

# WHISTLEBLOWER PROTECTION AND ITS SIGNIFANCE IN SECURITY RISK MANAGEMENT

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## **General background and definition of whistleblower**

The persecution of the whistleblower is a common problem that is faced both locally and abroad which includes against a body corporate or a government. The common repercussion faced by a whistleblower is civil and criminal liabilities which includes detrimental actions such as demotion, harsh treatment, suspension and termination of employment. This takes away their fundamental liberties and livelihood.

As an example of a body corporate related whistle blowing, Stanley Adams, a world product manager in the area of vitamins in the Swiss based drug company Hoffmann-La Roche during 1972, he discovered the unfair trading practices of price fixing by his employer Hoffmann-La Roche which enabled the company to collect big profits at the expense of consumers worldwide. He passed the evidences to the European Economic Community ("the EEC"). Unfortunately Adam's identity was not kept as a secret. Consequently, while crossing the Swiss border with his family, he was arrested for industrial espionage by the Swiss government and spent six months in jail. He fought for ten years to clear his name and receive compensation from EEC.

Another fairly recent incident is the arrest of Julian Assange, the founder of Wikileaks, which is an international non-profit organization that publishes submissions of private, secret, and classified media from anonymous news sources and news leaks. The founder of Wikileaks revealed to public a secret video of US air crew firing on civilians in a Baghdad street that killed a dozen of people including two employees of Reuters news agency by posting it on its own website and YouTube which has been viewed by millions and also shown on television news program around the world.

## **Challenges in private security risk management and the relevancy of whistle blowing protection in curbing crime or misconduct**

Though the abovementioned examples are also taking into the consideration of allegation of corruption or criminal acts of public interests within the public sphere, private corporations are also affected. The importance to curb corruption, bribery and misconduct was also highlighted by various governmental organizations and MACC even stressed that cooperation between private and government bodies is mutually beneficial for both parties.

Crime does affect corporations and it can be seen in various instances. Likewise, internal whistle blowing activities would have adverse effect on crime. According to the Association of Certified Fraud Examiner's Report in the United States, 46.2% of fraud incidents examined were detected by tips, an increase from 34.2% in 2006. In 2006, the next highest means of detection was by 'accident' at 25.4%, decreasing to 20% in 2008. In 2008, detection by 'internal controls' at 23.3% took over from 'accident' as the second highest means of detection. So, in 2008, fraud detected by tips or whistle blowing act was almost double that identified by the means of detection.

However, achieving the above locally - potential whistle blowers (employees) are left with a dilemma of choice after witnessing an alleged misconduct or crime in the company – to report or not to report. This can be regarded as a great concern as to making such decision that could expose them to several risks. These risks includes from jeopardizing their careers up to losing their jobs. Externally, they would have to face the risk of being suit under defamation by the accused or the company.

Unless the whistle blowers are afforded more security and protection, they might be too afraid to disclose the information to the enforcement agency or company's security manager or employer due to fear of the repercussions that may entail should they proceed.

Certainly the security practitioners will be facing a great challenge to investigate, if key witnesses won't give truthful and honest cooperation and evidences concealed. Even worst if nobody was even willing to give the first information report, therefore the alleged misconduct or crime is not even highlighted to the management.

On a broader context, the impact does not only affect to the process or initiation of investigation, it extends beyond a single reported case – it affects the total risk assessment and risk mitigation plans of the Company as statistics or reported cases did not reflect the actual happenings.

### **Whistle blower protection in Malaysia prior to the enactment of Whistleblower Protection Act 2010 (“the WPA 2010”)**

There were some limited protections for specific types of whistle blowing found within the ambit of Section 368B of the Companies Act 1965 (“CA 1965”) and Section 321 of the Capital Markets and Services Act 2007 (“CMSA 2007”)

A person may also be protected against private actions under a legally binding contract. For example, employer can include a substantive part of the agreement to protect the employee against private action by the company should the employee reports to the employer or to some other authority against the any corrupt practice of the employer.

