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The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws

Terry Morehead Dworkin

Indiana University; Seattle University, United States

A. J. Brown

Griffith University, Australia*

I. INTRODUCTION

The United States and Australia were both leaders in passing laws designed to protect whistleblowers and encourage whistleblowing.¹ In the United States, the modern whistleblowing protection movement was buoyed by seminal events such as the explosion of the spaceship Challenger and the Watergate break-in that led to the resignation of President Nixon, which brought attention to the need for whistleblowing laws. In response to these events, Congress enacted the federal Inspector General Act² and the Civil Service Reform Act (CSRA)³ in 1978 to protect whistleblowers and encourage reporting of problems. In the 1980s, the focus of the US

* We thank the Australian-American Fulbright Commission and Griffith University for providing the grant funds that made this collaboration possible through Professor Dworkin's visit to Australia as a Fulbright Visiting Senior Specialist in July 2010.

¹ "Whistleblowing" in this article is generally taken to mean disclosure by organization members (former or current) of "illegal, immoral or illegitimate practices . . . under the control of their employers to persons or organizations who may be able to affect action." Marcia Parmerlee Miceli & Janet P. Near, *The Relationships Among Beliefs, Organizational Position, and Whistle-Blowing Status: A Discriminant Analysis*, 27 ACAD. MGMT. J. 687, 689 (1984). However, a variety of the statutes discussed herein, while targeted to or especially important for whistleblowers, may arise via non-organization-member complainants.

² 5 U.S.C. app. §§ 1–12 (2008).

³ Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

whistleblower movement mainly shifted to the states;⁴ since the 1990s, whistleblowing laws have been enacted in all fifty states, but public sector law continued to be enacted at the federal level, with the passage of the 1989 Whistleblower Protection Act (WPA).⁵

At the same time, in Australia, legislative action regarding whistleblowing law was triggered by the unraveling of systemic government corruption in the state of Queensland through the Fitzgerald Inquiry (1987–1989).⁶ By 1994, several Australian states had enacted whistleblower protection or public interest disclosure acts, and a federal parliamentary committee recommended similar action for the federal public sector as well as the private sector nationally.⁷ The Australian states followed the United States' legislative approach relatively closely by establishing public sector laws based on an “anti-retaliation” model of whistleblower protection, albeit with the stronger adoption of an “institutional” or “structural” model of protection.⁸

Today, whistleblowing law reform is again an active field in each country. The reasons, whether direct or indirect, for this resurgence of reform include the failure of the original anti-retaliation approach, to a

⁴ See Elletta Sangrey Callahan & Terry Morehead Dworkin, *The State of State Whistleblower Protection*, 38 AM. BUS. L.J. 99, 105 (2000) [hereinafter Callahan & Dworkin, *Whistleblower Protection*].

⁵ 5 U.S.C. § 1201 (1989).

⁶ On the role of whistleblowing from the inception of Australia's Fitzgerald Inquiry through over two decades of progress, see generally AJ Brown, *Restoring the Sunshine to the Sunshine State: Priorities for Whistleblowing Law Reform in Queensland*, 18 GRIFFITH L. REV. 666, 666–89 (2009) [hereinafter Brown, *Sunshine*].

⁷ SENATE SELECT COMM. ON PUB. INTEREST WHISTLEBLOWING, IN THE PUBLIC INTEREST: REPORT OF THE SENATE SELECT COMMITTEE ON PUBLIC INTEREST WHISTLEBLOWING (1994), available at http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=history/uwb_ctte/pi/index.htm [hereinafter SENATE SELECT COMM.].

⁸ See generally Richard E. Moberly, *Sarbanes-Oxley's Structural Model to Encourage Corporate Whistleblowers*, 2006 BYU L. REV. 1107 (2006) [hereinafter Moberly, *Corporate Whistleblowers*].

significant degree in the United States and almost completely in Australia. When law reform trends in each country are analyzed, however, recent reform activity can be seen to stem not from systematic acknowledgement of that failure, but rather from a resolve to try different alternative measures with a greater degree of assumed effectiveness. In the United States, the increased use of statutory reward or bounty mechanisms reflects the perceived success of these measures, which encourage whistleblowing by compensating aggrieved whistleblowers, so long as they are eligible. This contrasts sharply with the approach taken in Australia, where there are no rewards, and where, in addition to the institutional or structural model, law reform has focused on legitimating whistleblowing to the media as a means of inducing change.

This article analyzes this “second round” divergence of whistleblowing reform to extract its lessons for whistleblowing law reform in each country. Although the United States and Australia are post-colonial federations with similar constitutional structures, significant differences between the countries exist. A federal public sector whistleblowing regime has been much slower to materialize in any form in Australia, and efforts toward private sector whistleblowing regimes, even on the original anti-retaliation model, have been even slower. Regardless, a comparison of the whistleblowing laws of these two countries is helpful because it can help lead to more successful protection of whistleblowers and encourage reporting.

The first part of the article charts the development of whistleblowing laws in the United States—and the movement toward rewards because of the relative success of the federal False Claims Act (FCA) since its revision in 1986—up to and including the 2010 Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank). The second part charts the development of Australian whistleblowing laws, up to and including new or amended Public Interest Disclosure Acts in four Australian jurisdictions between 2010 and 2012, as well as mooted federal reforms. The third part

of this article identifies four distinct legislative models or approaches at work through these aggregations of laws: anti-retaliation or organizational justice; reward or bounty; institutional or structural; and public or media. Measures that deploy these models, separately or in a mixture, provide different types of incentives, both to whistleblowers and to organizational or political responsiveness to whistleblowing.

In conclusion, we argue that, in Australia, the failure of the original anti-retaliation approach, and the need to supplement the institutional/structural approach, has led almost naturally to new attempts to try other approaches, and we predict that the reward approach will also now be taken up. In the United States, in light of the successful, but necessarily partial reach of the reward model, we predict that the institutional/structural approach, long pursued in Australia, is also likely to expand. This begs the question of whether, when, and how each country is likely to return to the fundamental problem of the substantial failure of the original anti-retaliation model. On this score, the answer in each country is likely to be different, but the objective remains the same. Overall, we argue that legislative efforts that effectively integrate and reconcile all these different approaches provide the most likely path to greater success in protecting whistleblowers and encouraging whistleblowing.

II. THE MONEY? WHISTLEBLOWING LAW REFORM IN THE UNITED STATES

A. The Anti-Retaliation Model and Its Evolution

Until the 1990s, legislative protection for whistleblowers consisted primarily of protection from retaliation, including the possibility of recovering wages and benefits, and jobs if they were lost due to

whistleblowing.⁹ Legislators assumed that fear of retaliation prevented observers of wrongdoing from reporting it and that barring retaliation would encourage whistleblowing, prevent retaliation, and discourage wrongdoing. While intuitively appealing, this has proven not to be the case.¹⁰ Indeed, the approach has been spectacularly unsuccessful in protecting whistleblowers. Most private-sector employees were employees at will,¹¹ unless whistleblowers could sue in tort for termination in violation of public policy and recover punitive damages (not a widespread remedy at the time), the protection was inadequate.¹² What about public-sector employees?

1. The CSRA

In 1978, the CSRA was passed to protect public sector whistleblowers.¹³ Like all whistleblowing statutes, it banned retaliation, but it went further by also trying to make it easier to report and to deal with the information brought forward by whistleblowers. It presumed that if there was an effective, identified channel to report problems, which was known to

⁹ Elletta Sangrey Callahan & Terry Morehead Dworkin, *Do Good and Get Rich: Financial Incentives for Whistleblowing and the False Claims Act*, 37 VILL. L. REV. 273, 276 (1992) [hereinafter Callahan & Dworkin, *Incentives*].

¹⁰ MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE 175–78 (1992). Social science studies indicate that factors such as open communication channels within organizations, a well-defined and understood way to blow the whistle within an organization, and belief that something will be done to correct the problem are more influential. *Id.*

¹¹ See ALFRED G. FELIU, INDIVIDUAL EMPLOYEE RIGHTS 1 (2d ed. 1996). A private employee at will is one who works without a timed contract and can be fired at any time for any reason. *Id.* Public employees have some constitutional job security, and most unionized employees (which are now around 10 percent of US employees) are protected by a “just cause” contract clause. DAVID P. TWOMEY, LABOR & EMPLOYMENT LAW 580–81 (11th ed. 2001).

¹² Terry Morehead Dworkin & Janet P. Near, *Whistleblowing Statutes: Are They Working?*, 25 AM. BUS. L.J. 241 (1987).

¹³ See Civil Service Reform Act, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified as amended in scattered sections of 5 U.S.C.).

employees, whistleblowing would be easier and more likely.¹⁴ In an attempt to create this sort of channel, the CSRA created the Office of Special Counsel (OSC) to receive and assess reports regarding alleged governmental agency wrongdoing. If the OSC found a “substantial likelihood” of agency wrongdoing, it required the agency to investigate and give a report about its findings.¹⁵ The OSC then assessed the report and submitted it to Congress and the President, as well as kept a file of it.¹⁶ It was also supposed to act as an advocate for a whistleblower who suffered retaliation. Despite numerous revisions, and attempted revisions such as the passage of the WPA,¹⁷ this public sector anti-retaliation model, too, has generally proved unsuccessful in spurring whistleblowing or protecting whistleblowers.¹⁸ However, the recent passage of the Whistleblower Protection Enhancement Act of 2012¹⁹ and a more active OSC²⁰ may lead to greater success in the future.

¹⁴ Moberly, *Corporate Whistleblowers*, *supra* note 8, at 1131–32. The legislation was an early model for what was later to be called the structural model of whistleblowing legislation.

¹⁵ 5 U.S.C. § 1206(b)(3)(A), *repealed by* Pub. L. No. 101-12, § 3(a)(8), 103 Stat. 16 (1989).

¹⁶ 5 U.S.C. § 1206(b)(5)(A).

¹⁷ *See* 5 U.S.C. § 1201 (1989).

¹⁸ *See, e.g.*, Press Release, Gov’t Accountability Project, Senate Approves Whistleblower Rights Breakthrough (June 23, 2006), *available at* <http://www.whistleblower.org/press/press-release-archive/2006/1290-senate-approves-whistleblower-rights-breakthrough> (stating that the court had effectively gutted protection for whistleblowers by refusing to protect them); Thomas M. Devine & Donald G. Alpin, *Abuse of Authority: The Office of the Special Counsel and Whistleblower Protection*, 4 ANTIOCH L.J. 5, 25–26 (1986); Terry Morehead Dworkin, *SOX and Whistleblowing*, 105 MICH. L. REV. 1757, 1766–67 (2007); Rhonda McMillion, *Aiding Whistle-Blowers*, A.B.A. J., Mar. 1989, at 121 (quoting Rep. Patricia Schroeder, the OSC “lost sight of its mission”).

¹⁹ Whistleblower Protection Enhancement Act of 2012, Pub. L. No. 112-199, 126 Stat. 1465 (2012).

²⁰ *See infra* note 263.

2. Sarbanes-Oxley

The Sarbanes-Oxley Act of 2002 (SOX)²¹ is the most prominent of recent anti-retaliation legislation. Among its provisions, it contains elements of the structural model established by the CSRA (and discussed below).²² Like its predecessors, it has not proved very successful.²³ SOX was passed in response to the wrongdoing, scandals, publicity and anger brought on by the actions of leaders of failed corporations such as Enron and WorldCom.²⁴ Whistleblowers were important in bringing the wrongdoing of these corporate leaders to light.²⁵ They also testified at hearings before Congress about the law,²⁶ and were intended to play a crucial role in SOX enforcement. This represented an acknowledgement by the US Congress of the importance of whistleblowing in the control, detection, and deterrence of wrongdoing in the financial sector.

²¹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, 800 (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

²² See Moberly, *Corporate Whistleblowers*, *supra* note 8.

²³ See TOM DEVINE & TAREK F. MAASSARANI, *THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE* 161–66 (2011).

²⁴ See, e.g., SPECIAL INVESTIGATIVE COMM. OF THE BOARD OF DIRS. OF ENRON, *REPORT OF INVESTIGATION* (2002), available at <http://f11.findlaw.com/news.findlaw.com/wp/docs/enron/specinv020102rpt1.pdf>; Lawrence A. Cunningham, *The Sarbanes-Oxley Yawn: Heavy Rhetoric, Light Reform (And it Just Might Work)*, 35 CONN. L. REV. 915, 924–25 (2003). Other companies that collapsed relatively soon thereafter as a result of corporate greed include Global Crossing, Tyco, and Adelphia. *Id.*

²⁵ See *Corporations Must Disclose Ethics Codes, Information on Financial Experts*, *SEC Says*, 71 U.S.L.W. 2472 (Jan. 28, 2003). Indeed, of the three female whistleblowers named “People of the Year,” by *Time Magazine* in 2002, two, Sherron Watkins and Cynthia Cooper, blew the whistle on Enron and WorldCom, respectively. Richard Lacayo & Amanda Ripley, *Persons of the Year 2002: The Whistleblowers*, *TIME* (Dec. 30, 2002), <http://www.time.com/time/magazine/article/0,9171,1003998,00.html>. See also Michael Orey, *WorldCom-Inspired ‘Whistle-Blower’ Law Has Weaknesses*, *WALL ST. J.*, Oct. 1, 2002, at B1.

²⁶ *The Corporate and Criminal Fraud Accountability Act of 2002: Hearing on H.R. 4098 Before the S. Comm. on the Judiciary*, 107th Cong. 107–146 (2002); see also JOHN BOSTELMAN, *SARBANES OXLEY DESKBOOK* 2–32 (2004). Some private companies chose to comply because they considered it good business. *Id.*

SOX applies to publicly-traded companies,²⁷ covers mail, wire, bank, and securities fraud, and requires companies to establish a code of ethics²⁸ and whistleblowing procedures.²⁹ Employees who reasonably believe that their information about a company concerns a covered violation have a right to report without retaliation.³⁰ Unlike most of the state and federal whistleblowing statutes, SOX specifies different report recipients for internal and external whistleblowing in order for the whistleblower to be protected.³¹ It requires audit committees to establish company whistleblowing procedures whereby employee whistleblowers can anonymously submit issues of concern regarding questionable accounting or auditing matters.³² Further, it requires the committees to have procedures for retaining and treating the complaints. This structural model was seen as an improvement over earlier attempts to encourage whistleblowing and protect whistleblowers.³³

SOX protects whistleblowers from retaliation, broadly defines retaliation,³⁴ and provides criminal penalties for retaliation.³⁵ Nonetheless,

²⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010) (broadening the class of covered employees); *see infra* notes 124–35 and accompanying text.

²⁸ 15 U.S.C. § 7263(a) (2010). The ethics code must apply to top corporate officers. *Id.*

²⁹ 18 U.S.C. § 1514A(b)(2)(A) (2010).

³⁰ Virtually all state and federal whistleblowing legislation has similar reasonable belief standards. *See Callahan & Dworkin, Whistleblower Protection, supra* note 4, at 120–22.

