breaches of laws covered by the *WPA* which were unrelated to human resources issues.<sup>169</sup> The scant awareness of the legislation and the significant misuse of hotlines to complain about ‘personality clashes’ are problems that could be addressed with an adequate information campaign.

Only 46 per cent of companies have hotlines and 58 per cent of those are set up with the companies’ own external lawyers.<sup>170</sup> 55.4 per cent of employees prefer to disclose to government agencies and only 5.4 per cent prefer to disclose to the press.<sup>171</sup> Japanese legislators and corporations have a tendency to want problems dealt with in-house and informally rather than exposed to independent public scrutiny and investigation, a tendency with some resonance in dominant cultural values. Consistent with this is that 71 per cent of employees expressed a preference to remain anonymous when whistleblowing due to concerns over reprisals.<sup>172</sup>

163 Baer, above n 159, 1300–1.

164 Pontell and Geis, ‘Black Mist and White Collars’, above n 116, 118.

165 It is curious that it is not a separate department but is located within the Cabinet Office.

166 Consumer Affairs Agency (Japan), «公益通報者保護制度に関する実態調査 報告書» [Survey into the Implementation of the Whistleblower Protection System] (June 2013) 10 (‘2013 Consumer Affairs Agency Survey’).

167 Ibid.

168 Ibid.

169 Ibid.

170 Ibid.

171 Ibid.

172 Ibid.

Retaliation remains common after whistleblowing and even after obtaining relief in court against retaliation. 50 per cent of employees who made internal disclosures experienced retaliation, including dismissal.<sup>173</sup> The survey shows that around 65 per cent of litigation concerning employer retaliation against whistleblowers which went to judgment resulted in the whistleblower ‘winning’, although there were only 29 cases that went to final judgment.<sup>174</sup> The *WPA* was applied in 37 per cent of these cases.<sup>175</sup> The rest were resolved by the application of the abusive dismissal doctrine. Only six of these cases arose from whistleblowing concerning fraud. These concerned frauds under the *Penal Code* and *J-SOX*.<sup>176</sup> In most of these cases, the employees ultimately won.<sup>177</sup>

## **B Has the WPA Prevented Retaliation?**

All this suggests that the *WPA* has at least been successful in protecting whistleblowers in fraud cases where those cases have gone to judgment. However, getting to judgment in employment-related disputes in Japan takes a notoriously long time.<sup>178</sup> Even if employees win, they must bear their own legal costs. Both of these structural factors discourage whistleblowers from pursuing remedies through legal action and account for the low number of proceedings initiated by employees in Japan generally — around 7000 in 2010, which is very low compared to other developed countries.<sup>179</sup> In practice, the vast majority of disputes between workers and employers are resolved via informal ‘financial settlements’ without the involvement of the courts.

In the Olympus ‘employee transfer’ case (unrelated to the Woodford case) the worker in question blew the whistle on breaches by Olympus of the *Unfair Competition Act* by poaching the staff of its business partners.<sup>180</sup> The matter went to court and Olympus was ordered to stop retaliatory actions against the whistleblower.<sup>181</sup> After the case ended, Olympus started taking different retaliatory steps in the workplace against the employee. Olympus even commenced new

173 Ibid.

174 Ibid. The CAA compiled details of 29 completed legal proceedings concerning disputes between companies and whistleblowers. Here ‘winning’ means cases whistleblowers prevailed in all or part of their claims. The CAA emphasises that this is not a comprehensive survey of all whistleblower disputes adjudicated by Japanese courts.

175 Ibid.

176 Ibid.

177 Ibid.

178 Araki, above n 55, 275.

179 Ryuichi Yamakawa, ‘Systems and Procedures for Resolving Labor Disputes in Japan’ (2013) 34 *Comparative Labor Law & Policy Journal* 899, 907.

180 日野 勝吾 [Hino Shogo], «公益通報者保護法はどこへ向かうのか» [The *Whistleblower Protection Act*: Where to from Here?] *消費者法ニュース* [Consumer Law News] (Osaka), October 2012, 26. See also Application to Confirm Employer’s Lack of Obligation Under an Employment Contract (Olympus Case), Tokyo District Court, Decision 2073, 15 January 2010, 137, Labour Law Reports, No. 1035, 70; Decision 2127, 31 August 2011, 124, Labour Law Reports, No 1035, 42.

