

WHISTLE-BLOWING AS AN ANTI-CORRUPTION TOOL – AN OVERVIEW

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ABSTRAK

In the present scenario, the growth competition in trade and business has led to more and more frauds, illegitimate practices, and corruption in public as well as in private sector. Many countries, organisations, and professions have rules, guidelines and legislation that set the parameters to deal with the reporting of wrong doing at the workplace. Whistle-blowing comes into existence as one of the effective tool when companies involve themselves in illegal or unethical practices or wrongdoing in the workplace to gain a competitive edge over the competitors. Whistle-blowing is increasingly recognized as an important tool in the prevention and detection of corruption and other malpractice. By disclosing wrongdoing in an organisation, whistle blowers can avert harm, protect human rights, help to save lives and safeguard the rule of law. The paper examines whistle-blowing as a valid concept, the causative factors that encourage it, the effectiveness of whistle-blowing as tool in fighting corruption and the effectiveness of current law in protection for whistle blowers. Beside, some suggestions to improve the weaknesses in the implementation of the whistle- blowing Act 2010 are also presented.

Keywords:

Corruption, illegitimate practices, frauds, wrongdoing, whistle-blowing, protection law, Whistle-blowing Act 2010.

INTRODUCTION

For many years, we have seen a number of cases of organisational scandals that has making the headlines where the ENRON scandal can be seen as the biggest and the most crucial case in the American history and also the corporate world. The case of Worldcom and Arthur Andersen has added to a long list of financial fraud and lot of debate and case study has been done where it all relates to the issue of whistle-blowing. Whistle-blowing form part of the internal control system to achieve good corporate governance practices. Research has shown that whistle-blowing is one of the effective ways to detect fraud and wrongdoings (Chanjyot 2012). Association of Certified Fraud Examiners Report (ACFE 2012) stated that occupational fraud is more likely to be detected by a tipor whistle-blowing than by any other method. KPMG Malaysia Fraud Survey Report showed that 25% of fraud cases in Malaysia were detected through whistle-blowing (KPMG 2009). In realizing the importance of whistle-blowing in detecting fraud, most of the countries in the world are calling for the implementation of whistle-blowing policies and whistle blower protection laws. Thus, if the whistle-blowing policy and procedure are implemented successfully in the country, it would amount to a good early warning system to the country to eradicate improper conduct before the matter escalates to point of no return. However, despite the benefits of whistle-blowing in detecting and preventing fraud or other serious misconduct, not many are willing to come forward and blow the whistle on their employers' wrongdoing. This is hardly surprising due to the possibility of severe reprisal on the whistle blowers by their employers as a result of disclosure of incriminating information on their employers. This may result in loss of career, loss of family and social life. Thus, efforts must be taken to protect whistle blowers from any reprisal as a result of their noble and heroic deed of exposing any misfeasance or wrongdoing. Therefore, the objective of the study is to examine whistle-blowing as a valid concept, the causative factors that encourage it, the effectiveness of whistle-blowing as tool in fighting corruption and the effectiveness of current law in protection for whistle blowers.

LITERATURE REVIEW

DEFINITION

The term whistle-blowing is a relatively recent entry into the vocabulary of public and corporate affairs, although the phenomenon itself is not new. Recently, whistle-blowing has become common from government agencies to business corporations world over. Whistle-blowing has been regarded as a Western idea, being perceived as abandonment of cultural traits and of the norms of social behaviour and loyalty.

There have been several attempts to define whistle-blowing, but certainly there is no generally accepted definition. However, there are some definitions which are widely-used or often quoted. One of the first ones in the modern history of whistle-blowing was used by a consumer activist called Ralph Nader (1972), who claimed Whistle-blowing is “an act of a man or woman who, believing that the public interest overrides the interest of the organisation he serves, blows the whistle that the organisation is in corrupt, illegal, fraudulent or harmful activity.” (quoted in Miceli & Near 1998).

Maybe the most often used explanation of whistle-blowing was written by Miceli et al.(2009) and they defined whistle-blowing as “the disclosure of organisational member’s (former or current) disclosure of illegal, immoral, or illegitimate practices under the control of their employers to persons or organisations that may be able to effect action.”

According to Chanjyot (2012), “A whistle blower can be defined as a person who reveals any wrongdoings or malpractices that are taking place within an organisation. These revelations could be made either to the general public or to those who are in a position of authority.” Therefore, Chanjyot(2012) described whistle-blowers’ are “employees who revealed information that they reasonably believed evidenced a violation of law, rule, or regulation, a gross waste of funds, an abuse of authority or a specific and substantial danger to public health or safety.” By and large, the wrongdoing is a violation of a law or a direct threat to public or shareholders.