³¹ An internal report must go to someone with supervisory authority over the employee or to someone working for the employer who has the authority to investigate, discover, or terminate the wrongdoing. DANIEL P. WESTMAN & NANCY M. MODESITT, WHISTLEBLOWING 161 (2d ed. 2004).

³² Jennifer Bjorhus, *Sarbanes-Oxley Act Drives Demand for Whistle-Blower Hotline Services*, PIONEER PRESS, Oct. 12, 2004, at D1. Most commonly, the response to this requirement has been for companies to contract with an independent hotline company to receive the complaints. *Id.*

³³ Moberly, *Corporate Whistleblowers, supra* note 8, at 1110–12.

³⁴ 18 U.S.C. § 1513(e) (2002). Retaliation is defined as “knowingly” taking “any action harmful to any person, including interference with the lawful employment or livelihood of any person.” *Id.*

³⁵ *Id.* at § 1513(b).

the many hundreds of SOX whistleblowers who have suffered retaliation have few meaningful remedies. A few years after passage, studies of suits brought by SOX whistleblowers who suffered retaliation highlighted the Act's failures.³⁶ The lack of protection was particularly harmful because employees believed they were protected,³⁷ yet most had been fired.³⁸ Of the 286 cases that went forward to an administrative law judge, only six (2 percent) resulted in a decision for the employee.³⁹ Another study of over seven hundred claims showed similar results⁴⁰ and showed that an employee's probability of success decreased over time.⁴¹ In 2006, none of the 159 cases that the hearing agency resolved resulted in a win for the

³⁶ E.g., Beverly Earle & Gerald A. Madek, *The Mirage of Whistleblower Protection Under Sarbanes-Oxley: A Proposal for Change*, 44 AM. BUS. L.J. 1, 20–21 (2007) “[T]he number of cases settled . . . suggests that complainants are fighting an uphill battle.” *Id.* One early study reported that through May of 2006, of the 677 completed Sarbanes-Oxley retaliation complaints, 499 claims were dismissed, ninety-three claims settled, and ninety-five were withdrawn. *Id.*

³⁷ See *id.* at 17–18; Deborah Solomon, *Risk Management: For Financial Whistleblowers, New Shield is an Imperfect One; Claims of Employer Reprisal Go to OSHA Investigators Unschooled in Accounting; A Fired CFO Lingers in Limbo*, WALL ST. J., Oct. 4, 2004, at A1.

³⁸ 82 percent had been fired. See Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 132 (2007) [hereinafter Moberly, *Unfulfilled Expectations*] (during the first three years of whistleblower complaints, only 3.6 percent of the whistleblowers who filed claims were successful in the administrative process, and only 6.5 percent on appeal). Even if successful, the complainant often must wait a long time before receiving anything. See Jayne O’Donnell, *Blowing the Whistle Can Lead to Harsh Aftermath, Despite Law*, USA TODAY, Aug. 1, 2005, http://usatoday30.usatoday.com/money/workplace/2005-07-31-whistle-usat_x.htm?csp=34 (detailing the ordeal of David Windhauser, the first employee ordered to be reinstated); *Welch v. Cardinal Bankshares Corp.*, 454 F. Supp. 2d 552 (W.D. Va. 2006).

³⁹ Earle & Madek, *supra* note 36, at 22 (spanning from 2003 to May, 2006, there were thirty-three settlements). *Id.* at 23.

⁴⁰ Moberly, *Unfulfilled Expectations*, *supra* note 38 (during the first three years of whistleblower complaints, only 3.6 percent of the whistleblowers who filed claims were successful in the administrative process, and only 6.5 percent on appeal).

⁴¹ *Id.* at 91.

employee,⁴² and the subsequent results continued to be dismal.⁴³ Few of the decisions turned on the merits of the whistleblower's retaliation claim.⁴⁴

A detailed analysis of the failed claims showed a variety of reasons for the failures, including procedural complexity, misinterpretations of the statute's burden of proof, interpretations that were as strict as possible against the whistleblower, very short statute of limitations (i.e., thirty days for an appeal), and others. As with the protection for public employees, blame also lies with the Occupational Health and Safety Administration (OSHA),⁴⁵ the administrative agency designated to deal with complaints. It lacked sufficient resources, which resulted, among other things, in some whistleblowers not even being interviewed before a determination was made on their claims. A study released in January 2009 by the US

⁴² *Id.* at 91 n.126 (citing an e-mail from Nilgun Tolek, Dir. of the OSHA Office of Investigative Assistance, dated Oct. 3, 2006). OSHA's fiscal year ended on September 30, 2006. *Id.* at 126. As of September 4, 2008, 1,273 SOX retaliation complaints had been filed with the Department of Labor. See Terry Morehead Dworkin, *US Whistleblowing: A Decade of Progress?*, in *A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE* 40 (David B. Lewis ed., 2010). The Department found in favor of the complainants in less than 2 percent of the retaliation claims. *Id.*

⁴³ See Lawrence S. Moy, et al., *Whistleblower Claims Under the Sarbanes-Oxley Act of 2002*, in *UNDERSTANDING THE SECURITIES LAWS OF 2010* (2010). Between 2002 and summer 2008, 1,273 SOX complaints were filed with the Department of Labor. *Id.* Jennifer Levitz, *Whistleblowers Are Left Dangling: Technicality Leads Labor Department to Dismiss Cases*, WALL ST. J., Sept. 4, 2008, http://onlinewsj.com/article/SB122048878500197393.html?mod=googlenews_wsj (stating that of the 1,273 SOX retaliation complaints filed, the department found in favor of the whistleblowers seventeen times); Tracy Coenen, *The Failure of Whistleblower Protection under Sarbanes-Oxley*, ALLBUSINESS, <http://www.allbusiness.com/accounting/fraud/4969189-1.html> (last visited Oct. 19, 2012) (reporting that roughly two-thirds of the claims were dismissed).

⁴⁴ See Moberly, *Unfulfilled Expectations*, *supra* note 38, at 69–70.

⁴⁵ See Wendell H. Ford, Aviation Investment and Reform Act for the 21st Century, Pub. L. No. 106-181, 114 Stat. 61 (2000) (codified in scattered sections of 49 U.S.C.). Whistleblowers who suffer retaliation must file a complaint with the Secretary of Labor who then refers it to OSHA for investigation. 49 U.S.C. § 42121(b)(1). An administrative law judge hears the evidence resulting from the investigation and renders a decision. *Id.* The decision can be appealed to the Administrative Review Board of the Department of Labor. Secretary's Order 5-2002, 67 Fed. Reg. 65008 (Oct. 22, 2002).

Government Accountability Office (GAO)⁴⁶ added substance to this finding.⁴⁷ Although Congress designated OSHA to handle SOX whistleblower complaints, it did not give the already overstretched agency any additional funding.⁴⁸ Since SOX complaints comprise approximately 13 percent of whistleblower claims received by OSHA,⁴⁹ the SOX additions put a severe strain on OSHA's resources, especially since OSHA employees had no experience dealing with the law.⁵⁰ This was complicated further by a lack of information about what the agency was doing.⁵¹

The GAO study found numerous deficiencies; for example, OSHA did not accurately keep its data and key dates were often inaccurately recorded,⁵² despite the fact that the laws mandate time limits for OSHA determinations (which were seldom met).⁵³ One contributing factor was the lack of basic tools for investigators, such as laptops and cell phones, to use

⁴⁶ The GAO did the study because it recognized that, “[w]orkers who ‘blow the whistle’ on prohibited practices play a role in enforcing federal laws,” but they face reprisals. U.S. GOV'T ACCOUNTABILITY OFFICE, WHISTLEBLOWER PROTECTION PROGRAM: BETTER DATA AND IMPROVED OVERSIGHT WOULD HELP ENSURE PROGRAM QUALITY AND CONSISTENCY (Jan. 2009), available at <http://www.gao.gov/new.items/d09106.pdf> [hereinafter USGAO].

⁴⁷ *Id.* It also found that whistleblowers received a favorable outcome in 21 percent of the complaints. *Id.*

⁴⁸ The agency was already overstretched because it dealt with whistleblower complaints based on sixteen other laws, from environmental laws to travel safety laws to employment safety law. *Id.* at 1.

⁴⁹ See Moberly, *Unfulfilled Expectations*, *supra* note 38, at 125.

⁵⁰ See USGAO, *supra* note 46, at 8, for a list of the included laws.

⁵¹ The GAO examined what was known about complaint processing times and what affected those times, what outcomes resulted, and the challenges OSHA faced in administering the program. *Id.* at 3.

⁵² *Id.* at 15–18. Indeed, in one regional office *none* of the case-closed dates matched the files. *Id.* at 15.

⁵³ *Id.* at 17. OSHA has thirty to ninety days to complete its investigation and make an initial finding, depending on which of the fourteen statutes under which the whistleblower is seeking protection. *Id.*

in the field while investigating complaints.⁵⁴

A practical problem of SOX is the lack of an explicit provision⁵⁵ in the law that allowed for the full range of damages for a whistleblower, including punitive damages or a reward structure, which would help offset the full costs of retaliation.⁵⁶ This deterred lawyers from taking whistleblowers' cases on a contingency basis. It also failed to lead to the growth of a specialized bar made up of lawyers specializing in whistleblower claims. The development of a specialized bar was important to the success of the revised FCA, which has been the most successful spur for whistleblowing so far.⁵⁷ Several writers called for the provisions of significant rewards to make the law more effective.⁵⁸

Dodd-Frank⁵⁹ was designed to remedy some of the flaws in SOX. Dodd-Frank makes SOX more whistleblower-friendly by providing for the right to

⁵⁴ *Id.* at 37. Based on these findings, the GAO's recommendations went to some basic steps such as keeping accurate information and providing training and equipment, rather than more substantive reforms of the program. *Id.* at 42.

⁵⁵ SOX specifies that a whistleblower who successfully proves retaliation is entitled to "all relief necessary to make the employee whole." 18 U.S.C. § 1514A(c)(1). This includes reinstatement, back pay and benefits, special damages such as attorneys' and expert witness fees, and litigation costs. *Id.* at § 1514A(c)(2). While the language "all relief necessary" can be interpreted to allow for additional damages. *See, e.g.,* Kalkunte v. DVI Financial Services, Inc., No. 2004-SOX-00056, 2005 WL 4889006, at *61 (U.S. Dep't of Labor SAROX July 18, 2005) (front pay); Murray v. TXU Corp., No. 3:03-CV-0888-P, 2005 U.S. Dist. LEXIS 10298 (N.D. Tex. May 27, 2005); MICHAEL DELIKAT, CORPORATE WHISTLEBLOWING IN THE SARBANES-OXLEY/DODD-FRANK ERA § 6:1.1 (2006); *see also* Hanna v. WCI Cmty., Inc., 348 F. Supp. 2d 1332 (S.D. Fla. 2004) (damage to reputation). Most courts do not follow such an interpretation).

⁵⁶ Indeed, Congress removed punitive damages language from the final version of the bill. *See* Murray v. TXU Corp., No. 3:03-CV-0888-P, 2005 U.S. Dist. LEXIS 10945, at *13 (N.D. Tex. June 7, 2005).

⁵⁷ *See* Callahan & Dworkin, *Incentives*, *supra* note 9, at 282–83, 326.

⁵⁸ *See, e.g.,* Pamela H. Bucy, *Private Justice*, 76 S. CAL. L. REV. 1, 3–5, 27–8 (2002); Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. Rev. 91 (2007); Dworkin, *supra* note 18, at 1773.

⁵⁹ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5567 (2010).

a jury trial,⁶⁰ precluding enforcement of mandatory pre-dispute arbitration agreements,⁶¹ lengthening the statute of limitations,⁶² and broadening the class of covered employers.⁶³ However, because of its even broader application and rewards, Dodd-Frank may eclipse the use of SOX in the future.

B. The Reward Model

1. The US FCA and Its Progeny

The success of the revised FCA⁶⁴ in recovering money for the government and for whistleblowers has led to a reward system dominating US whistleblower legislation today. The FCA was originally passed during the Civil War, when government procurement increased rapidly and the government did not have the resources to adequately monitor contractors or screen for quality.⁶⁵ In order to deter fraudulent activities, Congress borrowed an idea from England and passed *qui tam* legislation designed to turn ordinary citizens into private attorneys-general to act on behalf of the government.⁶⁶ If citizens discovered fraud involving government funds, whistleblowers called “relators,” were authorized to file a claim on behalf of

⁶⁰ *Id.* § 922(c)(1)(B) amending 18 U.S.C. § 1514A.

⁶¹ *Id.* § 922(c)(2).

⁶² *Id.* § 922(c)(1)(A)(i). The limitations period is extended to 180 days (from ninety days) to file a complaint. *Id.*

⁶³ *Id.* § 929A. Expanding “covered employers” to include any “subsidiary or affiliate whose financial information is included in the consolidated financial statements of such company.” *Id.* Additionally, employees of “nationally-recognized statistical rating organizations” (generally assumed to be credit rating agencies, among others) are now covered. *Id.* § 922(b)(1). Dodd-Frank also amends the FCA to strengthen protections for whistleblowers.

⁶⁴ *See* 31 U.S.C. §§ 3729-3733 (1988).

⁶⁵ For example, the government was sold sawdust as gunpowder. Callahan & Dworkin, *Incentives*, *supra* note 9, at 302 n.112.

⁶⁶ *Id.* at 302.

the government and they received a reward for their trouble.⁶⁷

The FCA was variously effective over the years, but a century later, for several reasons,⁶⁸ it had fallen into disuse and only a handful of claims were being filed annually. Federal contract fraud continued to be a problem, and to address it, Congress significantly revised the FCA in 1986.⁶⁹ Congress also instituted other reward provisions in the late 1980s and early 1990s regarding limited kinds of governmental wrongdoing,⁷⁰ but the rewards were discretionary and the amounts were relatively small. It is the large rewards under the FCA that have become the primary characteristic of revised and new whistleblowing legislation. While all whistleblowing statutes still bar retaliation, FCA-style rewards have become the drivers of reports of wrongdoing by whistleblowers, and recovery of funds by the government.⁷¹

Use of the FCA exploded after revision because of several beneficial changes, including increased certainty, size of rewards,⁷² and extension of the statute of limitations. Within three years, the number of claims increased

⁶⁷ *Id.* Unlike most whistleblowing legislation, the relator does not need to be an employee. *Id.* However, most relators gain their information by being an organizational member with reluctant access to insider information. See MARCIA P. MICELI ET AL., WHISTLE-BLOWING IN ORGANIZATIONS 6, 34 (2008).

⁶⁸ Callahan & Dworkin, *Whistleblower Protection*, *supra* note 4, at 123 n.112.

⁶⁹ See 31 U.S.C. §§ 3729–3733 (1988).

⁷⁰ See, e.g., Financial Reform, Recovery and Enforcement Act of 1989, 12 U.S.C. § 1831k (1990) (authorizing federal banking agencies to pay rewards for original information that leads to recoveries over \$50 thousand); Insider Trading and Securities Enforcement Act, 15 U.S.C. § 78u-1 (1988) (authorizing the Securities and Exchange Commission to offer rewards of up to 10 percent of the penalty imposed for civil insider trading penalties).