181 Ibid.

legal proceedings against the whistleblower on what were generally regarded as spurious grounds.<sup>182</sup>

Despite the *WPA* obliging government departments to take action after receiving employee disclosures, in one case the regulator took no action for 16 months.<sup>183</sup> In two other cases the authorities did nothing for a year.<sup>184</sup> There have been incidents where the authorities, after receiving disclosures, revealed to the employer the employee's name and substance of the complaint which then led to reprisals, including dismissal.<sup>185</sup> No penalties exist for government departments which fail to act promptly or at all on reports from whistleblowers.

Several cases show that whistleblowing systems established by companies have either not been used by workers or have been used to trigger retaliation against whistleblowers. The Olympus scandal illustrates the former. Concerning the latter, in the Olympus 'employee transfer' case, the employee reported the alleged misconduct via the internal whistleblower system only to have the details conveyed to his supervisors (who were subjects of the complaint) and the personnel department. They then took steps against the worker which the court ultimately found to constitute unlawful retaliation.<sup>186</sup>

In light of the above, observers are divided over whether the *WPA* has been effective in protecting against employer reprisals. Those who consider it has been effective point to employee victories in most cases which have gone to judgment.<sup>187</sup> The CAA survey's finding regarding the outcome of whistleblower litigation supports this view. Those who believe the *WPA* has been ineffective cite the problems discussed above.<sup>188</sup> Whether by operation of the *WPA* or the abusive dismissal doctrine, whistleblowers usually get some protection from the courts against retaliation if their cases proceed to judgment. Commentators also agree that the *WPA* has so far had some symbolic effect in making whistleblowing more socially acceptable in Japanese companies.<sup>189</sup> The significance of this shift in attitudes should not be understated. In a conservative society like Japan, social change is usually very gradual. Deeply entrenched attitudes and values reinforce labour market factors that tend to stifle whistleblowing. The *WPA* should be lauded for promoting a shift in attitudes toward whistleblowing, a shift which

182 Ibid.

183 Ibid.

184 Iwazaki, above n 90, 52–3. In one case, two former officers of the food producer Meat Hope had disclosed fraudulent food product mislabeling at that company to the Ministry of Agriculture, Forestry and Fisheries. The Ministry did not act on the disclosure for over a year and only after the former officers reported the matter to the media.

185 Yamamoto, above n 112, 22.

186 Hino, 'The *Whistleblower Protection Act*: Where to from Here?', above n 180.

187 Ibid 23.

188 Japan Federation of Bar Associations «公益通報者保護法に関する意見書—消費者庁の「公益通報保護制度に関する実態調査報告書」を受けて—» [Submission in relation to the Consumer Affairs Agency's 'Survey into the Implementation of the Whistleblower Protection System'] (21 November 2013) 3–5 (*JFBA's 2013 Submission Regarding the WPA*); Hino, 'The *Whistleblower Protection Act*: Where to from Here?', above n 180, 29–30.

189 See, eg, Yamamoto, above n 112, 22; Hino, 'The *Whistleblower Protection Act*: Where to from Here?', above n 180.

may eventually have transformative effects on corporate and societal culture. Further, the codification of whistleblower protections enables companies and employees to more easily understand the available protections, rather than having to cobble together the principles of the abusive dismissal doctrine as set out in judgments of various courts. The *WPA* helps overcome the imprecise parameters of the application of this doctrine.<sup>190</sup>

### **C Has the WPA Uncovered Corporate Fraud?**

There is no published research concerning the effectiveness of the *WPA* in uncovering fraud. The number of court cases in which whistleblowers made allegations of fraud is tiny — only six in the 2013 survey. If there is a high correlation between the reporting of fraud and its incidence, this figure means that fraud is barely a problem. This is unlikely to be true given the consensus about the high incidence of white-collar crime in Japan. It is much more likely that the *WPA* has had only a very limited effect in uncovering fraud because, notwithstanding the consensus over the high incidence of white-collar crime, there has only been a small number of court cases arising from whistleblowing. Moreover, the low 4.5 per cent level of whistleblowing regarding non employment related malfeasance, the lack of awareness of the *WPA* generally, the recent cluster of accounting fraud scandals and the cultural aversion to whistleblowing also point to this conclusion. Whilst more research is required to draw a firmer conclusion, it is likely that the *WPA* has had at best a limited effect in uncovering corporate fraud.