However this definition is widely-used, as whistle-blowing is getting prevalent, in practice a more expansive view became dominant. Whistle-blowing promotes “accountability by allowing for the disclosure by any person of information about misconduct while at the same time protecting the person against sanctions of all forms. It recognizes that whistle-blowing relates to internal and external disclosures and should apply to all organisations, public and private.” In this sense, whistle-blowing has to “ensure that individuals have the ability to speak out in their conscience and that organisations are more open and accountable to their employees, shareholders and the greater public in their activities” (Banisar 2006). Therefore, whistleblowers are always facing two dilemmas: a conflict between personal and organisational values, and a conflict between obligations owed to an organisation and to parties beyond it (Jubb 1999).

FACTORS OF WHISTLE-BLOWING

Many studies have been done on whistle-blowing in the western context where it has covered various academic fields such as psychology (Miceli & Near 1998, Xu & Ziegenfuss 2008), cross-culture (Patel 2003, Sims & Keenan 1999), organisational behaviour (Kaplan & Schultz 2007) and accounting or auditing (Arnold & Ponemon 1991, Brennan & Kelly 2007). The decision to whistle blow on corporate wrongdoing is difficult decision to be made (Brennan & Kelly 2007) and involves an extremely complicated process (Miceli & Near 1998). The decision to blow the whistle influence by three (3) main factors: (1) Individual factor – demographic variables such as age, gender and length of service, (2) Organisational factor – size of organisation and individual’s managerial status, and (3) Situational factor – seriousness of wrongdoings and status wrongdoer (Brennan & Kelly 2007, King 1997, Miceli & Near 1998, Oh & Teoh 2010). These factors are explains below:-

INDIVIDUAL FACTORS

Previous study shows that men and women differ significantly in making ethical judgments on whistle-blowing. Women are less likely than men to engage in whistle-blowing acts (Miceli & Near 1998, Sims & Keenan 1998). Normally men will occupy higher position in organisation compared to

women and tend to be seen more credible, where this could enable in whistleblowing act.

From the age perspective, older staff has a better knowledge and understanding on organisation control system and framework as compared to a new staff. Therefore, old staff would have more tendency to whistle blow compare to a new staff (Sims & Keenan 1998).

Length of service plays a significant role in whistleblowing intention. Senior employees are more likely to whistleblowing because they are closer to retirement; possess high level of power and organisation commitment (Miceli & Near 1998).

ORGANISATIONAL FACTORS

Organisational factors consist of size of organisation and individual's managerial status. Previous studies have found that the people tend to whistle blow in small company compare to larger organisation. People working in large organisation feels that should retaliation occur from their act of whistleblowing, they can easily replace because large organisation is seen as less dependent on one employee compare to small organisations. Large organisation will have a long and complex reporting and communication channel and this discourage the tendency of people to whistle blow (Miceli & Near 1998).

Person holding supervisory positions are usually seen as person that set the ethical climate and culture for their subordinates and have more power and authority than other employees in organisations (King, 1997). Different level of managers will have different perceptions towards whistle-blowing. The prosaically behavior stance suggests that observers of wrongdoing consider themselves as responsible for correcting it (Latane & Darley 1968). With this responsibility in mind, persons of higher status are expected to be more likely to whistle blow (Miceli & Near 1998).

SITUATIONAL FACTORS

The nature and severity of the corporate wrongdoings in question may affect decisions to whistle blow. Seriousness can be viewed as a financial consequences safety and health risk, and frequency of wrongdoing. The nature of wrongdoing, its financial impact and the severity of the case will affect the individual's intention to whistle blow (Miceli & Near 1998).

The status of those who commit any wrongdoing, unethical or illegal acts will influence those who observe it to whistle blower, where it is in observer's mind that his or her action will result in corrective action and its impact on the particular post that currently held that violator. If the wrongdoing is committed by someone who holds a very high level position, it can't be dealt easily by terminating the contract or employment and there will almost certainly be fear of retaliation from the act of whistle-blowing by the complainant (Miceli & Near 1984).

HOW EFFECTIVE WHISTLE-BLOWING IN FIGHTING CORRUPTION?