⁷¹ See MICELI, ET AL. *supra* note 67, at 164–65 (2008).

⁷² Congress raised the possible recovery to treble the amount of the fraud and raised the possible fine per incident to \$10,000 from \$2,000, with thousands of claims possible in a single suit. 31 U.S.C. § 3729(a); see Fred Strasser, *When the Big Whistle Blows . . .*, NAT'L L. J., May 8, 1989, at 1, 43.

twenty-fold,⁷³ and claims today are in the hundreds.⁷⁴ The successful whistleblower gets up to 30 percent of the recovery of treble the fraud, plus the fines (which can be \$10,000 per incident with the possibility that there may be hundreds of incidents in a suit). Since fraud in the health care and defense industries alone runs into the billions of dollars,⁷⁵ the whistleblower almost always receives over a million dollars, and often much more.⁷⁶ In fiscal year 2010, the government recouped \$3 billion from civil cases alone in suits alleging fraud, an increase of 25 percent from the previous year.⁷⁷ Thus, the government and the whistleblower gain significantly from the FCA, as does, ultimately, the taxpayer. A recent study by the University of Chicago and Toronto University showed that in industries covered by the FCA, employees were substantially more likely to bring forth evidence of

⁷³ Rick Wartzman & Paul M. Barrett, *For Whistle-Blowers, Tune May Change*, WALL ST. J., Sept. 27, 1989, at 1.

⁷⁴ See *Fraud Statistics – Overview*, U.S. DEP'T OF JUSTICE (Dec. 7, 2011), http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf.

⁷⁵ MICELI ET AL., *supra* note 67, at 164. An example of continuing large awards in the medical industry is illustrated by the October 2010 FCA claim settlement by GlaxoSmithKline PLC for \$750 million. Peter Loftus, *Whistleblower's Long Journey*, WALL ST. J., Oct. 28, 2010, at B1. The whistleblower received \$96 million. *Id.* Graft from the Iraq war and reconstruction is a current source of lawsuits. See Joel Millman, *The Hunt for Weapons of Mass Corruption*, WALL ST. J., June 12, 2011, at A6. Encouraging off-label use of products by the manufacturers is an increasing source of such claims. *Id.* Two other cases of improper marketing in 2009 were settled for \$2.3 billion and \$1.4 billion. *Id.*; see also Peter Loftus, *Johnson & Johnson Ordered to Pay \$327 Million*, WALL ST. J., June 4, 2011, <http://online.wsj.com/article/SB10001424052702303745304576364621661093868.html>.

⁷⁶ See, e.g., Warren P. Strobel & Marisa Taylor, *\$69.3 Million Afghan-Contracting Fine May Be a Record*, MCCLATCHY (Nov. 5, 2010), <http://www.mcclatchydc.com/2010/11/05/103300/693-million-afghan-contracting.html#storylink=misearch>; Andy Pasztor, *Northrop Agrees to Pay \$325 Million to Settle Suit*, WALL ST. J., Apr. 3, 2009, at B1. However, when taxes and attorneys' fees are paid, the net is less. Additionally, individual reward is diminished when cases involve multiple whistleblowers.

⁷⁷ Evan Perez, *U.S. News: Lawsuits Bring in \$3 Billion for U.S.*, WALL ST. J., Nov. 23, 2010, at A4.

major frauds than in those areas not covered.⁷⁸

When large rewards first began to be issued, many questioned the ethics and propriety of such payments, as well as whether they would lead to meritless claims.⁷⁹ The latter has been less problematic. There is little incentive to bring a meritless claim because the whistleblower can only recover if she or he bases the claim on information that the government does not have,⁸⁰ and it leads to a recovery for the government. Additionally, it would be difficult to find a lawyer willing to represent the whistleblower if the information is unlikely to lead to a recovery, since many of these cases are taken on a contingency basis. The concern that whistleblowers might be motivated by gain rather than a desire to help is also no longer a major ethical consideration. The desire by the government to recover money and correct wrongdoing now trumps concerns regarding whistleblower motive. A “pure” motive is seen as secondary to the public good created by whistleblowers,⁸¹ regardless of motive.

As the size of the reward is directly related to the magnitude of the fraud, it is proportional to the wrongdoer’s action, as well as beneficial to the government.⁸² The rewards are also seen as a way to stop wrongdoing, while also giving the whistleblower sufficient monetary protection for the risk of a lost job, lack of a future in the organization or even the profession, and other possible consequences of whistleblowing.⁸³ A reasonable belief

⁷⁸ Alexander Dyck, et al., *Who Blows the Whistle on Corporate Fraud?*, 65 J. FIN. 2213, 2215 (2010).

⁷⁹ See, e.g., Callahan & Dworkin, *Incentives*, *supra* note 9, at 318–36; Elkan Abramowitz, *Mutiny for the Bounty—Qui Tam: Bonanza or Fair Reward*, N.Y.L.J., May 1, 1990, at 3; Michael Waldman, *Time to Blow the Whistle?*, NAT’L L.J., Mar. 25, 1991, at 13.

⁸⁰ 31 U.S.C. § 3730(e)(4)(A) (2012). See *infra* notes 130–34 and accompanying text for a discussion of the latest developments regarding the bar to basing a suit on previously disclosed information.

⁸¹ See Callahan & Dworkin, *Incentives*, *supra* note 9, at 319.

⁸² *Id.* at 327.

⁸³ For a more thorough discussion of the issues, see *id.* at 318–36.

standard prevents rash claimants from profiting and can result in monetary costs to the meritless claimant.⁸⁴ While the trend is now to limit the rewards to recoveries from significant wrongdoing, the question of propriety has been settled.

State legislators, in a time of financial need, took notice of the success of the federal government's recoveries and started passing their own FCA legislation.⁸⁵ The state FCA statutes have proved to be as successful as the federal law in generating reports and recoveries.⁸⁶ The range of statutory recovery allowed varies by state, with some more generous than the federal law.⁸⁷

More states were encouraged to pass targeted FCA-type legislation by the passage of the 2006 Deficit Reduction Act, which was enacted to help combat Medicaid fraud.⁸⁸ The federal government pays 60 percent of Medicaid expenses, and the states shoulder 40 percent. This costs the federal government billions annually, and fraud is considered significant,⁸⁹

⁸⁴ 31 U.S.C. § 3730(d)(4). If a claim is clearly frivolous, clearly vexatious, or brought primarily for purposes of harassment, the judge can award the defendant reasonable attorneys' fees and costs. *Id.*

⁸⁵ See MICELI, ET AL., *supra* note 67, Appendix. Before 1992, only three states provided for the possibility of a statutory reward, and the amounts were insignificant in relation to the retaliation suffered. See, e.g., OR. REV. STAT. § 659.530 (1991) (possible award of \$50); S.C. CODE ANN. § 8-27-20 (Law. Co-op. Supp. 1991) (25 percent of savings resulting from the whistleblowing in the first year, up to a limit of \$2,000); WIS. STAT. ANN. § 230.83(2) (West 1987) (government can offer a reward for information to improve state administration or operations).

⁸⁶ See MICELI ET AL., *supra* note 67, 177–81. It is recommended that states give the relator at least 15 percent of the state's recovery. *Id.* at 166.

⁸⁷ *Id.* at 167. Nevada, for example, allows up to 50 percent of the recovery to go to the whistleblower. *Id.* at 165.

⁸⁸ Deficit Reduction Act of 2005, 42 U.S.C. § 1305 (2005). The law also requires that health care providers provide education programs on fraud and how to file false claims complaints. *Id.*

⁸⁹ MICELI ET AL., *supra* note 67, at 166.

so Congress was particularly interested in encouraging whistleblowing.⁹⁰ States can recover even more than 40 percent of money recovered as a result of information received from a whistleblower if they enact laws that follow the federal reward model, and several have done so.⁹¹

2. Tax Fraud

A reward system for reporting tax cheats has long been in existence, but like the FCA before revisions, it was not very effective.⁹² As in the FCA, anyone with information about tax fraud could report and put a claim in for a reward.⁹³ Rewards were at the discretion of the Internal Revenue Service (IRS) (which lost the reward amount from its revenue), and were seldom given or long-delayed.⁹⁴ In an attempt to increase revenue, Congress urged the IRS to revise the policy to increase the incentives to report, noting that the gap between what was owed and actual tax payments was about \$290 billion annually.⁹⁵ Several revisions similar to, but not as good as, the FCA were adopted in 2006.⁹⁶ These revisions include giving whistleblowers more certain awards and information, and allowing them greater participation in the process. A whistleblower office within the agency was created.⁹⁷

Significantly, whistleblowers can now recover 15 to 30 percent of the

⁹⁰ Jon Gibeaut, *Seeking the Cure: With Health Care Fraud Rampant, States Are Urged to Pass Their Own False Claims Act, but Foes Warn of Windfalls for Plaintiffs Lawyers*, 92 OCT A.B.A. J. 44 (2006).

⁹¹ MICELI ET AL., *supra* note 67, at 166, 177–81.

⁹² Jean Eagleshaw & Ashby Jones, *Whistleblower Bounties Pose Challenges*, WALL ST. J., Dec. 13, 2010, at C1 (quoting Dean Zerbe, Special Counsel at the National Whistleblower Center).

⁹³ *See* MICELI ET AL., *supra* note 67, at 164.

⁹⁴ *Id.*

⁹⁵ Tom Herman, *IRS Reworks Its Whistle-Blower Program; Tax Agency Is Criticized for Inconsistency in Paying Rewards*, *Lax Management*, WALL ST. J., June 22, 2006, at D1.

⁹⁶ Tax Relief and Health Care Act 2006, 26 U.S.C. § 1 (2006).

⁹⁷ *See* 26 U.S.C. § 7623. The office is designed to receive and investigate complaints. *Id.*

proceeds from actions to recover more than \$2 million, or from actions to recover from taxpayers with annual gross incomes of more than \$200,000.⁹⁸ Similar to what happened after the FCA revisions, reporting of significant tax fraud increased after the revisions.⁹⁹ Before, the IRS only received “a handful of legitimate claims” annually.¹⁰⁰ In fiscal years 2008 and 2009, the IRS received hundreds of reports of underpayments of \$10 million, and dozens reporting underpayments of \$100 million or more.¹⁰¹ In fiscal year 2010, the IRS received 460 claims that appeared to meet the reward guidelines.¹⁰²

An intended advantage of the revisions was quicker payment of awards. However, speed in this context is relative. Despite the revisions in 2006, the first payout was not made until April 2011, and this happened only after the whistleblower hired an attorney to move his claim through the IRS.¹⁰³ Four years after seeking recovery, he finally received an award of \$4.5 million.¹⁰⁴ The award was widely reported, and it was hoped that raised awareness

⁹⁸ *Id.* The amount awarded depends on “the extent to which the individual substantially contributed to such action.” *Id.* “This law is not designed to snag the guppies, but to harpoon the whales.” MaryClaire Dale, Associated Press, *IRS Awards \$4.5M to Whistleblower*, USA TODAY, Apr. 8, 2011, <http://usatoday30.usatoday.com/money/perfi/taxes/2011-04-08-irs-whistleblower-taxes-reward.htm> (quoting Patrick Burns of the nonprofit Taxpayers Against Fraud).

⁹⁹ Herman, *supra* note 95, at D3.

¹⁰⁰ Eagleshaw & Jones, *supra* note 92.

¹⁰¹ MaryClaire Dale, Associated Press, *Nice Motive to ‘Squeal’: IRS Awards \$4.5 Million*, SEATTLE TIMES, Apr. 9, 2011, at A1 [hereinafter Dale, *Nice Motive to ‘Squeal’*].

¹⁰² Ashby Jones, *Accountant Gets Whistleblower Payout*, WALL ST. J., Apr. 8, 2011, <http://online.wsj.com/article/SB10001424052748704415104576250870321773348.html>. The IRS received 5,678 tips during this period. *Id.* A large number of the tips involve ex-spouses or mom-and-pop businesses. Dale, *Nice Motive to ‘Squeal,’ supra* note 101.

¹⁰³ Dale, *Nice Motive to ‘Squeal,’ supra* note 101, at A1. The whistleblower, an accountant, discovered that his employer, a Fortune 500 company, had a tax liability of over \$20 million and reported it to the employer. *Id.* When the company refused to report it to the IRS, he gave the agency the information. *Id.*

¹⁰⁴ *Id.* The IRS withheld taxes before sending the check, so he actually received \$3.24 million. *Id.*

would further increase reporting.¹⁰⁵ Subsequently, the IRS adopted a new policy that it will not pay awards until the two-year period for taxpayers to appeal their payments has expired.¹⁰⁶ The slowness in payment may well make it more difficult for whistleblowers to find an attorney to represent them and reduce their willingness to report.¹⁰⁷

3. The Dodd-Frank Wall Street Reform and Consumer Protection Act

Dodd-Frank was passed after the financial crisis of 2008.¹⁰⁸ After the financial crisis, the Securities and Exchange Commission (SEC) used the bounty structures and experiences of the IRS, the FCA successes, and the SOX experiences to benchmark its past performance under its limited bounty program and make recommendations regarding its expanded role in encouraging whistleblowing under Dodd-Frank.¹⁰⁹ Although rulemaking under the new law is ongoing, the reward structure is in place, and analysis and predictions based on the IRS and FCA history is possible.¹¹⁰

¹⁰⁵ *Id.* “It ought to encourage a lot of other people to squeal.” (quoting Senator Charles Grassley, who helped get the IRS whistleblower office authorized in 2006). *Id.* However, the delay in recovery may also have a negative impact. *Id.* There have been several criticisms, explanations, and excuses offered about the delay. *Id.* Senator Grassley said the delay may be due, in part, to the fact that the IRS may fear embarrassment for missing \$20 million underpayments. *Id.* The IRS said a routine audit was already under way in the case, but the accountant’s information pointed out a new question. *Id.* The Treasury Department’s Inspector General for Tax Administration found that the Agency suffered from “deficiencies” in the “control and timely resolution of whistleblower claims.” Eagleshaw & Jones, *supra* note 92, at C1.

¹⁰⁶ Dale, *Nice Motive to ‘Squeal,’ supra* note 101.

¹⁰⁷ See Callahan & Dworkin, *Incentives, supra* note 9, at 315–16.

¹⁰⁸ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010).