## **VII PROPOSALS FOR CHANGING THE WPA**

Japan needs an effective corporate whistleblower system. There is no compulsion under the *Companies Act*, *J-SOX*, or the *Corporate Code* to establish these systems. The attempt to stimulate whistleblowing with the recent proposed *Companies Act* amendment was unsuccessful.<sup>191</sup> Existing evidence strongly suggests that whistleblower laws could be effective in Japan given the proven tendency of whistleblowing to uncover long-standing frauds.<sup>192</sup> Corporate regulators may not use ‘alternative’ enforcement methods such as surveillance operations<sup>193</sup> or amnesty programs<sup>194</sup> which probably contributes to the preponderance of long duration frauds. The prevalence of such frauds is evidence that the traditional regulatory monitors are ineffective. In addition to doubts about the effectiveness of the company auditor system and the scarcity of independent directors, Japan’s

190 See, eg, Hino, ‘The *Whistleblower Protection Act*: Current Trends and Issues’, above n 74, 64; Uemura, above n 110.

191 Goto, above n 88, 30–1.

192 Dyck, Morse and Zingales, ‘Who Blows the Whistle on Corporate Fraud?’, above n 9, 3.

193 Herbert Smith, above n 69, 28.

194 Kawasaki, above n 158; Pontell and Geis, ‘Black Mist and White Collars’, above n 116, 118.

allocation of resources to traditional external corporate monitors is low by international standards.<sup>195</sup>

Nevertheless, cultural and labour market barriers to whistleblowing are starting to erode. The *WPA* has had a welcome symbolic effect in making whistleblowing more socially acceptable. Whistleblowers can now point to a statute that legitimises reporting corporate wrongdoing in a society undergoing judicialisation. In light of these developments, changes to the *WPA* to make it more effective should be made. Indeed, the influential Japan Federation of Bar Associations ('JFBA') has recently demanded urgent action from the CAA to promote such amendments.<sup>196</sup>

Below we suggest potential changes to the objectives of the *WPA* — to focus not only on protection against retaliation, but also the detection of corporate malfeasance.<sup>197</sup> We then propose other changes to the Act and its implementation. These proposals consist in part of suggestions to adopt aspects of the American model to supplement Japan's current arrangements.

## A Objectives

The uncovering of malfeasance should be made an express objective of the *WPA*. The JFBA supports this approach. It argues that during deliberations leading up to enactment of the *WPA*, the importance of 'bridging the information gap between citizens and corporations' was emphasised by legislators.<sup>198</sup> However, the objectives of the Act ultimately failed to reflect the 'aim of the early detection and rectification of illegal conduct, by [the *WPA*] supplementing existing public regulator monitoring functions in place to protect the public interest'.<sup>199</sup> The JFBA also argues that the *WPA* should 'be a system which supplements the public regulatory oversight regime [for companies]'.<sup>200</sup>

## B Education

Better education about the *WPA* is required to ensure potential whistleblowers are aware of it and its real purpose.<sup>201</sup> A law will not be used until people know of its

195 See, eg, *Transparency International Report*, above n 9, 125; Aronson, 'The Olympus Scandal', above n 1, 133.

196 *JFBA's 2013 Submission Regarding the WPA*, above n 188. The amendments which the JFBA considers urgent are the introduction of penalties for retaliation, provision of protections for whistleblowers from criminal and civil liability in connection with whistleblowing, the establishment of a time limit for authorities' responses to external disclosures and a single government whistleblowing agency: at 2–5.

197 Iwazaki, above n 90, 42.

198 Japan Federation of Bar Associations, Submission on the Review of the *Whistleblower Protection Act* (18 February 2011) 2 ('*JFBA's 2011 Submission Regarding the WPA*').

199 *Ibid* 3.

200 *Ibid*.

201 Hino, 'The *Whistleblower Protection Act*: Current Trends and Issues', above n 74, 57.



existence.<sup>202</sup> The low level of awareness of the *WPA* is a real but surmountable challenge.<sup>203</sup> In addition to the CAA's own education activities,<sup>204</sup> employers might be required to provide instruction about it. As any addition to compliance obligations invariably invites objections, limiting this requirement to larger companies should make this achievable. Even amongst those who are aware of the *WPA* and use whistleblower systems, there is a significant 'grass-roots' misconception regarding the purpose of the Act.<sup>205</sup>

Some labour laws are subject to the *WPA* and reporting of serious employment matters should by no means be discouraged.<sup>206</sup> However, the Labour Standards Office already has in place well-used consultation hotlines for employment-related complaints.<sup>207</sup>

The longer *WPA* whistleblower systems are used by workers to complain about 'personality clashes', the more likely employers will dismiss hotlines as annoying inconveniences. Given the existence of the Labour Standards Office consultation hotlines, consideration should be given to excluding employment laws altogether from the scope of the *WPA*, so that the focus is on fraud and other forms of malfeasance.