According to Transparency International (2010), whistle blowing is an effective tools and become more important to deter and detect corruption. A 2003 global fraud survey by Ernst & Young showed that nearly 40 per cent of all frauds were prevented and/or detected by either internal or external whistle blowers. A study by the Association of Certified Fraud Examiners in the United States of America, during 2002, revealed that organisations with an anonymous whistle-blowing mechanism were losing an average of 50 per cent less money to fraud than organisations without such a mechanism (Janette 2008). However, the topic of whistle-blowing always invokes lively debate amongst employees and communities by taking all the pros and cons. Individuals need to make the difficult choice as to whether or not they are prepared to blow the whistle because of the real risks involved.

In Malaysia, the role of whistle-blowing in detecting and preventing corruption and wrongdoing in organisation is consider new since the Whistleblower Protection Act become to force once gazette in Malaysia

Parliament on December 2010. The Malaysia Anti-Corruption Commission (MACC) is the only agency that responsible for detecting, receiving information on corruption, conducting investigation and taking a legal action to those involved in corruption whether they are in private or public sector. Under MACC Act 2009, MACC has a clear function to investigate corruption cases which can be classified as giving or accepting gratification, intending to deceive principle (false claim) and abuse of power (MACC Act 2009).

To ensure the WPA carried out effectively, MACC has established new unit aimed to investigate complaints from whistle blowers who registered was subjected to harm as protection and justice for whistle blowers. This unit will investigate and if found whistle blower were subjected to severe by the employer, the unit will recommend a remedy to the whistleblower. However, the recommendation will be given refine by Deputy Public Prosecutor. Then will be brought to court for a decision.

The effectiveness of whistle-blowing in fighting corruption can be measured through the awareness of public with confident come forward to MACC to report corruption. Table 1 show the number of information related to corruption and the number of whistle blower request protection in MACC. Based on the data provided by MACC, percentage of whistle-blowing (as indicate by the number of whistle blower request protection) is consider low. Table 1 shows that out of 6475 reported corruption cases in 2011, only 6 cases (below 1%) of whistleblower request protection from MACC. Based on Table 1, only 0.09 % whistleblower disclosed information on improper conduct to the MACC. The significant lower percentage of whistle blowers request protection under WPA 2010 means that the WPA 2010 is still not an effective tool in fighting corruption. Although the reported corruption cases increase, however the number of whistle blower to make for protection under WPA 2010 is very low.

Interviews conducted with MACC officers revealed that there are due to 4 main reasons: (1) By referring to WPA 2010 and MACC Standing Order (Source of Management Procedure in MACC), if whistle blower come to MACC, there are not compulsory for MACC officer to explain and offer protection under WPA 2010. Under the procedure of the MACC Standing

Order (SO), any person who have information on corruption and have ability to help MACC is called “source”. Personal details and information from “source” will be classified as ‘secret’ or ‘top secret’. However, MACC officers are prefer using SO compared to WPA 2010.(2) Section 8 of WPA 2010 statedthat any person receives a disclosure of improper conduct shall not disclose the confidential information. If contravenes, MACC officer can be investigated and charge on this section. This put MACC in dilemma, and prefer whistle blower not request protection under WPA 2010. (3) The burden of WPA 2010 made the officer trapped with many procedures and responsibility. (4) There must have good relationship between MACC officer and the whistle blower. The whistleblower must have a full confident with MACC officer to protect their confidentiality. Only through a good relationships will determine the willingness of the public to provide information to MACC offices and apply for protection under WPA 2010.

Table 1: Corruption reported to MACC

ITEM	YEAR 2010	% (+/-)	YEAR 2011	% (+/-)	YEAR 2012	% (+/-)
1. Number of information related to corruption received by MACC	5646	-	6475	+20.1%	5496	- 19.6%
2. Number of whistleblower requestprotection from MACC	-	-	6	-	35	82%

3. Number of whistleblower approved under WPA	-	-	6	100%	29	79%
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Source: MACC

Actually, not all whistle blowers automatically are covered by WPA 2010. Each protection applied to be approved by ensuring compliance with the guidelines and WPA. Table 1 shows that in year 2011, all whistleblower request for protection under WTA was approved. However, in year 2012, 29 out of 36 (79%) was approved and the rest which were not approved because of not compliance with the conditions and procedures under WPA 2010.

THE EFFECTIVENESS OF WHISTLE BLOWER PROTECTION ACT 2010

The most important way of ensuring the mentioned ability to disclose is the protection of people willing to blow the whistle. One of the possible reasons for not blowing the whistle is the fear of retaliations, mostly the fear of being fired, or be pushed to resign. Other barriers for whistle-blowing are legal restrictions. The question is what the protection laws are currently in place to facilitate whistle-blowing, and how effective the law is?