¹⁰⁹ U.S. SEC. & EXCH. COMM’N, ASSESSMENT OF THE SEC’S BOUNTY PROGRAM iii (Mar. 29, 2010), available at <http://www.sec-oig.gov/Reports/AuditsInspections/2010/474.pdf>. It also benchmarked against the Financial Industry Regulatory Authority. *Id.*

¹¹⁰ Yin Wilczek, *Final Whistleblower Program Will Mirror SEC Proposal; Will Be Hurt by Budget Needs*, 43 SEC. REG. & L. REP. 102 (2011). It should be noted that in addition to conflict created by the lobbying on behalf of business interests versus employee and whistleblower advocates about the rules and regulations, there is conflict between

Another spur to Dodd-Frank and its reward structure was the failure of the SEC to act on a multi-billion dollar fraud case, reported to it over several years.¹¹¹ New York money manager Bernard Madoff ran a Ponzi scheme¹¹² that lasted for decades.¹¹³ The fallout from this scheme was “massive and . . . rocked Wall Street,”¹¹⁴ which was already suffering from the financial crisis.¹¹⁵ After the Madoff affair was revealed, several more Ponzi schemes came to light, but none had as significant an impact.¹¹⁶ The

Republicans and Democrats regarding this law. *Id.* There is a “stark divide” between the views of corporations and whistleblowers, and that is reflected in Congress itself “where there are fairly wide gaps between liberals and conservatives.” *Id.* (quoting Lawrence West, former associate director of the SEC’s Enforcement Division and now a partner in Latham & Watkins LLC).

¹¹¹ Kara Scannell et al., *Crisis on Wall Street: Markopolos Testifies Fairfield Knew Little About Madoff*, WALL ST. J., Feb. 5, 2009, at C2. The whistleblower, Harry Markopolos, persistently went to the SEC with information, and even offered to conduct an undercover operation for the agency, but he was rebuffed. *Id.* Madoff was convicted in the criminal case against him and is in prison for life. See James Heller & Joanna Chung, *Life After Madoff’s ‘Big Lie’*, WALL ST. J., Dec. 11–2, 2010, at A1.

¹¹² Dionne Searcey, *Post-Madoff, a Support Network: Victims of Alleged Ponzi Scheme Find Comfort Through Shared Hardship*, WALL ST. J., Feb. 2, 2009, at C3. It is the biggest Ponzi scheme in history involving at least \$50 billion. *Id.* Investors in the scheme may number in the thousands. Marcy Gordon, Associated Press, *SEC, Madoff to Settle Civil Suit*, SEATTLE P-I, Feb. 10, 2009, at C7.

¹¹³ Gordon, *supra* note 112. It officially came to light in December 2008, when Madoff’s sons turned him in a day after he confessed to them. *Id.*

¹¹⁴ *Id.* The fallout continues three years later. See, e.g., Chad Bray & Michael Rothfeld, *The Madoff Fraud: Peter Madoff Pleads Guilty*, WALL ST. J., June 30, 2012, at B1 (stating that Peter Madoff, brother of Bernard Madoff, submitted his guilty plea three years to the day after his brother was sentenced to 150 years in prison); Chad Bray, *Money Manager Settles Madoff-Related Case*, WALL ST. J., June 25, 2012, at C1; Chad Bray, *The Madoff Fraud: Sixth Guilty Plea in Scheme*, WALL ST. J., Dec. 20, 2011, at C3. It has had victims worldwide, and there are battles over reclaiming funds and compensating victims. See Reed Albergotti, *The Madoff Fraud: Amid Battles, Trustee Seeks \$2 Billion Payout*, WALL ST. J., July 27, 2012, at C1.

¹¹⁵ Michael Rothfeld, *Madoff Claims Lure Banks*, WALL ST. J., June 17, 2011, at A1. There are numerous lawsuits against different entities from Madoff’s victims and the court appointed trustee who is trying to reclaim funds for the victims. *Id.* “[S]orting out the huge Madoff fraud claims has become a mini-industry . . .” *Id.*

¹¹⁶ Steve Stecklow, *In Echoes of Madoff, Ponzi Cases Proliferate*, WALL ST. J., Jan. 28, 2009, at A1; Yuka Hayashi, *Japan Police Target Alleged Ponzi Scheme*, WALL ST. J.,

Madoff whistleblower that attempted to alert the SEC called the agency “both a captive regulator and a failed regulator,” and some of the congresspersons on the committee investigating the SEC’s failure agreed.¹¹⁷ The Madoff whistleblower recommended that the SEC set up a unit to receive tips in a manner similar to the unit implemented by the IRS.¹¹⁸ In light of the failure of SOX, the government decided that increased oversight and regulation was necessary,¹¹⁹ and that rewards would play a role in inducing whistleblowing and better protecting the whistleblower.¹²⁰

Dodd-Frank is broader than SOX in terms of what types of whistleblowing will be protected,¹²¹ who is protected,¹²² and the types of

Feb. 6, 2009, at A6. Following these, an alleged \$8 billion fraud scheme run by Allen Stanford was revealed due to closer inspection because of the Madoff fraud. Glenn R. Simpson et al., *The Stanford Affair: Madoff Case Led SEC to Intensify Stanford Probe*, WALL ST. J., Feb. 19, 2009, at A14. Like Madoff, allegations had “dogged R. Allen Stanford” for years, but the agencies failed to act effectively. *Id.* One accused Ponziist, Guy Albert de Chimay, built trust with his clients by claiming he managed \$200 million (false) for his royal relatives (true) in Belgium. Michael Rothfeld, *Famous Name Is Charged*, WALL ST. J., Sept. 11, 2010, at B1. He allegedly defrauded them of \$7 million. *Id.* Kenneth Starr, a financial advisor who allegedly defrauded clients out of \$59 million, pleaded guilty in September 2010, to securities fraud among many other counts. Chad Bray, *Investment Advisor to Stars Kenneth Starr Pleads Guilty*, WALL ST. J., Sept. 11, 2010, at B1.

¹¹⁷ Gregory Zuckerman & David Gauthier-Villars, *The Madoff Fraud Case: A Lonely Lament From a Whistle-Blower*, WALL ST. J., Feb. 3, 2009, at C3. He also said that he did not press his charges even harder because he feared retribution from the powerful Madoff. *Id.* Others who questioned Madoff’s performance numbers failed to come forward at all. Aaron Lucchetti, *The Madoff Fraud Case: On Street, Reluctance to Blow the Whistle*, WALL ST. J., Feb. 12, 2009, at C4.

¹¹⁸ Zuckerman & Gauthier-Villars, *supra* note 117. .

¹¹⁹ *Obama Lists Key Principles for Reform Of Nation’s Financial Regulatory System*, 77 U.S.L.W. 2517 (2009). “To rebuild trust in our markets, we must redouble our efforts to promote openness, transparency and plain language throughout our financial system.” *Id.*; Elizabeth Williamson & Melanie Trotman, *The Obama Budget: Federal Workers, Regulations to Increase*, WALL ST. J., May 8, 2009, at A4; Damian Paletta, *Bernanke Calls for Broader Regulations*, WALL ST. J., Mar. 11, 2009, at A4.

¹²⁰ Deborah L. Cohen, *Wetting Their Whistles*, 97-MAR A.B.A. J. 14 (2011).

¹²¹ See Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010). One court has held that included within the protection is an internal complaint

protection.¹²³ Like all whistleblowing laws, retaliation is barred.¹²⁴ Importantly, it contains a reward provision to encourage whistleblowers to report financial wrongdoing of those involved in transactions in public markets.¹²⁵ Similar to the FCA, a whistleblower that comes forward with new information about wrongdoing may receive 10 to 30 percent¹²⁶ of what the government recovers from civil or criminal actions, with a jurisdictional limitation that recovery must yield \$1 million or more.¹²⁷ This limit is

about a violation. *Egan v. Tradingscreen, Inc.*, No. 10 Civ. 8202(LBS), 2011 WL 1672066 (S.D.N.Y. May 4, 2011).

¹²² Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, 12 U.S.C. § 5567 (2010). The law protects whistleblowing employees of organizations and people that provide financial services to consumers. *Id.* § 5567(b). This is expansively defined. *Id.* The coverage can be expanded by the Bureau of Consumer Financial Protection. *Id.* § 5492(a)(1).

¹²³ *Id.* § 5567(c). The whistleblower must submit a charge to the Department of Labor (DOL) within 180 days of the alleged retaliation. *Id.* § 5567(c)(1)(A). If the DOL finds probable cause, it must order preliminary relief. *Id.* § 5567(c)(2)(B). This can include reinstatement and back pay. *Id.* § 5567(c)(4)(B). Included in an award can be “compensatory damages,” but this is undefined. *Id.* Either party can seek review of the Secretary of Labor’s order in the Circuit Court of Appeals in the district where the whistleblower lived at the time of the alleged violation. *Id.* § 5567(c)(4)(E). Whistleblowers can report anonymously if represented by counsel, but must reveal their identity before collecting the award. Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010).

¹²⁴ 15 U.S.C. § 78u-6(h). Retaliation is broadly defined. *Id.*

¹²⁵ *Id.* § 78u-6. The section amends the Securities and Exchange Act of 1934 (15 U.S.C. 78a et seq.), creating the new § 21E. *Id.* § 78u-6(a). The entities include investment banks and broker-dealers as well as public companies. *Id.* Generally, claims must be brought within six years of the date of the violation. *Id.* § 78u-6(h)(1)(B)(iii).

¹²⁶ *Id.* § 78u-6(b)(1)(A)(B). The amount of the award is at the discretion of the Commission considering the significance of the information to the success of the recovery, the degree of assistance provided by the whistleblower or his or her legal representative, the “programmatic interest of the Commission in deterring violations of the securities laws by making awards to whistleblowers,” and “such additional relevant factors” the Commission may establish by rule or regulation. *Id.* § 78u-6(c)(1)(B)(i)(III). Specifically excluded from being considered by the Commission is the balance of the Fund. *Id.* § 78u-6(c)(1)(B)(ii).

Id. § 78u-6(a)(1). The news media is specifically mentioned a source that the whistleblower cannot exclusively rely on. *Id.* § 78u-6(a)(3)(C). The information must be voluntarily provided. *Id.* § 78u-6(b)(1).

similar to that imposed by the IRS, but unlike the FCA, which has no amount jurisdictional limit.

Several additional limitations exist on recovery, however. In order to collect, the information provided by the whistleblower must be based on information not already known to the SEC or taken exclusively from public sources.¹²⁸ Specifically excluded from recovering are members, officers, or employees of “an appropriate regulatory agency,” the Department of Justice, a self-regulatory organization, the Public Company Accounting Oversight Board, or a law enforcement organization.¹²⁹ Additionally, a whistleblower that is convicted of a criminal violation related to judicial or administrative action cannot recover, unlike in the FCA, which allows for possible recovery.¹³⁰ And unlike the IRS auditor-whistleblower scenario discussed above, a whistleblower gaining information through an audit of financial statements required under securities laws is limited in recovery.¹³¹ Finally, a whistleblower that fails to submit information in the form required by the SEC cannot collect.¹³²

As these limitations illustrate, one of the trends in the evolution of federal whistleblower reward laws is to circumscribe who can recover and how rewards can be obtained.¹³³ In part, this trend is due to significant lobbying by business interests.¹³⁴ It was reflected in the effort to add more limitations

¹²⁸ *Id.* § 78u-6(a)(3). In an important change from previous whistleblower laws, original information can be based on a whistleblower’s original analysis, not just evidence of wrongdoing. *Id.* § 78u-6(a)(3)(A).

¹²⁹ *Id.* § 78u-6(c)(2)(A)(i-v).

¹³⁰ *Id.* § 78u-6(c)(2)(B).

¹³¹ *Id.* § 78u-6(c)(2)(C). The auditor cannot recover if submission of the information would violate the requirements of § 10A of the Securities Exchange Act of 1934. *Id.*

¹³² *Id.* § 78u-6(c)(2)(D).

¹³³ Gregory F. Parisi, *A World of Whistleblowers: What Companies Should Know About Dealing with Third Parties Going Forward*, 80 U.S.L.W. 863 (2012). However, unlike other laws, the eligibility for an award has global application. *Id.*

¹³⁴ See, e.g., Jessica Holzer, *SEC Urged to Revise ‘Whistleblower’ Plan*, WALL ST. J., Feb. 17, 2011, at C2. More than 260 firms told the SEC that the reward plan would turn financial fraud into a gold mine for employees. Jean Eagleshaw, *Firms Assail*

through restrictive rules and regulations,¹³⁵ and efforts to block President Obama for an extended period from appointing the head of the Consumer Financial Protection Bureau.¹³⁶ Despite the lobbying against the reward system and Republican threats to cut funding, the SEC, in a three-two vote on May 25, 2011, passed a rule giving employees the right to report wrongdoing directly to the SEC without first reporting to a company's compliance program.¹³⁷ SEC Chairman Mary Schapiro said the rule was intended to "break the silence of those who see a wrong."¹³⁸ It is also seen as a tool to help deter wrongdoing.¹³⁹ The rule was revised, though, so that if employees report internally (as most employees do) and the company informs the SEC about the violation, the employees can still get an award, as they could if they report internally and then to the SEC within 120

Whistleblowers Plan by SEC, WALL ST. J., Dec. 15, 2010; Eagleshaw & Jones, *supra* note 92, at C1. The Dodd-Frank law is so broad that it has already produced more than three million words in the Federal Register, and about 62 percent of the 387 sets of rules hadn't been proposed as of the end of April 2011. Jean Eagleshaw, *Overhaul Grows and Slows*, WALL ST. J., May 2, 2011, at C1. Indeed, no agency met any of the 26 Dodd-Frank-related April deadlines. *Id.*

¹³⁵ See, e.g., Cohen, *supra* note 120, at 14–15; Wilczek, *supra* note 110; Eagleshaw & Jones, *supra* note 92; Deborah Solomon & Jamila Trindle, *New Financial Rules Delayed*, WALL ST. J., June 15, 2011, at A1. This applies mainly to rule about derivatives. *Id.*

¹³⁶ Deborah Solomon, *Consumer Agency Stymied by GOP*, WALL ST. J., May 6, 2011, <http://online.wsj.com/article/SB10001424052748704810504576305553238068870.html>. The Republicans want the agency restructured before they will approve an appointment. *Id.* Many business groups oppose the agency. *Id.* The lobbying about Dodd-Frank continues. See Jessica Holzer & Andrew Ackerman, *SEC Addressing Gaps in Analysis*, WALL ST. J., Apr. 17, 2012, <http://online.wsj.com/article/SB10001424052702304818404577348101006567024.html>.

¹³⁷ Allen Smith, *SEC Approves Final Whistle-Blowing Rule*, SOC'Y FOR HUM. RES. MGMT, <http://www.shrm.org/LegalIssues/FederalResources/Pages/SECWhistleBlowingRule.aspx> (last visited Oct. 21, 2012).

¹³⁸ David Hilzenrath, *SEC Rule Rewards Those Who Detect Fraud*, SEATTLE TIMES, May 26, 2011, at A14 (quoting the *Washington Post*). The vote was split along party lines with Democrats voting for the rule. *Id.*

¹³⁹ *Id.*

days.¹⁴⁰

The Dodd-Frank reward structure is seen as a bellwether for the other rules and regulations that will follow,¹⁴¹ notwithstanding the fears that a lack of resources¹⁴² and other limits could hamper its effectiveness, as was the case with SOX, OSHA, and the IRS.¹⁴³ As what happened with the FCA and IRS revised reward laws, Dodd-Frank has generated a large number of claims. Claims began to come in before the law was passed in July 2010, and the SEC forecast at that time it would receive thirty thousand tips a year.¹⁴⁴ The SEC said it has already received hundreds of tips because of the law,¹⁴⁵ and many of them are “high quality.”¹⁴⁶

Dodd-Frank also created a similar reward system under the Commodity Exchange Act.¹⁴⁷ The rewards are for information provided to Commodity Futures Trading Commission (CFTC). As with the Madoff scandal, the CFTC recently failed to detect significant fraud before the financial crisis,

¹⁴⁰ Smith, *supra* note 137. Internal reporting could also increase the amount of the award the whistleblower receives. *Id.*

¹⁴¹ Hilzenrath, *supra* note 138.