### **C Definition of Whistleblower**

The exclusion of senior company staff from the definition is too narrow. It is self-evident that executives will usually have more knowledge about sensitive matters than regular employees. Directors, business partners, and even customers should be protected under the *WPA*.<sup>208</sup> In the Snow Brand fraudulent beef labeling case, the malfeasance was disclosed to the authorities by a warehousing business partner of Snow Brand. The warehousing company was forced by the authorities to suspend its business for 16 months until it was cleared of involvement in Snow Brand's misconduct.<sup>209</sup>

In providing protection to contractors the UK approach is considered by some to constitute '[b]est practice'.<sup>210</sup> Prima facie, broadening the definition of

202 Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 *Common Law World Review*, 144, 151.

203 Consumer Affairs Agency (Japan), «公益通報者保護制度に関する意見～消費者庁の実態調査を踏まえた今後の取組について» [Opinion Regarding the Whistleblower Protection System — Future Steps in Response to the Report [sic] (23 July 2013) 1 ('CAA Opinion Regarding the 2013 WPA Survey').

204 Ibid 2.

205 Hino, 'The Whistleblower Protection Act: Current Trends and Issues', above n 74, 57.

206 «公益通報者保護法の対象となる法律の一覧 (552本)» [List of Laws Subject to the Whistleblower Protection Act (456 laws)] 5 October 2015.

207 Yamakawa, 'Systems and Procedures for Resolving Labor Disputes in Japan', above n 179, 902.

208 See Yamamoto, above n 112, 24; Hino, 'The Whistleblower Protection Act: Current Trends and Issues', above n 74, 62; Mizutani, above n 55, 117.

209 Wolff, New Whistleblower Protection Laws for Japan, above n 133, 213. See also Kingston, above n 65, 207–9.

210 Latimer and Brown, above n 8, 773.

whistleblower is attractive as this would likely widen the drag-net for uncovering fraud. Consideration would need to be given to the remedies available to customers or business partners under the *WPA* as the existing remedies are based on the employer-employee relationship and would not directly apply to customers or business partners.

## **D Internal Reporting**

Companies should be required to establish and maintain effective whistleblower hotlines. As it is based on the British model, the *WPA* encourages internal reporting by setting very strict requirements for external disclosures. A rationale for this approach is that it is believed to encourage companies to promote proper compliance because if they fail to do so, employees will choose to make external disclosures which may embarrass or damage the company's interests.<sup>211</sup> Although self-regulation may be the 'holy grail' of corporate governance,<sup>212</sup> it is only effective if employers live up to their side of the bargain — by establishing and maintaining effective systems. This would give workers confidence their reports will be handled discreetly. The *WPA* does not do this and the *Guidelines* merely 'encourage' employers to establish them.<sup>213</sup>

If whistleblower systems are not obligatory, the *WPA*'s tiered requirements for external disclosures should be replaced with a simple, single requirement as in *US-SOX/Dodd Frank* and the Australian whistleblower provisions. If internal whistleblower hotlines are not mandatory, it seems unreasonable to effectively oblige employees to report internally — the same requirement should apply to both internal and external disclosures.<sup>214</sup> In Japan, it is highly unlikely that eliminating the tiered requirements for external disclosures will result in a deluge of disclosures to the media. The CAA survey shows that the clearly preferred outlet for external disclosures is government departments and not the media.<sup>215</sup>

The *Guidelines* advise employers to appoint their external lawyers as hotline recipients.<sup>216</sup> 58 per cent of employers have followed this advice.<sup>217</sup> This is highly problematic because these lawyers owe duties to the employers that can easily conflict with the duty to properly handle a report of wrongdoing from an employee. The duty to investigate the report objectively and fearlessly is in tension with the interest in keeping the corporate client happy. It is surprising that the CAA only recognised this as a problem as late as July 2013.<sup>218</sup> Further, Japanese people tend to be wary of dealing with lawyers, seeing them as unapproachable and

211 Araki, Otokowaza and Kamota, above n 41, 153.

212 Brand, Lombard and Fitzpatrick, above n 9, 301–2.

213 *Guidelines*, above n 58, 1.

