

MINORITY SHAREHOLDERS WATCH GROUP

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WHISTLEBLOWER PROTECTION ACT

SOME IMPROVEMENTS NEEDED

THE Whistleblower Protection Act 2010 (the Act) is a good move in that wrongdoers have been put on notice that there is such an act that enables whistleblowing in a structured manner and protects whistleblowers by offering them anonymity and assurance against victimisation.

Wrongdoers will be a bit more wary now that there is such an act in force.

The Act is an effective preventive control which will result in wrongdoers thinking twice before perpetrating an improper conduct — a deterrence to potential wrongdoers.

The emphasis on whistleblowing as an effective tool to act against wrongdoers has trickled down to the rules of the stock exchange, Bursa Malaysia.

The listing requirements have now been amended to require listed companies to establish and maintain for themselves, and their subsidiaries, policies and procedures on whistleblowing. And to keep the listed companies honest, they must also disclose the policies and procedures on their corporate websites.

But then, who is a whistleblower? A whistleblower is any person who informs on another person or organisation regarded as engaging in an unlawful or immoral act. The Act calls this improper conduct.

At an organisational level, a whistleblower can also inform on acts (or omissions) prohibited by their codes of conduct.

But any act is only a collection of words. Its effectiveness is in its implementation and the ecosystem within which the act oper-

ates.

Protection under the Act

The protection offered to the whistleblower under the Act is fourfold. There is protection of confidential information, immunity from civil and criminal action, protection against detrimental action and protection as to the identity of the whistleblower. If there is any documentation which may be accessed in any kind of proceedings and if the whistleblower is named or described or there is a possibility that the whistleblower will be discovered, all such passages shall either be concealed or obliterated so far as is necessary to protect the whistleblower from discovery.

The Act states that no person shall take detrimental action against a whistleblower or any person related or associated with the whistleblower in reprisal for a disclosure of improper conduct.

Opportunities for improvement

There are some opportunities for improvement when it comes to the Act. Firstly, the Act states that disclosures of improper conduct must only be made to enforcement agencies. Some jurisdictions have allowed whistleblowers to approach the fourth estate — the media.

For whatever reasons, some whistleblowers may feel more comfortable approaching the media as opposed to enforcement agencies. This is something that can be considered. The idea is to get the whistleblower motivated enough to blow the whistle and to become as comfortable as pos-

sible when he does blow the whistle and thereafter. There should be some latitude for the whistleblower to choose to whom he wants to blow the whistle.

Secondly, there will be revocation of whistleblower protection if the disclosure of improper conduct principally involves questioning the merits of government policy, including the policy of a public body.

No institution should be exempted from the reach of a whistleblower. This is one area where the immunity offered by the Act can be relaxed — a whistleblower should be able to blow the whistle on all and sundry.

Thirdly, there is a provision in the Act that whistleblower disclosures are not specifically prohibited by any written law — the banking secrecy provisions under the Financial Services Act are an obvious example. Banking secrecy is an important requirement and yet we find that most wrongdoings involve some banking information — we need to strike a fine balance to ensure that the sanctity of banking secrecy is maintained, yet we are permissive enough to allow disclosure of banking information to substantiate a whistleblower's allegation. A case of the end justifying the means, perhaps.

Rewarding whistleblowers

Whistleblowers face all the risks and there is no reward or compensation. Perhaps, it is time to take a page from the US practice of rewarding whistleblowers to encourage them to blow the whistle. This practice can also be seen as compensating the

whistleblower for the risks that they have undertaken, so that they appear less mercenary. Again, perhaps, the end justifies the means.

Many good people out there

There are many good people out there who want to highlight improper conduct but are afraid of victimisation and reprisals. They have rice bowls to protect. They have families to feed and to take care of. They cannot afford to lose their jobs.

Some fear that the reprisals might be in the form of harm to themselves or their loved ones. The fears are many. Anonymity looks good on paper but in real life, leakages happen. And we all know reprisals can take many forms — from an outright sacking to being subjected to mental anguish and psychological pressures and threats.

Thus, having a robust Act is all well and good, but the success is in the implementation, in the ecosystem that should be fertile enough to germinate whistleblowers. There must never be a trust deficit, real or perceived, for to have such a deficit would blunt any initiative to encourage whistleblowing as a means of discovering improper conduct.

We are reminded by the saying, "The only thing necessary for the triumph of evil is for good men to do nothing". There are many good men out there — are we going to give them an opportunity to do something?

The writer is chief executive officer of the Minority Shareholders Watch Group

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