¹⁴² Wilczek, *supra* note 110. Since the Republicans are in control of the House, getting sufficient resources could be a struggle. *Id.* The enforcement program was allegedly underfunded for many years prior to Dodd-Frank. *Id.* The law called for an increase of 18 percent to the SEC’s budget. *Id.* In April, a deal was reached to provide adequate funding through September 2011. Suzanne Barlyn, *SEC, CFTC Win Increases in Funding in Budget Deal*, WALL ST. J., Apr. 12, 2011, <http://online.wsj.com/article/SB10001424052748703518704576258840642909826.html>. What happens next depends in part on the election results of 2012.

¹⁴³ Eagleshaw & Jones, *supra* note 92, at C1.

¹⁴⁴ *Id.*

¹⁴⁵ See Jessica Holzer & Fawn Johnson, *Larger Bounties Spur Surge in Fraud Tips*, WALL ST. J., Sept. 7, 2010, at C3; Wilczek, *supra* note 110. A plaintiff’s firm said calls from potential whistleblowers had gone up tenfold. *Id.* It also said that they had “been judicious” about passing information to the SEC because they wanted to review them and make sure the SEC was going to take them seriously. *Id.*

¹⁴⁶ Hilzenrath, *supra* note 138, at A16 (quoting Robert Khuzami, an SEC enforcement official).

¹⁴⁷ Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. § 5301 (2010).

despite agency examinations.¹⁴⁸

C. The Structural Dimension

As already noted, a variety of US provisions are not limited simply to anti-retaliation measures and reward mechanisms, but have progressively included elements of a “structural” or institutional model of whistleblowing legislation.¹⁴⁹ The broad intention is to require or induce the establishment of institutional mechanisms by which organizations take it on themselves to encourage internal whistleblowing, prevent and control wrongdoing, and prevent or self-remedy retaliation. Some structural reforms included establishment of independent mechanisms for disclosure, such as the OSC; however, SOX reflected a significant shift towards organizational requirements compared to previous legislation.

In another attempt, Congress tried to get private corporations to set up a structural model under the Organizational Sentencing Guidelines.¹⁵⁰ Taking a carrot and stick approach, the Organizational Sentencing Guidelines stated that if an organization adopted an effective program to detect and deter violations of law, penalties could be reduced (up to 95 percent) if the organization was convicted of a crime.¹⁵¹ Conversely, penalties could be increased (up to 400 percent) if the organization had no such program.¹⁵²

¹⁴⁸ Silla Brush, *Regulator Twice Failed to Find Fraud at Peregrine*, SEATTLE TIMES, July 12, 2012, http://seattletimes.com/html/business/technology/2018709101_peregrine18.html?syndication=rss. The investigations were made in 2007 and 2008. *Id.* A third was scheduled in 2011, but didn't take place due to lack of resources of the CFTC. *Id.* The fraud caused the collapse of Peregrine Financial Group and a shortfall of \$200 million in client funds. *Id.*

¹⁴⁹ Moberly, *Corporate Whistleblowers*, *supra* note 8.

¹⁵⁰ U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 8A1.2 (1991), available at http://www.ussc.gov/guidelines/1991_guidelines/Manual_PDF/1991_Guidelines_Manual_Full.pdf.

¹⁵¹ See Moberly, *Corporate Whistleblowers*, *supra* note 8, at 1134; Dworkin, *supra* note 18, at 1775.

¹⁵² U.S. SENTENCING COMM'N, *supra* note 150.

An effective program included a code of ethics and a whistleblowing procedure that banned retaliation, and was known to employees and prosecuted effectively.¹⁵³

A more recent development involving a structural element is found in the Patient Protection and Affordable Care Act, signed by President Obama on March 23, 2010, which expands the effort to reduce fraud and recover funds in the health care area.¹⁵⁴ In addition to reward provisions, the Patient Protection and Affordable Care Act includes a requirement that long-term care facilities tell their employees that they are required to report reasonable suspicion that a crime is occurring, or has occurred, and that if they fail to do so they are subject to a fine of up to \$200,000.

In the absence of reward mechanisms, US experience has been that these efforts to embed whistleblowing structurally or institutionally have had limited effect in spurring whistleblowing or protecting whistleblowers. They have also not prevented crises such as those brought on by Enron, WorldCom, the Madoff fraud, or the current financial crisis. Nevertheless, the adoption of a structural model has been relatively piecemeal. This raises the question whether the approach will nevertheless continue to develop, and involve—by accident or design—some movement towards a greater blending of models.

D. Whistleblowing and the Media

By contrast with any of the three preceding approaches, one model, embraced by neither federal nor state laws, involves significant attention to protecting whistleblowing to the media.¹⁵⁵ This is in some respects surprising, given that whistleblowing to the media has long provided a

¹⁵³ See Dworkin, *supra* note 18, at 1771.

¹⁵⁴ Patient Protection and Affordable Care Act, 42 U.S.C. § 18001 (2010).

¹⁵⁵ See Elletta Sangrey Callahan & Terry Morehead Dworkin, *Who Blows the Whistle to the Media, and Why: Organizational Characteristics of Media Whistleblowers*, 32 AM. BUS. L.J. 151 (1994).

quintessential example of whistleblowing.¹⁵⁶ Among researchers, there has been debate about whether disclosures that do not reach the public domain should be categorized as whistleblowing at all.¹⁵⁷

Why has this been a silent or missing element in the United States? A partial explanation lies in the fact that public employees have some constitutional protection for whistleblowing under the First Amendment. The 1978 CSRA legislation also sought to buttress these First Amendment rights of freedom of speech.¹⁵⁸ However, provisions once aimed at this result have proved over time to be of limited benefit. One example is the 1989 WPA extension of protection to disclosures outside official channels “not specifically prohibited by law . . . if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs.”¹⁵⁹

In 2006, the First Amendment protection was also significantly undermined by the Supreme Court decision in *Garcetti v. Ceballos*.¹⁶⁰ In this case, a prosecutor wrote a memo asking whether a sheriff’s deputy had lied in an affidavit to get a search warrant.¹⁶¹ The Court found that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens, and, thus, are not constitutionally protected from employer sanctions. This was seen as potentially silencing public employee whistleblowing.¹⁶² Attempts to amend the WPA¹⁶³ and

¹⁵⁶ The Pentagon Papers and the Watergate scandals are examples.

¹⁵⁷ See MICELI ET AL., *supra* note 67, at 7–10, 85.

¹⁵⁸ ROBERT G. VAUGHN, THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS 88–107, 286–308 (2013).

¹⁵⁹ Whistleblower Protection Act 1989, 5 U.S.C. § 1213(a)(1)(B) (2002).

¹⁶⁰ *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

¹⁶¹ *Id.* at 413–16.

¹⁶² MICELI ET AL., *supra* note 67, at 155. Senators picked up on the *Garcetti* dissent’s idea that the majority’s decision could silence whistleblowers and unanimously passed legislation to overturn it. *Id.* at 155–56 (Sen. Bill S. 494). The House passed similar legislation, but the differences between the bills were not resolved in the conference committee. *See id.* at 156–57.

provide broader coverage have been unsuccessful.¹⁶⁴

In the private sector, legislation does not protect whistleblowing to the media, and a recent decision showed that courts are also disinclined to protect this sort of whistleblowing. In *Tides v. Boeing Co.*,¹⁶⁵ the court rejected the whistleblower's argument that protection should be given because whistleblowing to the media might lead to information being provided to one of the recipients authorized by SOX.¹⁶⁶ If the whistleblower first reports to the media, she or he must then file a claim under the FCA or Dodd-Frank in order to gain the statutory benefits.¹⁶⁷ This disinclination to extend protection to media whistleblowers seems based on the perception that whistleblowers go to the media because their claims are "less worthy" or groundless, or because they are seeking revenge or are compelled by other bad motives.¹⁶⁸ However, studies paint a different picture.¹⁶⁹ Most media whistleblowers turn to the media because they lack power within the organization to effect change, there is a high risk of retaliation, or they seek anonymity. Additionally, a lack of meaningful response when the wrongdoing was reported within the organization prompts this drive toward the media.¹⁷⁰

If the whistleblower chooses to go outside the organization to report, the

¹⁶³ Whistleblower Protection Act, 5 U.S.C. § 1213(a) (2002).

¹⁶⁴ See MICELI ET AL., *supra* note 67, at 155–56.

¹⁶⁵ *Tides v. Boeing Co.*, 644 F.3d 809 (9th Cir. 2011); *see also*, Terry Morehead Dworkin & Elletta Sangrey Callahan, *Employee Disclosures to the Media: When Is a "Source" A "Sourcerer"?*, 15 COMM/ENT L. J. 357, 361 (1993) [hereinafter Dworkin & Callahan, *Employee Disclosures*].

¹⁶⁶ Dworkin & Callahan, *Employee Disclosures*, *supra* note 165, at 816–17.

¹⁶⁷ False Claims Act, 31 U.S.C. § 3730(e)(4)(A) (2010). The person must be the original source of the information to the media. *Id.* § 3730(e)(4)(A)(iii).

¹⁶⁸ Dworkin & Callahan, *Employee Disclosures*, *supra* note 165; Sissela Bok, *Whistleblowing and Professional Responsibility*, 11 N.Y.U. EDUC. Q. 1, 4 (1980). [T]he disappointed, the incompetent, the malicious, and the paranoid all too often leap to accusations in public . . .” *Id.*

¹⁶⁹ Dworkin & Callahan, *Employee Disclosures*, *supra* note 165, at 392.

¹⁷⁰ *Id.* at 394.

government and the media are the two primary external outlets. Each group has a different focus, however. The government is charged with serving the public interest, while the media is more influenced by economic pressures of competition, especially in the “Internet Age”; newsworthiness is not necessarily a measure of the public good.¹⁷¹ Additionally, government entities often want to capture the information themselves and mandate disclosure to particular persons, agencies, or other entities if the whistleblower is to be protected.¹⁷²

In the United States, the focus of whistleblowing laws has shifted primarily from protection against retaliation to significant rewards for information. This change has also been marked by a limited focus on structural models of protection and little attention given to the role of the media. It remains to be seen how effective the Dodd-Frank law and the mechanisms created to enforce it will be, but so far, it is the reward model that has most closely achieved the desired results. This contrasts with the progression in Australian law, which began similarly in terms of an anti-retaliation focus, but has relied more heavily on detailed structural models, and has most recently turned towards enhancement of the role of the media, while eschewing rewards entirely.

III. THE MEDIA? WHISTLEBLOWING LAW REFORM IN AUSTRALIA

A. Anti-Retaliation

As in the United States, much of the initial Australian movement towards statutory recognition of whistleblowing lay in assumptions that fear of reprisal represented the primary disincentive to employee disclosure of wrongdoing. In 1990, in the state of Queensland, the first temporary

¹⁷¹ *Id.* at 393. There is usually a direct relationship between newsworthiness and the significance of the wrongdoing. *Id.*

¹⁷² *Id.* at 368.

whistleblowing legislation was built on removal of official or legal retaliation (“authorized” reprisals), criminalization of retaliation, and injunctive relief.¹⁷³ Soon, a range of Australian state jurisdictions followed suit with whistleblowing laws covering, for the most part, public-sector wrongdoing revealed by public-sector employees.¹⁷⁴

Much of the aim was to remove official legal barriers to disclosure, outlaw retaliation, and provide criminal and civil remedies if retaliation occurred. Civil remedies are based on the creation of a tort of victimization, which provides a right to sue for damages for detrimental action in the general courts.¹⁷⁵ The only state not to have provided this remedy, New South Wales (NSW), finally did so in 2010.¹⁷⁶ In addition to this remedy, over time, three states have provided an alternative right to seek restitution or damages for victimization through anti-discrimination tribunals, whose role otherwise includes complaints in respect to detrimental action taken on the basis of gender, racial, or other discrimination.¹⁷⁷

The limits of these remedial avenues are immediately clear, even by comparison with US provisions. Even the most recent addition, in NSW,

¹⁷³ See *Whistleblowers (Interim Protection) and Miscellaneous Amendments Act 1990* (Qld) (Austl.); Brown, *Sunshine*, *supra* note 6.

¹⁷⁴ See *Public Interest Disclosure Act 2003* (WA) (Austl.); *Public Interest Disclosure Act 2002* (Tas) (Austl.); *Whistleblowers Protection Act 2001* (Vic) (Austl.); *Public Interest Disclosure Act 1994* (ACT) (Austl.); *Protected Disclosure Act 1994* (NSW) (Austl.); *Whistleblowers Protection Act 1994* (Qld) (Austl.); *Whistleblowers Protection Act 1993* (SA) (Austl.).

¹⁷⁵ See, e.g., *Whistleblowers Protection Act 1993* (SA) s 9(2)(a) (Austl.); see also *Public Interest Disclosure Act 2012* (ACT) s 41 (Austl.); *Whistleblowers Protection Act 1994* (Qld) s 43(1) (Austl.) (current version at *Public Interest Disclosure Act 2010* (Qld) ss 42-43 (Austl.)); *Public Interest Disclosure Act 2003* (WA) 15(1) (Austl.); *Public Interest Disclosure Act 2002* (Tas) s 20(2) (Austl.); *Whistleblowers Protection Act 2001* (Vic) s 19(1) (Austl.); *Public Interest Disclosure Act 1994* (ACT) s 29 (Austl.).

¹⁷⁶ See *Protected Disclosures Act 1994* (NSW) s 24 (Austl.) (current version at *Public Interest Disclosure Act 1994* (NSW) s 20(A) (Austl.)).

¹⁷⁷ See *Whistleblowers Protection Act 1994* (Qld) s 45(1)(c) (Austl.) (current version at *Public Interest Disclosure Act 2010* (Qld) s 44 (Austl.)); *Whistleblowers Protection Act 1993* (SA) s 9(2)(b) (Austl.); *Public Interest Disclosure Act 2003* (WA) s 15(4) (Austl.).

explicitly provides that recoverable civil damages “do not include exemplary or punitive damages or damages in the nature of aggravated damages.”¹⁷⁸ General problems of cost and risk of adverse outcomes mean there have never been more than a handful of claims.¹⁷⁹ There are also no legal firms or services with any significant, specialized experience in such actions.