214 Mizutani, above n 50, 118; Araki, Otokowaza and Kamota, above n 38, 163.

215 *2013 Consumer Affairs Agency Survey*, above n 166, 24–5.

216 *Guidelines*, above n 63, 1.

217 *2013 Consumer Affairs Agency Survey*, above n 166, 13.

218 *CAA Opinion Regarding the 2013 WPA Survey*, above n 203, 5.

aloof.<sup>219</sup> However, the regulatory reforms of early 2015 have put more pressure on companies to limit internal reporting or at least to make it more secure.

## E External Disclosures

The 2013 survey shows that over half of employees surveyed prefer to whistleblow to government agencies due to fear of retaliation or concerns regarding an adequate response from employers.<sup>220</sup> Government departments are obliged under the *WPA* to take ‘appropriate measures’ in response to disclosures.<sup>221</sup> However, official responses have often been tardy or even contributed to reprisals against employees.<sup>222</sup>

Designation of a single government agency as a disclosure recipient may be helpful. This approach is considered ‘best practice’ and is adopted in Canada, the US and the UK.<sup>223</sup> Japan is a unitary state so a ‘one-stop shop’ approach would be easier to implement than in a federation. Studies by Geert Hofstede show that workers in Japan are exceptionally fearful of ‘uncertainty’ in the workplace.<sup>224</sup> The JFBA’s own experience in handling whistleblower enquiries indicates that there is considerable uncertainty amongst potential whistleblowers as to which government agency they should contact.<sup>225</sup> This uncertainty would decline with a single agency. The traditionally close relationship between regulators and companies<sup>226</sup> can still at times be ‘overly familiar’.<sup>227</sup> This tends to weaken official responses to whistleblowing. A single agency could act as an intermediary between the whistleblower and the government agency with direct jurisdiction over the relevant employer to ensure a timely and independent response. Statutory time limits should be set to ensure this agency acted expeditiously in responding to reports of wrongdoing.

## F Long Duration Frauds

Frauds of long duration, in particular, accounting frauds, deserve special attention given such frauds cost so much both financially and in terms of morale and stress.<sup>228</sup> These frauds often involve company auditors and external

219 Colin P A Jones, ‘Book Review Essay: How Compliance is Ruining Japan’ (2007) 23 *Connecticut Journal of International Law* 197, 203–4.

220 2013 *Consumer Affairs Agency Survey*, above n 166, 25.

221 *WPA* art 10.

222 2013 *Consumer Affairs Agency Survey*, above n 166, 65–6.

223 Latimer and Brown, above n 8, 779.

224 Richard G Brody, John M Coulter and Paul H Mihalek, ‘Whistle-Blowing: A Cross-Cultural Comparison of Ethical Perceptions of US and Japanese Accounting Students’ (1998) 16(2) *American Business Review* 14, 15–6 citing Geert Hofstede, *Culture’s Consequences* (SAGE Publications, 1980) and Geert Hofstede, *Cultures and Organizations: Software of the Mind* (McGraw-Hill, 1991).

225 *JFBA’s 2011 Submission Regarding the WPA*, above n 198, 9.

226 Jones, above n 219, 203.

227 *JFBA’s 2011 Submission Regarding the WPA*, above n 198, 9.

228 Byington and McGee, above n 146, 42.

accountants.<sup>229</sup> Consideration should be given to including such professionals within the scope of those protected by the *WPA* in the same manner that *US-SOX/Dodd-Frank* protects auditors. If the first set of accountants in the Olympus scandal had disclosed the fraud, the enormous costs and stresses would have been alleviated by resolving the issue many years earlier. Further, corporate crime in Japan routinely involves middle or senior management.<sup>230</sup> Consideration should be given to amendments that expressly require whistleblowing by middle and senior managers if they uncover fraud.<sup>231</sup>

## G Penalties

The *WPA* should incorporate criminal penalties for employers who retaliate against whistleblowers.<sup>232</sup> The absence of penalties is controversial because retaliation against internal witnesses remains commonplace.<sup>233</sup> Without the threat of harsh sanctions, companies engaging in misconduct which want to continue concealing their wrongdoing are likely to continue to threaten potential whistleblowers. These employers know that the long-established propensity of workers in Japan to avoid litigation and to reach settlements, including confidentiality undertakings, tends to result in the ‘miscreant’ being ‘removed from the building’, and thus silenced. No doubt, Olympus expected to press on with its fraud when it dismissed Woodford.<sup>234</sup> If we assume for a moment that the *WPA* applied to Woodford, the Olympus chairperson would surely have thought twice before dismissing him if there were criminal sanctions for doing so.