The Malaysian Parliament has from time to time introduced legal protection for whistle blowers in attempt to counter malpractices and frauds in the country. Such protection found in Section 40, Protection of Informers, Dangerous Drug Act1952 (Act 234), Companies Act (CA) 1965 (Act 125), Capital Markets and Services Act (CMSA) 2007 (Act 671), Malaysian Anti-Corruption Commission Act 2009 (Act 694) and the latest enactment introduced is Whistle blower Protection Act 2010 (Act 711). The scope of protection found in Companies Act, Capital Markets and Services Act 2007 and Malaysian Anti-Corruption Commission Act 2009 is limited due to the following reasons: (1) The protection for a whistleblower is only applicable if he form a reasonable belief in the course of performance of his duties. It is

questionable whether an officer who learns about circumstances amounting to a wrongdoing outside office hours may be entitled to protection under the law. Under the CA 1965 and CMSA 2007, employee is only protected if reports the wrongdoing committed by his employer officers. (2) No provision have been made in CA 1965 and CMSA 2007 protecting the anonymity of the whistle blower. (3) It is not expressly provided in CA 1965 and CMSA 2007 as to whether the officer who make a 'protected disclosure' is entitled to any civil law remedies such as damages. (4) There is no duty imposed on the Registrar of Companies, Security Commission and the stock exchange to investigate the matter highlighted by the officer.

As a result, the protection of whistle blowers based on CA 1965 and CMSA 2007 is inadequate and lacks the necessary clarity to create assurance that individuals would be protected if they spill the beans on their employer's wrongdoing. Whereas in Malaysia Anti-Corruption Commission Act (MACC) 2009, there is no assurance to informer that Officer of Commission cannot disclose to other officer regarding the informer and information. Therefore, there is no clear protection if the informers face detrimental action by their employer. Based on the weaknesses of the existing acts, the Whistle blower Protection Act (WPA) 2010 (Act 711) has been introduced by the government and gazette in Parliament on 15 December 2010 to enhance protection to the whistle blower and support any loopholes in other acts before. With the enactment of the WPA 2010, the officers of a company or any other person who provides information as to the misfeasance or wrongdoing of any company or its directors are entitled to wider protection under this act. The WPA 2010 applies generally to whistleblowers who disclose information relating to the wrongdoings in private and public sector. The enactment of the WPA 2010 is part of the efforts taken by Malaysian government to fulfill its obligations under the United Nation Convention Against Corruption (UNCAC).

PROTECTION OF THE WHISTLE BLOWER UNDER WPA 2010

There are a few section which clearly define how the whistleblower can be protected under the WPA 2010 and be explain as below:-

Section 6(1) WPA states that the whistle blower protection is only available to a person who makes a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged or is preparing to engage in improper conduct. Whereas 'improper conduct' was defined in section 2 WPA 2010 to mean any conduct which amounts to a disciplinary offence or criminal offence. However, the protection afforded by WPA 2010 is only limited to a disclosure made to an enforcement agency such as Royal Malaysian Police (RMP), Royal Customs Department (RCD), Roadand Transport Department (RTD) Malaysian Anti-Corruption Commission (MACC) and Immigration Department. Section 6 (2) of WPA 2010 allows disclosure of improper conduct to be made even if the person making the disclosure is not able to identify a particular person involved in the misconduct. A whistleblower that makes a disclosure in accordance to Section 6 of WPA 2010 would be conferred with whistleblower protection under Section 7 of the WPA 2010 which includes: (a) protection of confidential information, (b) immunity from civil and criminal action, and (c) protection against detrimental action.

According to Section 8 (1) WPA 2010, the whistle blower is entitled to full anonymity of any information about himself and the alleged improper conduct that he provided to the enforcement agency. Any person who makes or receives a disclosure of improper conduct obtain confidential information in the course of investigation shall not disclose the confidential information to others. Any person (officer of enforcement agency and whistle blower) who makes disclosure of confidential information to others unless allowed by the WPA 2010, would be guilty of an offense.

Section 9 of the WPA 2010 states that a whistle blower should not be subject to any civil or criminal liability, including disciplinary action as a result of the disclosure of improper conduct. It must be remembered that an employee owes a number of duties to his employer such as duty of loyalty,

duty of act in an interest of the employer and duty of confidence. Any disclosure of information relating to the employer may amount to a breach of these duties. The protection afforded by Section 9 is important as the defenses provided by the common law for these breach of duties are very narrow.