Also, the courts have sometimes had difficulty in identifying how these compensation avenues compare to, or fit with, other compensation rights—such as those granted under workplace health and safety legislation—as well as how they can co-exist with the criminal offence of reprisal.¹⁸⁰ Indeed, the poor configuration of anti-retaliation rights in state legislation is replete with ironies. One Queensland court effectively decided that no action for civil damages could be taken unless the criminal offence of reprisal had first been proven or could at least be shown to have occurred, effectively reducing the damages provision to a criminal victim’s compensation provision.¹⁸¹

Legislative reform to reverse the effect of these and other decisions¹⁸² may represent a fairly small “band aid” on the larger problems involved. These reforms reflect the general problem that strong focus on the criminalization of reprisals—intended to be a strength of Australian anti-retaliation approaches—has proven to be more symbolic than substantive. Very few prosecutions for reprisal have been undertaken and there have been no known successes.¹⁸³ While reprisal offences may help encourage

¹⁷⁸ *Public Interest Disclosure Act 1994* (NSW) s 20(A)(3) (Austl.).

¹⁷⁹ See A.J. Brown et al., *Best Practice Whistleblowing Legislation for the Public Sector: Key Principles*, in *WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR: ENHANCING THE THEORY AND PRACTICE OF INTERNAL WITNESS MANAGEMENT IN PUBLIC SECTOR ORGANISATIONS* 261, 271–77 (2008) (discussing the few known claims).

¹⁸⁰ See *id.*

¹⁸¹ See *Howard v Queensland* [2000] Qd R 223 (Austl.); Brown et al., *supra* note 179.

¹⁸² See *Public Interest Disclosure Act 2010* (Qld) s 42(5) (Austl.).

¹⁸³ Brown et al., *supra* note 179.

whistleblowing and deter reprisals, in practice they may have made *real* whistleblower protection more difficult by distracting from, or masking, the reality that the vast bulk of adverse outcomes unjustly suffered by whistleblowers are never likely to be proven to a criminal standard.¹⁸⁴

Further irony is found in the possibility that the statutory tort of victimization, as presently configured, may close off, or restrict, other more generous rights under the general law of employment. For example, one of the few significant compensation awards was in favor of a NSW police officer whose employer failed to sufficiently support him after he reported and gave evidence of suspected internal misconduct.¹⁸⁵ The claim was brought under common law principles of employment, rather than under any whistleblowing remedy, which in NSW may now have restricted rather than amplified the chances of such outcomes.

Other cases similarly suggest that, at best, the civil compensation provisions offer little practical benefit to aggrieved whistleblowers. They exist in parallel to existing rights of compensation for work-based injury, which, while ill-matched to whistleblowing situations, are at least a more recognizable part of the legal landscape.¹⁸⁶ For example, the confidential settlement achieved in 2012 by one of Australia's most prominent whistleblowers, nursing manager Toni Hoffman, was achieved in response to a claim under the Workers' Compensation and Rehabilitation Act 2003 (Qld). The national and international media profile of the case was undoubtedly of greater assistance to this settlement than were the relevant

¹⁸⁴ See Rodney Smith & A.J. Brown, *The Good, The Bad and the Ugly: Whistleblowing Outcomes*, in *WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR: ENHANCING THE THEORY AND PRACTICE OF INTERNAL WITNESS MANAGEMENT IN PUBLIC SECTOR ORGANISATIONS*, 129–30, 134 (2008).

¹⁸⁵ See *Wheadon v New South Wales* (Unreported, District Court of NSW, Feb. 2, 2001) (Austl.) (ordering the NSW Police Service to pay AUD\$664,270 for having breached its duty of care to the officer, who experienced harassment and victimization resulting in serious stress culminating in psychiatric illness).

¹⁸⁶ Brown et al., *supra* note 179.

whistleblowing anti-retaliation provisions.¹⁸⁷

It is unlikely that the irrelevance of such provisions is because whistleblowers are undeserving of compensation. Recent empirical research into public sector whistleblowing, encapsulating 118 federal, state, and local agencies, confirms that the need exists for more effective, realistic, targeted, and low-cost compensation mechanisms.¹⁸⁸ Although not all whistleblowers claim to suffer mistreatment or retaliation, significant proportions do, directly or indirectly.¹⁸⁹ The risks of mistreatment quickly escalate if public employees report wrongdoing that is more widespread or systemic, particularly involving more senior employees.¹⁹⁰ The experience of whistleblowers is generally corroborated by evidence from managers and case handlers.¹⁹¹ Yet outside normal misconduct investigation channels, Australia's state whistleblowing regimes do not offer even an intermediate administrative path to remedies for retaliation or mismanagement, like those offered under some US regimes (successful or otherwise). The closest

¹⁸⁷ See *Toni Hoffman Settles Claim for Compensation*, MAURICE BLACKBURN LAWYERS (Mar. 8, 2012), <http://www.mauriceblackburn.com.au/news/press-releases—announcements/2012/toni-hoffman-settles-claim-for-compensation.aspx>. The original claim was for AUD\$400,000 for medical expenses, loss of income and superannuation and stress arising mostly from the wrongdoing and investigation processes, including lack of support, as well as loss of future earnings due to the general impact on her career. See *Dr Jayant Patel Nurse Toni Hoffman and Queensland Health Settle Claim*, COURIERMAIL.COM.AU (Mar. 8, 2012), <http://www.couriermail.com.au/news/queensland/patel-nurse-queensland-health-settle-claim/story-e6freoof-1226294131009>. Alleged direct reprisals or retaliation were limited to vilification and ostracism by local managers, since dismissed or disciplined. Ms. Hoffman remains employed by Queensland Health. See *Hoffman v Queensland* (Unreported, Dist. Ct., Dec. 12, 2011) (Austl.). For an overall account of the “Dr. Death” case involving serial criminal medical negligence resulting in death, see HEDLEY THOMAS, *SICK TO DEATH* (2007).

¹⁸⁸ See Brown et al., *supra* note 179, at 109–60, 203–32, 261–88.

¹⁸⁹ See Smith & Brown, *supra* note 184, at 127–29, 134.

¹⁹⁰ See A.J. Brown & Jane Olsen, *Whistleblower Mistreatment: Identifying the Risks*, in *WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR: ENHANCING THE THEORY AND PRACTICE OF INTERNAL WITNESS MANAGEMENT IN PUBLIC SECTOR ORGANISATIONS* (2008).

¹⁹¹ See Smith & Brown, *supra* note 184, at 127–29, 134.

equivalents are the anti-discrimination remedies noted earlier, but again, there is little sign that these are proving accessible or successful. Statistics on the tiny number of cases handled recently by the most established anti-discrimination regime—South Australia—suggest otherwise.¹⁹²

Until recently, the stagnation of Australian anti-retaliation provisions, notwithstanding recent and current law reform efforts in the public sector, has been reinforced by the state of policy at the federal level. In contrast to state efforts, no federal public-sector whistleblowing legislation exists, despite recommendations for such legislation since the early 1990s.¹⁹³ A new Public Service Act 1999 (Cth) included a provision prohibiting victimization against many federal servants if they reported misconduct, but without any separate enforceable remedies. More recently, political shifts and a fresh parliamentary inquiry¹⁹⁴ led to two federal public interest disclosure bills covering public sector wrongdoing, including the first ever

¹⁹² EQUAL OPPORTUNITY COMM'N, ANNUAL REPORT 2007-08 17 (2008), *available at* http://www.eoc.sa.gov.au/sites/eoc.sa.gov.au/files/attachments/annual_report_2008.pdf (finding one complaint lodged); *see also* EQUAL OPPORTUNITY COMM'N, ANNUAL REPORT 2008-09 18 (2009), *available at* http://www.eoc.sa.gov.au/sites/eoc.sa.gov.au/files/attachments/annual_report_2009.pdf (finding eight complaints but none found to be within the Act); EQUAL OPPORTUNITY COMM'N, ANNUAL REPORT 2009-10 39–41 (2010), *available at* http://www.eoc.sa.gov.au/sites/eoc.sa.gov.au/files/attachments/2009-10_annual_report_print.pdf (finding eight complaints with one found to be within to be within the Act); EQUAL OPPORTUNITY COMM'N, ANNUAL REPORT 2010-11 21 (2011), *available at* http://www.eoc.sa.gov.au/sites/eoc.sa.gov.au/files/attachments/2010-11_annual_report.pdf (finding that five complaints, three within the Act, one conciliated, two may proceed to tribunal hearing); *cf.* Smith & Brown, *supra* note 184 (stating statistical evidence that the number of state government employees deserving of reportable remedies for mistreatment in public interest reporting cases are more likely to number in the hundreds (perhaps 500–700) per year, based on data from other jurisdictions). For concerns about the adequacy of the provisions from the start, see SENATE SELECT COMM., *supra* note 7, at ¶ 4.48-4.51.

¹⁹³ *See, e.g.*, SENATE SELECT COMM., *supra* note 7.

¹⁹⁴ *See* HOUSE OF REPRESENTATIVES STANDING COMM. ON LEGAL & CONSTITUTIONAL AFFAIRS, WHISTLEBLOWER PROTECTION: A COMPREHENSIVE SCHEME FOR THE COMMONWEALTH PUBLIC SECTOR (1999) (Cth) (Austl.), *available at* <http://fraud.govspace.gov.au/files/2010/12/Whistleblower-protection-House-of-Representatives.pdf> [hereinafter STANDING COMM.].

government bill.¹⁹⁵ These are before the federal parliament at the time of writing. The issue of effective remedies proved one of the most problematic. The parliamentary committee's primary suggestion—that an enforceable compensation mechanism for federal employees be embedded in the new federal Fair Work Act then under design—was initially rejected by the federal government without clarity as to what alternative anti-retaliation mechanism would be available.¹⁹⁶

Similarly, anti-retaliation measures in the only national private sector whistleblowing legislation, Part 9.4AAA of the Corporations Act 2001 (Cth), are severely limited. Despite recommendations dating from 1994, it took until 2004 for these measures to be introduced as part of corporate transparency reforms that paralleled SOX.¹⁹⁷ Far from being comprehensive, however, the provisions relate only to reported breaches of corporations legislation and no other regulation.¹⁹⁸ Additionally, they provide only ill-defined rights of reinstatement in the event of dismissal or compensation in the event that a criminal offence of victimization is proven.¹⁹⁹ These provisions provide nothing in between, nor any mechanisms for administrative relief or independent investigation of

¹⁹⁵ The first was a private member's bill introduced by Independent MP Andrew Wilkie in October 2012. See *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth) (Austl.); *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012* (Cth) (Austl.). The government bill was introduced in March 2013. See *Public Interest Disclosure Bill 2013* (Cth) (Austl.).

¹⁹⁶ See *id.* at 104; cf. *Government Response: Whistleblower Protection: A Comprehensive Scheme for the Commonwealth Public Sector*, (2010) (Tabled by Sen. J Ludwig, Special Minister of State (Cth) (Austl.)), available at <http://www.aph.gov.au/binaries/house/committee/laca/whistleblowing/report/governmentresponse.pdf> [hereinafter *Comprehensive Scheme*] (“The Government will further consider options to protect persons who make disclosures under the scheme from detrimental treatment in the workplace which occurs as a result of making the disclosure.”).

¹⁹⁷ See *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) (Austl.).

¹⁹⁸ See *Corporations Act 2001* (Cth) ss 1317AB, AC, AD (Austl.).

¹⁹⁹ *Id.*

reprisal claims.²⁰⁰ In October 2009, a review of the provisions was initiated by the federal treasury and attorney general, but the review did not identify these problems as priorities for reform and it was never formally concluded.²⁰¹ No known actions (criminal or civil) have been brought under the provisions in the eight years of their existence.

The almost total failure of the anti-retaliation model, as an element of Australian whistleblowing law, raises many questions. The provisions (where they exist) are highly rudimentary, even by comparison to the US provisions that originally inspired them. Moreover, as a general rule they have been conceived and enacted without reference to the most relevant avenues for ensuring organizational justice through Australia's workplace relations or industrial relations system. This system is highly developed by comparison to the United States, and instead bears closer resemblance to that of the United Kingdom where it was taken up as the natural home for a patently more successful system of whistleblower compensation in 1998.²⁰²

It is only recently that restructuring of Australia's workplace relations system under the Fair Work Act 2009 (Cth) and new uniform national health and safety laws has made the prospect of more seamless whistleblower protection laws more possible.²⁰³ Part of the explanation for the lack of success also lies in a drift of policymaking in the 1990s away

²⁰⁰ *Id.*

²⁰¹ See ATT'Y GEN. DEP'T, IMPROVING PROTECTIONS FOR CORPORATE WHISTLEBLOWERS: OPTIONS PAPER (2009) (Cth) (Austl.), available at http://archive.treasury.gov.au/documents/1620/RTF/whistleblowers_options_paper.rtf.

²⁰² See, e.g., Hon. Jeremy McMullen, *Ten Years of Employment Protection for Whistleblowers in the UK: A View from the Employment Appeal Tribunal*, in A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE: WHAT CAN WE LEARN FROM EXISTING WHISTLEBLOWING LEGISLATION AND RESEARCH? 7 (2010).

²⁰³ See *Workplace Relations (Work Choices) Act 2005* (Cth) (Austl.); *Fair Work Act 2009* (Cth) (Austl.); *Work Health and Safety Act 2011* (Cth) (Austl.); *New South Wales v Commonwealth* [2006] 231 ALR 1 (Austl.). See generally SAFE WORK AUSTRALIA, <http://www.safeworkaustralia.gov.au> (last visited Oct. 22, 2012) (listings of model uniform workplace health and safety laws).

from employment-based approaches to protection. This drift was due to arguments that whistleblowing should be given “as broad a definition as possible to include disclosures by people from within or outside the organization”²⁰⁴—not just those disclosures protectable through workplace-based relationships. Because these relationships lie at the heart of whistleblowing, however, the result of this broader approach has instead been that there is no effective protection for anyone. At the time of writing, the new federal public sector bills both offer a new direction, more consistent with the United Kingdom regime, by returning to the earlier recommendation and by proposing to connect whistleblower compensation rights to the remedial avenues available under the Fair Work Act 2009.²⁰⁵ Whether this will be achieved, and if so, how well it will work, will only be known with time.

B. Structural/Institutional

While the anti-retaliation model has a poor track record, there is evidence of greater success from the other focuses in Australian whistleblowing laws. More than in US law, legislation at the Australian state level (and proposed for the federal public sector) has concentrated on structural and institutional regimes aimed at preventing and minimizing retaliation by ensuring that whistleblowers have effective means of disclosure, are responded to, and, theoretically, are supported and protected. The approach had only thin statutory effects at the outset. For example, the first South Australian legislation provided no such detail regarding internal disclosure procedures, investigative responsibilities, or whistleblower support.²⁰⁶ A future

²⁰⁴ See SENATE SELECT COMM., *supra* note 7, ¶ 2.12.

²⁰⁵ See *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth) s 41 (Austl.); *Public Interest Disclosure (Whistleblower Protection) (Consequential Amendments) Bill 2012* (Cth) Schedule Items 1-4 (Austl.); *Public Interest Disclosure Bill 2013* (Cth) s 18 (Austl.).

