

Australian whistleblowers provide tip-offs for US scheme amid criticism of laws at home

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Dozens of Australians have contacted the US securities regulator to report suspected misconduct after it launched a scheme rewarding whistleblowers with cash bounties.

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The US Securities and Exchange Commission (SEC) has received 39 whistleblower tip-offs from Australia since late 2011, when laws to "incentivise" those who exposed insider trading, market manipulation, foreign bribery and other misconduct came into force.

Figures from the SEC's Office of the Whistleblower show that Australia has been one of its top foreign sources of tip-offs, ranking at least seventh for the past two years. Canada and the UK were by far the biggest contributors.

The US scheme, introduced under the sweeping Dodd-Frank Wall Street reforms, gives whistleblowers 10 per cent to 30 per cent of any financial penalties paid by those pursued as a result of their tip-offs, as long as the fine levied is at least \$US1 million (\$1.13 million).

The SEC has so far received more than 6500 tips and paid rewards to six whistleblowers under the scheme, ranging from \$US50,000 to the whopping \$US14 million paid to an unnamed individual in October.

The SEC declined to comment on whether any Australian-sourced tip-offs led to prosecutions or current investigations, and whether the Australian tips were about US companies operating in Australia, Australian-based companies with a US presence, or companies based elsewhere with dealings in both countries.

Foreign tips accounted for almost 12 per cent of the 3238 tips the SEC received last year, 149 of which related to the offshore bribery-tackling Foreign Corrupt Practices Act (FCPA).

The FCPA's most recent scalp was Alcoa, which, along with Australian subsidiary Alumina, last week agreed to pay fines of \$US384 million to settle charges that one of its units bribed officials in Bahrain.

The response to the US scheme comes amid criticism of Australia's own whistleblowing laws and how the corporate regulator, the Australian Securities and Investments Commission (ASIC), has dealt with whistleblowers.

An ongoing Senate inquiry into ASIC's performance was launched last year after revelations the regulator took 16 months to act on a 2008 whistleblower tip-off alleging serious misconduct inside the Commonwealth Bank's financial planning arm. The bank later paid \$51 million in compensation to impacted clients.

Experts are now calling for a major review of Australia's private sector whistleblower laws, dubbed "poorly regarded" by the Governance Institute of Australia, including whether US-style rewards should be offered.

The Governance Institute has urged that a "targeted" review of whistleblower laws be launched, and AJ Brown, from Griffith University's Centre for Governance and Public Policy, said it was a "logical" time to review private sector whistleblower protections, after laws impacting government workers and contractors were reformed last year.

Describing Australia's whistleblower laws as "patchy, limited and far from international best practice", Professor Brown said a review should include a "serious look" at whether Australia should adopt a reward scheme similar to those in place in the US.

The long-standing US False Claims Act - a Lincoln-era law beefed up by the Reagan and Obama administrations - rewards whistleblowers that report companies defrauding the government in a similar way to the SEC-run Dodd-Frank scheme.

The False Claims Act has proved lucrative for the US government and whistleblowers alike, recouping \$US3.8 billion in fines and penalties for the US government in 2012-13 as whistleblowers shared \$US354 million in bounties.

Independent Senator Nick Xenophon and groups including the Australian Federal Police Association and the Tax Justice Network have called for Australia to consider whistleblower laws similar to those in place in the US, arguing they could help tackle fraud and better protect and compensate whistleblowers.

Senator Xenophon has flagged plans to introduce legislation into the Senate modelled on the US laws, and told BusinessDay he was planning to release the draft legislation in coming months. He was preparing to travel to the US at his own cost to research its whistleblower laws.

BusinessDay revealed last year that the federal Attorney-General's department is researching the US laws. "We are still considering the merits of an Australian scheme and will continue to work with the private sector on this," a spokesman said this month.

Whistleblowers, including one of those at the centre of the CBA scandal, have complained that the system in Australia leaves them vulnerable to victimisation and financial and emotional stress, and in the dark about progress on their complaints.

Decade-old laws protect corporate whistleblowers who contact ASIC from being sacked and from criminal and civil liability, for example for breach of confidentiality or defamation. But the laws only apply to a narrow group, including current employees - preventing, for example, former employees, business partners and anyone wishing to act anonymously from claiming protection.

ASIC itself, in its submission to the Senate inquiry, called for changes to the current laws - including that they be extended to cover former employers, company advisers such as accountants and unpaid workers such as interns and volunteers. It said it had reworked its approach to whistleblowers, including putting in place a central tracking system for whistleblower reports, and providing "prompt, clear and regular" communication with whistleblowers.

ASIC's submission revealed that it received 845 "potential whistleblower reports" last financial year, 129 of which were referred to ASIC's compliance, investigation or surveillance teams for further action.

In response to questions from BusinessDay, ASIC declined to say how many of these qualified as protected whistleblowers under the current laws, citing confidentiality requirements.

Professor Brown, whose submission to the inquiry called for wide-scale reforms, said pressure was building for stronger whistleblower protection laws in the private sector, but warned that without a co-ordinated approach, a "proliferation" of complex rules could result - adding costs to business and government.

"Everybody knows that [whistleblowing] happens ... but people are just on the edge of acknowledging how important it really is," he told BusinessDay. "People are [afraid] that it's a bit of a Pandora's box to facilitate or encourage whistleblowing."

The previous Labor government launched a review of corporate whistleblower laws in 2009, with then corporate law minister Chris Bowen saying the current regime had "fundamental shortcomings". He revealed at the time that just four whistleblowers had used the protections to provide information to ASIC.

But despite taking submissions, the project was abandoned, with the former government saying last year that the consultations "did not reach consensus on the need for or form of further reforms".

In its submission to the current Senate inquiry, the Governance Institute, formerly Chartered Secretaries Australia, "strongly recommended" a separate review of whistleblowing laws "which recognises the involvement of multiple regulators in the process of investigating and prosecuting corporate and private whistleblowing".

The Institute's national policy director Judith Fox said that while there were concerns about how ASIC managed whistleblowers, "ASIC's not in this alone", pointing to ASIC's need to liaise on criminal matters with the Commonwealth Director of Public Prosecutions and the Australian Federal Police.

Attorney-General George Brandis was unavailable for comment.

This story was found at: <http://www.theage.com.au/business/australian-whistleblowers-provide-tipoffs-for-us-scheme-amid-criticism-of-laws-at-home-20140119-312op.html>