For instance, this practice can be adopted from The Corporate Governance Guide - Towards Boardroom Excellence issued by the Bursa Malaysia which is a written advice by The Securities Commission of Malaysia and the Bursa Malaysia that encourages companies to introduce and maintain whistle blowing policy.

### **Protection under WPA 2010**

The WPA 2010 came into effect from 15 December 2010. This Act was enacted to combat corruption and other wrongdoings by encouraging and facilitating disclosures of improper conduct in the public and private sector, to protect persons making those disclosures from detrimental action, to provide for the matters disclosed to be investigated and dealt with and to provide for other matters connected therewith

There are three types of protections conferred by Section 7(1) of WPA 2010 to the whistleblower namely; (1) Protection of confidential information; (2) Immunity from civil and criminal action; and (3) Protection against detrimental action which is extended to any person related to or associated with the whistleblower. Other sorts of protections are also given by the virtue of the Act.

*‘Whistleblower’ is defined under section 2 of WPA 2010 as “any person who makes a disclosure of improper conduct to the enforcement agency under section 6”.*

Section 6(1) of WPA 2010 states that *“a person may make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct; provided that such disclosure is not specifically prohibited by any written law”*.

‘Improper conduct’ is defined under section 2 of WPA 2010 as *“any conduct which is proved, constitutes a disciplinary offence or a criminal offence”*.

In comparison to the available whistle blowing protection provisions prior to WPA 2010:

- Section 321 of CMA 2007 only provides protection to a chief executive, internal auditor, company secretary or any officer responsible for preparing or approving financial statements or information who makes disclosure to the Securities Commission or the stock exchange of any information relating to the breach of any of the provision in the securities law or rules of the stock exchange or any matter which adversely affects to a material extent the financial position of a listed corporation.
- Section 368B(1) of CA 1965 protects any officer of the Company who reports any suspicious act involving fraud or dishonesty as defined in Section 174(8c)(b) which is being committed or likely to be committed against the Company to report it in writing to the Registrar of Companies

It is submitted that the WPA 2010 defines whistleblower as any person who makes a disclosure of improper conduct to the enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct. However, such disclosure must not be specifically prohibited by any written law; for example the disclosure must not be specifically prohibited by any provisions in Official Secrets Act 1972.

In contrast, the definition of ‘improper conduct’ and ‘whistleblower’ has been given a broad application by WPA 2010 which complements the initially limited protection or narrow application and coverage prior to its enactment. This is certainly has been a positive approach to promote whistle blowing by the Parliament.

## **Moving forward**

Based on the above discussion, whistle blowing protection is contended to have significant impact to companies when dealing with alleged crime and misconduct. Impliedly, the issue at hand is about encouraging these employees to come forward and cooperate with internal investigations with less to fear about their job security, fundamental liberties and livelihood. Once a whistle blowing culture is nurtured through adequate mechanisms such as protections and awareness, managing security risks within the organization may be on more accurate findings on the reported cases. A more accurate statistics leads to accurate facts, hence sufficient and adequate risk mitigation plans can be strategized.

Therefore I humbly submit that the below instrument must take place within the company internal policies to encourage whistle blowing activities in the company:

- I. Whistle blowing protection to be included into the employment contract to protect *bona fide* whistle blowers who whistle blow through the correct specified channel. Protection to the whistleblowers should adopt the spirit and intent of the protections given in the WPA 2010, subject to their private jurisdiction
- II. It is also equally important to provide an anonymous whistle blowing mechanism such as a hotline. In the United States, it is mandated by the Sarbanes-Oxley Act 2002, that all public companies have such a mechanism. This is a good practice that may also be adopted.
- III. Or promote by educating employees on the substantive and procedural requirements of whistle blowing in order to be protected in accordance with WPA 2010

The above should steer the organization's mindset into the right direction which promotes proper whistle blowing activities and concurrently allow greater opportunity to curb crime and misconduct in the organization.

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