²⁰⁶ See *Whistleblowers Protection Act 1993* (SA) (Austl.).

commonwealth ombudsman, John McMillan, noted that the Act imposed “no obligation upon agencies to define a whistleblowing procedure.”²⁰⁷ However, this criticism reinforces the importance being placed on this structural approach, even at that time.

By contrast, the major review leading to the Queensland legislation gave a high priority to the structural approach,²⁰⁸ and the law itself required that any public service manager, internal auditor, or investigative authority, in addition to designated officers, must be ready to receive and recognize whistleblowing disclosures.²⁰⁹ Federal parliamentary committees reinforced the approach.²¹⁰ Recently, the structural approach has continued to expand. For example, the Queensland legislation always provided that every public agency “must establish reasonable procedures to protect its officers from reprisals that are, or may be, taken against them by the entity or other officers of the entity.”²¹¹ The legislation was reformed in 2010 to follow the precedent set by other states (principally Victoria and Western Australia), specifying in detail the obligations on organizations to recognize and manage disclosures, and to require a lead oversight agency to specify guidelines with which organizations’ own internal disclosure procedures must then comply.²¹²

Australian Capital Territory legislation from 2012 sets out the latest, current best practice framework.²¹³ The approach is also taken up in the

²⁰⁷ SENATE SELECT COMM., *supra* note 7, ¶ 4.46.

²⁰⁸ QUEENSL. ELECTORAL AND ADMIN. REVIEW COMM’N, REPORT ON PROTECTION OF WHISTLEBLOWERS A11-12 (1991).

²⁰⁹ See *Whistleblowers Protection Act 1994* (Qld) ss 26-27 (Austl.) (current version at *Public Interest Disclosure Act 2010* (Qld) s 17 (Austl.)); see also *Public Disclosure Act 2012* (ACT) s 15 (Austl.).

²¹⁰ See SENATE SELECT COMM., *supra* note 7, ¶ 9.31.

²¹¹ *Whistleblowers Protection Act 1994* (Qld) s 44 (Austl.) (current version at *Public Interest Disclosure Act 2010* (Qld) ss 28, 49, 60 (Austl.)).

²¹² See *id.*

²¹³ See *Public Interest Disclosure Act 2012* (ACT) ss 28, 33 (Austl.).

current federal public sector bills, mentioned earlier.²¹⁴ Specific innovations include statutory requirements for retaliation risks to be assessed and managed from the outset of internal disclosure receipt.²¹⁵ The approach contrasts with US approaches because it focuses strongly on internal whistleblowing procedures and management obligations, including preventative support, as opposed to the creation of whistleblowing channels to independent agencies. More recently, the approach has also been bolstered by stronger systems of external oversight, usually by the relevant government ombudsman.²¹⁶ However, internal disclosure procedures remain at its core.

Large gaps in the take-up of the structural approach remain. For example, it is non-existent in the private sector. The transparency reforms introduced into corporate law in 2004 did not even go as far as SOX; yet, no equivalent of Dodd-Frank has yet been introduced. Instead, a voluntary Australian standard may be used.²¹⁷ Further, the empirical research shows that while public-sector organizations can be quite good at developing and implementing procedures to encourage whistleblowing and act on the disclosures, they are far less proficient in developing and implementing procedures to protect and support their staff.²¹⁸ Serious questions remain

²¹⁴ See SENATE SELECT COMM., *supra* note 7.

²¹⁵ See *Public Interest Disclosure Act 2012* (ACT) s 33(2) (Austl.); *Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth) ss 34(b), 35(2)(e) and (f) (Austl.); *Public Interest Disclosure Bill 2013* (Cth) s 59(1) (Austl.).

²¹⁶ See *Public Interest Disclosure Act 1994* (NSW) s 20(A)(3) (Austl.), for a discussion on how the Act gives the NSW Ombudsman a powerful oversight and lead agency role. See also *Public Interest Disclosure Act 2010* (Qld) (Austl.) (discussing where the new oversight role was initially allocated to the Public Service Commission, but has recently been transferred to the Ombudsman); *Public Service and Other Legislation Amendment Act 2012* (Qld) (Austl.).

²¹⁷ See, e.g., AUSTRALIAN STANDARD, WHISTLEBLOWER PROTECTION PROGRAMS FOR ENTITIES (2003), available at <http://fairwhistleblower.ca/files/fair/docs/Australian%20Standard%20AS%208004-2003.pdf>.

²¹⁸ See A.J. Brown & Jane Olsen, *Internal Witness Support: The Unmet Challenge*, in WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR: ENHANCING THE THEORY AND

about the adequacy of legislative requirements governing the role of oversight agencies and their preparedness to assist whistleblowers when organizational trust breaks down.²¹⁹ Nevertheless, there is clear evidence that agencies that take their responsibilities to whistleblowers seriously—and many do—achieve better outcomes in the management of whistleblowing than agencies that do not.²²⁰ Thus, in Australia, more than in the United States, there are some signs of success from the implementation of structural or institutional approaches, at least in the public sector, and these approaches have potential for greater success in the future.

C. Media/Public Whistleblowing

In addition to efforts to strengthen the structural approaches, the most dramatic area of recent Australian reform, contrasting even more strongly with US reform, is the growing statutory recognition of the role of whistleblowing to the media. Australia has no equivalent to the First Amendment and no broad constitutional protection of free speech relevant to public whistleblowing, whether by public servants or others. Since 1994, the High Court has recognized a more limited, implied freedom of political communication.²²¹ This was used in one instance to overturn a blanket

PRACTICE OF INTERNAL WITNESS MANAGEMENT IN PUBLIC SECTOR ORGANISATIONS 203 (2008); Peter Roberts, *Evaluating Agency Responses: Comprehensiveness and the Impact of Whistleblowing Procedures*, in WHISTLEBLOWING IN THE AUSTRALIAN PUBLIC SECTOR: ENHANCING THE THEORY AND PRACTICE OF INTERNAL WITNESS MANAGEMENT IN PUBLIC SECTOR ORGANISATIONS 233 (2008).

²¹⁹ See Lindy Annakin, *In the Public Interest or Out of Desperation? The Experience of Australian Whistleblowers Reporting to Accountability Agencies* (Mar. 2011) (Unpublished Ph.D. thesis, University of Sydney), available at http://ses.library.usyd.edu.au/bitstream/2123/7904/1/l_annakin_2011_thesis.pdf.

²²⁰ See Roberts, *supra* note 218; PETER ROBERTS, A.J. BROWN & JANE OLSEN, WHISTLING WHILE THEY WORK: A GOOD PRACTICE GUIDE FOR MANAGING INTERNAL REPORTING OF WRONGDOING IN PUBLIC SECTOR ORGANISATIONS (2011).

²²¹ See *Bennett v President, Human Rights and Equal Opportunity Comm'n* [2003] 204 ALR 119 (Austl.) (questioning the validity of Public Service Regulation 7(13), prohibiting a federal employee from disclosing “directly or indirectly, to any person any

regulation banning federal public servants from releasing any official information whatsoever without permission.²²²

Instead, as traditionally was the case under English law, the principal protection for public revelation by whistleblowers lay in a common law public interest defense to actions for a criminal or civil breach of confidentiality.²²³ By 1994, however, the Senate Select Committee on Public Interest Whistleblowing noted that the scope and relevance of this defense in modern circumstances was extremely unclear.²²⁴ Since then, it has been increasingly accepted that statutory protection should include disclosure to the media where such disclosure is “excusable in all the circumstances,” taking into account “the seriousness of the allegations, reasonable belief in their accuracy, and reasonable belief that to make a disclosure along other channels might be futile or result in the whistleblower being victimised.”²²⁵

At first, only one Australian jurisdiction moved to operationalize this principle—and inadequately. The Protected Disclosures Act 1994 (NSW) recognized public whistleblowing by including a “journalist” among the persons to whom a disclosure could be made, as a last resort, provided the disclosure was “substantially true.”²²⁶ This nevertheless made NSW the first jurisdiction, possibly worldwide, to legislate what is now known as a three-

information about public business or anything of which the employee has official knowledge.”); see also *Crimes Act 1914* (Cth) s 70(2) (Austl.). See generally AUSTRALIAN LAW REFORM COMM’N, *SECRECY LAWS AND OPEN GOVERNMENT IN AUSTRALIA: REPORT 112* (2009), available at <http://www.alrc.gov.au/sites/default/files/pdfs/publications/ALRC112.pdf>.

²²² *Bennett*, 204 ALR 119 (Austl.).

²²³ See *Gartside v Outram* (1856) 26 L.J. 113 (Austl.); *Allied Mills Ltd v Trade Practices Comm’n* (1980) 55 FLR 125 (Austl.); *Attn’y Gen. (UK) v Heinemann Publishers* (1987) 75 ALR 461 (Austl.).

²²⁴ See SENATE SELECT COMM., *supra* note 7, at ¶ 8.27.

²²⁵ *Id.* ¶ 9.130.

²²⁶ See *Protection Disclosures Act 1994* (NSW) s 19 (Austl.) (current version at *Public Interest Disclosures Act 1994* (NSW) s 19 (Austl.)) for a definition of “Journalist.”

tiered model of internal, regulatory, and public whistleblowing,²²⁷ more widely recognizable since the enactment of the Public Interest Disclosure Act 1998 (UK) four years later.²²⁸

By contrast, other early legislation took different, confusing approaches. South Australia's Whistleblowers Protection Act 1993 did not necessarily disturb the common law position, but also did not expressly incorporate public disclosure. Its architect described the provisions as intended to "deter whistleblowing allegations being sensationalised inappropriately through the media," due to "the justifiable need for a politically neutral and impartial public service to keep some matters confidential while serving the government of the day."²²⁹ In Queensland, the Whistleblower Protection Act 1994 positively neutralized any remnant common law principle by excluding the media from the "appropriate" persons to whom disclosures could be made.²³⁰ The logic of this—that good internal and regulatory whistleblowing regimes should prevent any need for whistleblowers to ever go public—was repeated as late as 2006 in official advice that "untested allegations" aired in the media could "unjustly bring the person against whom the allegations are made into disrepute[,] . . . prejudice the conduct of the investigation[.]" and "unnecessarily disrupt the workplace."²³¹

Recently, significant reform has re-established disclosure to the media as

²²⁷ See Wim Vandekerckhove, *European Whistleblower Protection: Tiers or Tears?*, in *A GLOBAL APPROACH TO PUBLIC INTEREST DISCLOSURE: WHAT CAN WE LEARN FROM EXISTING WHISTLEBLOWING LEGISLATION AND RESEARCH?* 16-17 (2008) (describing the three-tiered model).

²²⁸ See Employment Rights Act, 1996, §§ 43G, 43H (U.K.) (current version at Public Interest Disclosure Act, 1998, (U.K.)).

²²⁹ M.R. Goode, *A Guide to the South Australian Whistleblowers Protection Act 1993*, AUSTRALIAN INSTITUTE OF ADMINISTRATIVE LAW NEWSLETTER NO. 13, 1993, at 14; see SENATE SELECT COMM., *supra* note 7, at ¶ 4.43.

²³⁰ See *Whistleblower Protection Act 1994* (Qld) s 25 (Austl.).

²³¹ OFFICE OF THE PUB. SERV. COMM'R, REVIEW OF THE WHISTLEBLOWERS PROTECTION ACT 1994 (Qld) 18 (2006), available at <http://www.psc.qld.gov.au/library/document/catalogue/equity-ethics-grievance/review-whistleblowers-protection-act-report.pdf>.

a firm part of best practice whistleblowing laws, at least for the public sector. In 2007, the incoming federal government committed to the reversal of a draconian approach to the treatment of whistleblowers and journalists.²³² It matched the NSW approach by protecting any whistleblower who “has gone through the available official channels, but has not had success within a reasonable timeframe and . . . where the whistleblower is clearly vindicated by their disclosure.”²³³ Right to Know, a coalition of media organizations commissioned an audit of government secrecy that recommended that legislation should at least protect “whistleblowers who disclose to the media after a reasonable attempt to have the matter dealt with internally or where such a course was impractical.”²³⁴ The results of the empirical research, released in September 2008, reinforced this position.²³⁵

Since that time, four jurisdictions have moved to recognize public or media whistleblowing as a formal part of the regime—Queensland, Western Australia, the Australian Capital Territory, and, in principle, the federal government. In 2010, Queensland’s new Public Interest Disclosure Act adapted and liberalized the NSW provision from sixteen years earlier.²³⁶ The NSW provision now provides that whistleblowers will retain legal

²³² See A.J. Brown, *Privacy and The Public Interest Disclosures: When is it Reasonable to Protect ‘Whistleblowing’ to The Media?*, PRIVACY L. BULL., Aug. 2007, at 19, 19–28, available at http://www.griffith.edu.au/_data/assets/pdf_file/0020/151274/brown-aug2007.pdf, for an overview of these cases.

²³³ Kevin Rudd & Joe Ludwig, *Government Information: Restoring Trust and Integrity*, AUSTRALIAN LABOR 1, 10 (2007), available at http://parlinfo.aph.gov.au/parlInfo/download/library/partypol/EFRO6/upload_binary/efro62.pdf;fileType=application%2Fpdf#search=%22ALP%20library%20d-g%22.

²³⁴ Press Release, Irene Moss, Chair, Australia’s Right to Know Report on the Independent Audit into the State of Free Speech in Australia (Oct. 31, 2007) (on file with author).

²³⁵ See Brown et al., *supra* note 179.

²³⁶ See *Public Interest Disclosure Act 2010* (Qld) s 20(4) (Austl.) (defining “Journalist” to mean “a person engaged in the occupation of writing or editing material intended for publication in the print or electronic news media”).

protection if they take a public interest disclosure to a journalist after they have first taken it to an official authority and that authority has either “decided not to investigate or deal with the disclosure,” not recommended any action, or failed to notify the whistleblower whether the disclosure was to be investigated.²³⁷ While only providing for media disclosures after official channels have been tried, this provision was arguably the most liberal of its kind in the world—given parliamentary confirmation that it included facility for officials to go public, more or less immediately, in the face of a simple “deemed refusal” to respond to an internal disclosure.²³⁸

A similar reform has since been introduced to Western Australia’s Public Interest Disclosure Act 2003.²³⁹ Most significantly, an even more thoughtful approach was introduced in reforms to the Australian Capital Territory’s legislation. Under the Public Interest Disclosure Act 2012 (ACT), a whistleblower may make a public interest disclosure to a journalist if an official authority has committed the following: “refused or failed to investigate” the disclosure; given no response or progress report on a disclosure in three months; or investigated but proposed no action in circumstances where there remains “clear evidence” of the disclosed conduct.²⁴⁰ In addition to striking this new, arguably more sustainable balance as to when whistleblowers should go public, the same provision was the first in Australia to permit a whistleblower to go public without first making an internal or regulatory disclosure, if going to the authorities

²³⁷ *Id.*

²³⁸ See Qld, Parliamentary Debates, House of Representatives, 16 Sept. 2010, 3413 (Austl.), available at http://www.parliament.qld.gov.au/documents/hansard/2010/2010_09_16_WEEKLY.pdf. See generally A.J. Brown, *Flying Foxes, WikiLeaks and Freedom of Speech: Statutory Recognition of Public Whistleblowing in Australia*, in WHISTLEBLOWING AND DEMOCRATIC VALUES 86 (2011) [hereinafter Brown, *Flying Foxes*].