The CAA’s explanation for excluding sanctions from the *WPA* is that civil law should not include criminal sanctions, as in the UK’s *PIDA*.<sup>235</sup> This reason is not decisive because equivalent US and Korean laws contain criminal sanctions.<sup>236</sup> For example, *US-SOX* s 1107 provides that retaliation against whistleblowers is punishable by large fines or imprisonment or both. Moreover, Japan’s own *Nuclear Regulation Act* contains criminal penalties.<sup>237</sup> However, even if criminal sanctions were adopted, the historical reluctance of Japan’s judiciary to apply

229 Pontell and Geis, ‘Black Mist and White Collars’, above n 116, 122. See also Tokikazu Konishi, ‘Fraud by Certified Public Accountants in Japan and the United States’ (2010) 5 *Asian Criminology* 99, 100–4.

230 See Kai-D Bussmann and Markus M Werle, ‘Addressing Crime in Companies’ (2006) 46 *British Journal of Criminology* 1128, 1137; Iwazaki, above n 90, 34.

231 Pascoe, above n 35, 537 citing Elizabeth C Tippett, ‘The Promise of Compelled Whistleblowing: What the Corporate Governance Provisions of Sarbanes Oxley Mean for Employment Law’ (2007) 11 *Employee Rights and Employment Policy Journal* 1, 28–35.

232 See *JFBA’s 2013 Submission Regarding the WPA*, above n 188, 4; Hino, ‘The Whistleblower Protection Act: Where to from here?’, above n 180, 29; Yamamoto, above n 112, 24.

233 See, eg, *JFBA’s 2013 Submission Regarding the WPA*, above n 188, 3; Yamamoto, above n 112, 22; Hino, ‘The Whistleblower Protection Act: Where to from here?’, above n 180, 26.

234 This can be assumed given that even after Woodford reported the frauds to the authorities, Olympus continued to deny that any wrongdoing had occurred: see Aronson, above n 1, 111.

235 *WPA Explanatory Notes*, above n 73, 46.

236 *JFBA’s 2013 Submission Regarding the WPA*, above n 188, 3–4.

237 *Nuclear Regulation Act* (Japan) Act No 166 of June 1957 art 78.

such sanctions in employment related matters may limit their effectiveness in practice.<sup>238</sup> Nonetheless, their presence may have some deterrent effect.

Some Australian, New Zealand and Korean laws exempt whistleblowers from criminal and civil liability, for example, for breach of confidentiality.<sup>239</sup> The retaliatory litigation launched against the worker in the Olympus 'employee transfer' case suggests Japan should follow the lead of these countries. Fortunately, Japan has started along this course. The *WPA* is silent on whether employees may be civilly sued by their employers in relation to removal by employees of materials needed to blow the whistle. Courts have recently considered this issue and held that employers are precluded from taking action against whistleblowers in these circumstances.<sup>240</sup> This should be reflected in amendments to the *WPA*.

## **H Anonymous Whistleblowing**

The *WPA* is silent on anonymous whistleblowing but there are reasons why it should be explicitly protected. The CAA's position appears somewhat confused. It states that anonymous whistleblowers do not need protection because they are anonymous, but if an anonymous whistleblower's identity is subsequently revealed, protected disclosures will attract the *WPA*'s protections.<sup>241</sup> But in a different part of the same document the CAA states that 'anonymous reports are not protected by [the *WPA*].'<sup>242</sup> Whilst the official position is confused, in practice over 80 per cent of companies accept anonymous disclosures.<sup>243</sup> Given the choice, 71 per cent of workers would prefer anonymous reporting,<sup>244</sup> and most of the 4.5 per cent of reports of illegal conduct identified in the CAA survey were made anonymously.<sup>245</sup> Some major frauds have been revealed by anonymous whistleblowing, including the Mitsubishi Motors cover-up, the Duskin food scandal, the Livedoor fraudulent accounting and the Nichia case.<sup>246</sup> The investigation report into the Olympus scandal suggests a workforce preference at that company for anonymous reporting.<sup>247</sup>