Section 10 of the WPA 2010 deals with the protection of a whistleblower against detrimental action. Detrimental action has been defined as any action causing injury, loss, damage, intimidation, harassment, interference with the lawful employment or livelihood of any person and a threat to take any of the actions as stated earlier. Section 10 (1) prohibits any detrimental action to be taken against the whistle blower as a result of disclosure of improper conduct. As stated in Section 10 (5), no person acting on behalf of any public or private body shall terminate a contract, withhold payment that is due under a contract or refuse to enter into a subsequent solely for the reason that the party to the contract or it is employee or employer has made a disclosure of improper conduct to any enforcement agency relating to the public or private body. Section 10 (1) may apply to a situation where an employee of the supplier of a private body makes a disclosure of the improper conduct of the private body to the enforcement agency. As a consequence, the private body terminates any contract with the supplier. A whistle blower may complain to any enforcement agency if he or any person related to or associated with him suffers from any detrimental action in breach of Section 10 (1).

WPA 2010 gives assurance on the relocation of place of whistle blower's employment. In Section 19 of WPA 2010 stated that the whistleblower who fears or has suffered detrimental action may request to the enforcement agency to apply in writing to the relevant public body for relocation of his place of employment.

RECOMMENDATIONS

Many countries have enacted legislations to protect whistle blowers exemplifies the importance of whistle-blowing in promoting good governance within both public and private institutions. Malaysia also shows its commitment in eradicating corporate fraud, corruption and misbehaviour through the enactment of WPA 2010. However, until now, whistle blow yet to be an effective tool in fighting corruption due to several reasons described earlier. Therefore, to make the whistle-blowing as an effective tool in the fighting corruption, there are some recommendations should be considered by the authorities concerned:

First, amendment should be made to Section 6 of the WPA 2010. Section 6 (1) in WPA 2010 describes “...*provided that such disclosure is not specifically prohibited by any written law...*” This means information on misdoing or corruption can only be reported only if there is no written law that prohibits. There are many acts prohibit disclosed information without consent. This clause really made public uncomforted to blow the whistle. This clause also made public discourage to disclose improper conduct. The latest amendment is on Section 20A, Panel Code which punishes “whoever’ releases information or matter which has been obtained by him in the performance of his duties to the public without permission, was too wide and could affect anyone. Even there are many interpretation of law, whether public protected or not if disclosed improper conduct without consent, public feel unsafe and really discourage provision.

Second, the responsibility of investigation officer and the need to build public trust in the MACC. Investigation officer can utilized protection under Section 65, MACC Act 2009 to protect the whistle blower. For example, if bank officer forward information related with corruption that protected under their act (disclosed information without permission), MACC can use that information to open investigation and use Section 35, MACC Act 2009, Investigation on share, purchase account etc., to collect that information legally from the bank. However, the whistle blower must keep it secret from other people about their involvement and the MACC officer who received that information must have full integrity and responsibility to keep secret his

informer information and details. Therefore, strategies to protect whistleblower and collect information legally is much depends on the creativity of MACC officer to utilize the law. The important point to be made is MACC officers must be responsible and the public confidence in the MACC officers should be built and enhanced.

CONCLUSION

Any company whether private or public sector those committed to the highest standard of integrity, openness and accountability in the conduct of its businesses and operations should aspires to conduct its affairs in an ethical, responsible and transparent manner. Recognizing these values, such organisation or company should provide avenue for all employees and members of the public to disclose any improper conduct within the organisation. Therefore, whistle-blowing is increasing recognized as an effective tool for fighting corruption, wrongdoing and malpractice within the organisation. However, whistle blowers often expose themselves to great personal risks in order to protect the public interest. As a result of speaking out, they may lose their jobs, dampen their career prospects, and even put their own lives at risk.

The introduction of new legislation to protect whistle blowers in Malaysia is a further evidence of the importance of whistle-blowing in the context of Malaysia environment. The Whistle blower Protection Act 2010 was enforced in 2011, and represented a new piece of legislation protecting the right and identities of persons who report instances of corruption. Although WPA 2010 is a new act and there are still some weaknesses that need to be improved, in fact it's the only appropriate legislation to protect whistle blowers. Besides improving the existing weaknesses in the WPA 2010, the government should continue to encourage the whistle-blowing of the wrongdoing and malpractice within the organisation. There should be a policy provided to protect the employees and members of the public who report such allegations. Other than that, early and quick law enforcement action is the key to preventing corruption, wrongdoing and malpractice and the whistle blower program gives the tools to help achieve that goal.

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