All this suggests that workers in Japan prefer anonymous whistleblowing and, perhaps most importantly, Japanese companies are not averse to it. The concept of anonymity in whistleblowing is controversial.<sup>248</sup> Despite this, a number of whistleblower laws provide for anonymity, the most notable being *US-SOX*.<sup>249</sup>

238 Jones, above n 219, 204.

239 *JFBA's 2013 Submission Regarding the WPA*, above n 188, 3–4.

240 Yamamoto, above n 112, 22–3.

241 *WPA Explanatory Notes*, above n 73, 49.

242 *Ibid* 62.

243 *2013 Consumer Affairs Agency Survey*, above n 166, 22.

244 *Ibid* 36.

245 *Ibid*.

246 Iwazaki, above n 90, 51–3.

247 *Olympus Third Party Investigation Report*, above n 2, 128.

248 Vaughn, above n 13, 312.

249 *Ibid* 311.

Certain Australian State laws provide for it.<sup>250</sup> Japan appears to have the necessary ingredients for effective anonymous reporting. Incorporating a scheme for anonymous reporting into the *WPA* should be considered.

## I Bounties

Offering bounties to workers may contribute to erosion of the cultural and structural obstacles to whistleblowing.<sup>251</sup> Bounties likely account for the success of the Japan Fair Trade Commission's cartel leniency program which is modeled on similar programs in the US and Europe.<sup>252</sup> Despite early doubts that such a program would succeed amongst people traditionally averse to whistleblowing, the program resulted in the increased exposure of cartels in Japan.<sup>253</sup>

However, a bounties program under the *WPA* would face significant obstacles. First, in 2013 only 1.6 per cent of employees surveyed said that the offer of bounties may encourage them to disclose wrongdoing.<sup>254</sup> Second, the cartel leniency program has been successful only because there is fierce competition *between* Japanese companies; the marked willingness to disclose wrongdoing under this program involved potential harm to competitors rather than to one's own company.<sup>255</sup> This is quite different from disclosing wrongdoing *within* a company where the 'company community' norm prevails. Bounties per se have little scope to encourage employees to breach this norm. Nevertheless, if the binding force of the 'company community' norm continues to decline, there may be a role for bounties in the future when combined with other reforms.

## VIII CONCLUSION

The *WPA* is a work in progress. It was enacted in response to reform pressures from inside and outside Japan which have encountered significant domestic opposition. The law has provided protection and remedies to some whistleblowers and has probably made whistleblowing more acceptable by implicitly challenging the norm of absolute loyalty to the company, but there is no doubt that more can be done. If no changes are made, complaints about 'personality clashes' will continue to clog whistleblower hotlines and reports of serious malfeasance will remain rare. The alternative is to recognise the limitations affecting present traditional regulatory monitors and corporate governance. Better education about the real purpose of whistleblowing, mandatory establishment of whistleblower

250 Latimer and Brown, above n 8, 774, citing *Public Interest Disclosure Act 2010* (Qld) s 17(1); *Public Interest Disclosures Act 2002* (Tas) s 8; *Protected Disclosure Act 2012* (Vic) s 12(2)(b).

251 Iwazaki, above n 90, 49.

252 Ibid.

253 Daiske Yoshida and Junyeon Park, 'Japan' in Jonathan Pickworth and Deborah Williams (eds), *Bribery & Corruption* (Global Legal Group, 1<sup>st</sup> ed, 2013) 142, 146.

254 *2013 Consumer Affairs Agency Survey*, above n 166, 8.

255 Kerbo and Inoue, above n 118, 147.

hotlines and the introduction of penalties for employer retaliation are the main changes required to bolster the law.

The Abe government is considering unprecedented deregulation of Japan's employee-friendly labour laws.<sup>256</sup> This will likely lead to a further decline in employee loyalty including a heightened propensity to blow the whistle. There could not be a better time than now for Japan's main whistleblower law to take a more robust role not only in the protection of whistleblowers, but also in uncovering harmful corporate fraud. Such changes would be consistent with the gradual judicialisation of some aspects of Japanese life over the last two decades.

256 Tabuchi, above n 128.