²³⁹ *Public Interest Disclosure Act 2003* (WA), s 7A (Austl.), as inserted by *Evidence and Public Interest Disclosure Legislation Amendment Act 2012* (WA) (Austl.).

²⁴⁰ *Public Interest Disclosure Act 2012* (Aust. Cap. Terr.) s 27 (Austl.).

would involve a “significant risk of detrimental action” and be “unreasonable in all the circumstances.”²⁴¹ In another refinement, the whistleblower only retains protection if he or she only discloses to journalists what is “reasonably necessary” to achieve action.²⁴² This is in line with objectives of whistleblower protection, and with the needs of whistleblowers, while precluding misuse of the legislation to agitate collateral causes or release information other than that relating to the unresolved elements of the disclosure.

The fourth Australian jurisdiction in which policy change has occurred is the federal one. To date, the only actual action taken by the federal government has been to enact a journalism “shield law” that strengthens journalists’ ability to protect the identity of confidential sources—including whistleblowers—by affording a legal privilege to refuse to reveal the identity of sources in court.²⁴³ However, in line with the policy shift towards protection of disclosure to the media, the key House of Representatives inquiry in 2009 recommended that this form of disclosure must be incorporated in the proposed federal whistleblowing regime: “[E]xperience has shown that internal processes can sometimes fail[,] . . . that the disclosure framework within the public sector may not adequately handle an

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Evidence Amendment (Journalist’ Privilege) Act 2011* (Cth) (Austl.). For background on the reform of the Evidence Act, see Matthew Tracey, *Journalist Shield Laws*, COMMC’N LAW BULLETIN, Vol 29.2, 2010, at 12, available at <http://www.camla.org.au/clb/CLB%20-%20Volume%2029,%20Issue%202.pdf>; Media Entm’t and Arts Alliance, *Official Spin: Censorship and Control of The Australian Press*, AUSTRALIAN POLICY ONLINE, 2007, at 8–10, available at <http://apo.org.au/research/official-spin-censorship-and-control-australian-press>; Chris Merritt, *Whistleblowers Shun New Laws Planned by Canberra*, AUSTRALIAN, Apr. 17, 2009, <http://www.theaustralian.com.au/business/news/whistleblowers-shun-new-laws-planned-by-canberra/story-e6frg906-1225699707935>; Chris Merritt, *Coalition Promise to Introduce Shield Laws Prompts Labor to Re-examine its Position*, AUSTRALIAN, Aug. 20, 2010, <http://www.theaustralian.com.au/business/legal-affairs/coalition-promise-to-introduce-shield-laws-prompts-labor-to-re-examine-its-position/story-e6frg97x-1225907500898>.

issue and that a subsequent disclosure to the media could serve the public interest”; any other approach would simply “lack credibility.”²⁴⁴ While the committee’s recommendation was limited,²⁴⁵ the federal government’s response in March 2010 was more liberal, promising that the legislation would protect public whistleblowing as a first resort where there is a “substantial and imminent danger or harm to life or public health and safety, and there are exceptional circumstances” excusing the lack of a prior internal or regulatory disclosure. It also stated that whistleblowing to the media would be protected as a last resort wherever the disclosure relates to a “serious matter” and the “public interest in disclosure outweighs countervailing public interest factors (e.g., protection of international relations, national security, cabinet deliberations).”²⁴⁶ This last qualification may yet prove to nullify the value of the measure, especially since the government also announced that public whistleblowing would not be protected where it involved “intelligence-related information.”²⁴⁷ Controversy, hence, remains, as the current federal bills take divergent approaches to how this principle should be implemented and what circumstances it will cover.²⁴⁸ Nevertheless, the basic principle is clear—public or media whistleblowing will be built into the federal scheme, if or when enacted.

No equivalent movement to protect public whistleblowing is occurring in the Australian private sector. This is notwithstanding the fact that, arguably,

²⁴⁴ STANDING COMM., *supra* note 194, at 162–64.

²⁴⁵ *Id.* at 164–65 (showing that this was similar to the position recommended but not enacted in Queensland in 1993, and to some more recent overseas legislation, such as that in Manitoba, Canada: Public Interest Disclosure (Whistleblower Protection) Act 2006, C.C.S.M. c. P217 (Manitoba), s 14(1) (Can.)). *Cf.* Canada’s Federal Public Servants Disclosure Protection Act 2005, S.C. 2005, c. 46, s 16(1) (Can.).

²⁴⁶ *Comprehensive Scheme*, *supra* note 195.

²⁴⁷ *Id.*

²⁴⁸ *See Public Interest Disclosure (Whistleblower Protection) Bill 2012* (Cth) ss 31–33 (Austl.); *Public Interest Disclosure Bill 2013* (Cth) s 26(1), Table, Items 2 and 3 (Austl.).

some protection of whistleblowing to the media remains just as important for private-sector accountability as for the public sector in the age of corporate social responsibility, environmental and consumer protection, and market transparency.

In any event, the key logic of this reform now extends beyond either simple clarification of a confused common law position, or acceptance of the political reality that public whistleblowing is going to occur and be valued. In addition, statutory recognition of the media as a third tier of the regime now represents a deliberate “driver” for change, providing official sanction to the risk of the “front page test” if public institutions fail to improve their integrity systems, or support for their employees. It institutionalizes the principle stated by a veteran political journalist, Laurie Oakes, that “leaks are the difference between a democracy and an authoritarian society. . . . [T]he risk of being found out via leaks makes those in authority think twice about telling porkies [lies], performing their duties sloppily, behaving badly, or rorting [abusing] the system.”²⁴⁹ As such, the focus on public whistleblowing works in conjunction with other models, being intended partly to promote organizational justice and combat retaliation and partly to extend the structural or institutional model to include “unofficial” channels.

D. Bounty/Reward Models

While the Australian track record in respect to public or media whistleblower protection contrasts with that of the United States, an even larger contrast exists regarding reward or bounty approaches. Despite the

²⁴⁹ Laurie Oakes, *Pillars of Democracy Depend on Leaks*, THE BULLETIN / NAT'L NINE NEWS (Aug. 24, 2005), <http://news.ninemsn.com.au>; see also LAURIE OAKES, ON THE RECORD: POLITICS, POLITICIANS, AND POWER 295 (2010) (leaking is best defined to mean the unauthorized disclosure of inside information). Not all leaking is necessarily whistleblowing, any more than all whistleblowing necessarily involves leaking, but when it comes to public whistleblowing, the effect is the same. *Id.*

common precepts of whistleblower protection in both countries, in Australia this approach has been almost entirely officially eschewed. The primary reasons appear to be cultural; Australians have a different response to the issue of propriety.

In 1989, one of the first parliamentary inquiries to consider copying some of the US whistleblower provisions was assembled in response to exposure of insider trading in private sector regimes.²⁵⁰ The inquiry concluded that any system of rewards or bounties was “incompatible with current attitudes in relation to the credibility of evidence. . . . [a]nd with accepted principles and practice within Australian society.”²⁵¹

In 1994, the Senate Select Committee also recommended firmly *against* establishment of any system of rewards for whistleblowing, even in relation to fraud.²⁵² According to the committee, whistleblowers “are not motivated by the thought of reward, rather they are generally motivated by public interest,” making rewards inapt.²⁵³ A “general agreement” existed among those who addressed the issue that rewards or bounties should not be encouraged.²⁵⁴ Other inquiries also concluded that it was simply “a citizen’s duty to report fraud, theft etc.,” “part of the responsibilities of public servants to do the same,” and that there was “no proof” that reward systems promote whistleblowing.²⁵⁵ Even Dr. William de Maria, a prominent Australian whistleblowing researcher, criticized US-style “bounty hunting” as “an incorrect and dangerous inducement on which to expect people of goodwill to come forward,” preferring instead that they “come forward on the old fashioned basis of just being ethically disturbed with what they

²⁵⁰ See HOUSE OF REPRESENTATIVES STANDING COMM. ON LEGAL & CONSTITUTIONAL AFFAIRS, FAIR SHARES FOR ALL: INSIDER TRADING IN AUSTRALIA 45 (1989), at ¶ 5.50.

²⁵¹ *Id.* ¶ 5.50.

²⁵² See SENATE SELECT COMM., *supra* note 7 at ¶ 11.20.

²⁵³ *Id.* ¶ 2.20.

²⁵⁴ *Id.* ¶ 5.44.

²⁵⁵ *Id.* ¶ 11.18.

see.”²⁵⁶

Assumptions biased against the use of rewards or bounties appear to be softening. A 2009 House of Representatives inquiry received much stronger evidence and arguments that qui tam provisions could play a useful role in whistleblowing law reform, and accepted that provisions such as those contained in the US FCA had “an important role” at least in combating fraud.²⁵⁷ The committee did not reach a conclusion on the issue of rewards, citing the fact that its main focus lay on “public interest disclosures within the Australian Government public sector concerning the conduct of public officials.”²⁵⁸ Nevertheless, while the political environment is increasingly fertile for a shift towards a reward system, there remains no specific movement towards the take-up of such provisions in respect to either the public or private sectors.

IV. ANALYSIS: FOUR OPTIONS, MODELS, OR STRANDS?

A. Contrasting Histories

What do these contrasting legal histories tell us about the preferred direction of whistleblower law reform? While the United States and Australia are both post-colonial federations with often-similar constitutional and legal structures, there are significant differences between the countries, particularly in terms of population and economic size. It is also clear that a federal public-sector whistleblowing regime has been much slower to materialize in any form in Australia than in the United States, and efforts towards the development of private-sector whistleblowing regimes in Australia, even those based on the original anti-retaliation model, have been even slower to ripen. A full account of the reasons for all the relevant

²⁵⁶ See *id.* ¶ 11.15.

²⁵⁷ STANDING COMM., *supra* note 194, at ¶ 5.51.

²⁵⁸ *Id.*

differences is beyond the scope of this article.

Nevertheless, the aggregation of laws in both countries shows four distinct legislative models or options at work: anti-retaliation or organizational justice; reward or bounty; institutional or structural; and public or media. Clear identification of these different strategies and options is significant because until recently, there has been little by way of theoretical overview to explain these apparently disparate approaches. Indeed, in the absence of an integrative picture, they have tended to unfold as competing models. In both countries, jurisdictions appear to have lurched for better solutions in a relatively blind fashion, looking for something more effective or persuasive, without necessarily evaluating why the previous effort did not work, or whether the strategies might be more effectively brought together.

To date, comparative legal analysis has only been of limited assistance. Analysis has looked across different jurisdictions in order to produce lists of principles that unite, or that could be used as a guide to the design of, whistleblowing legislation in different places.²⁵⁹ Such principles help highlight that the comprehensive adoption of *all* potentially desirable elements of a whistleblowing law, in any country, occurs rarely if ever. However, these principles may not necessarily assist the process of law reform because of the tendency of government to pick and choose those that

²⁵⁹ See, e.g., Paul Latimer, *Whistleblowing in the Financial Services Sector*, 21 UNIV. OF TASMANIA L. REV. 39 (2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2088807; David Lewis, *Employment Protection For Whistleblowers: On What Principles Should Australian Legislation Be Based?*, 9 AUSTRALIAN J. OF LAB. L. 1 (1996); Brown et al., *supra* note 179, at 271–77; David Banisar, *Whistleblowing: International Standards and Developments*, in CORRUPTION AND TRANSPARENCY: DEBATING THE FRONTIERS BETWEEN STATE, MARKET AND SOCIETY (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1753180; ANJA OSTERHAUS & CRAIG FAGAN, TRANSPARENCY INT'L, ALTERNATIVE TO SILENCE: WHISTLEBLOWER PROTECTION IN 10 EUROPEAN COUNTRIES (2009), available at http://www.transparency.de/fileadmin/pdfs/Themen/Hinweisgebersysteme/TI_Alternative%20to%20Silence_2009.pdf.

are easiest to adopt, without a clear understanding of their relative importance or the possibility that, in fact, *all* the principles are vital.

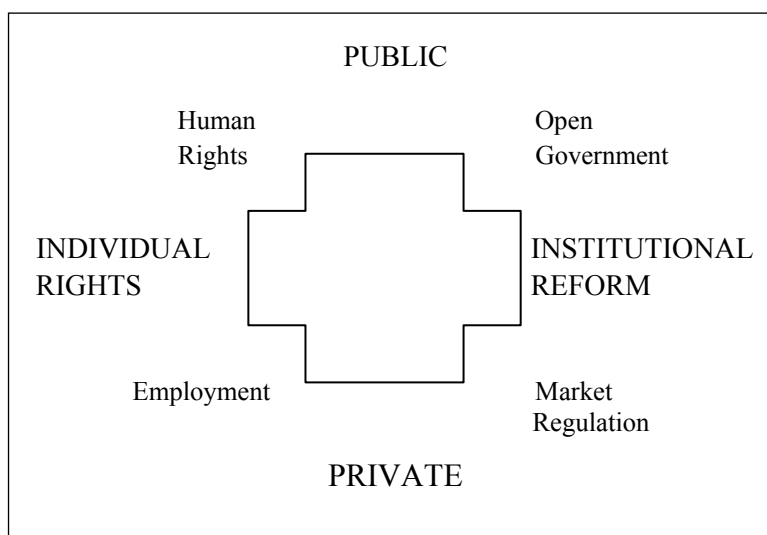
As the histories attest, whistleblowing law reform is made especially complex by the different fields of policy, regulation, and law that are spanned by the legislation to date. These fields include the following: employment law (public and private), in terms of both basic employment rights and specific disciplinary and misconduct regimes; workplace health and safety law; law pertaining to administrative justice; institutional accountability and open government (or, in the private sector, regulation relating to corporate transparency and social responsibility); media law; and constitutional law. With policymaking and regulation divided into very distinct silos in both societies, an integrated approach is plainly a challenge.

However, the “second round” divergence in the US and Australian law reforms helps identify both the need for, and possible nature of, such an integrated approach. The four models, or approaches, revealed to be at work in both places, already have a range of relationships and, it would seem, could benefit from more connection. The models may also provide evidence to support recent attempts by analysts and researchers to find an overall framework for mapping the different legal dimensions involved in whistleblowing laws. For example, the leading analysis, by Professor Robert Vaughn of the Washington College of Law, identifies four different “perspectives” at work in the field of whistleblowing law, which influence the character of legal standards and the scope of protections in any case: (1) an employment perspective; (2) an open-government perspective; (3) a market or regulatory perspective; and (4) a human rights perspective.²⁶⁰ According to Vaughn, these perspectives do not simply label aspects of whistleblower laws, but emphasize differing justifications, demonstrate connection with distinct bodies of law containing their own theories and

²⁶⁰ See VAUGHN, *supra* note 158, at ch. 15.

assumptions, and present different criteria for success and failure. As shown in Figure 1, they also relate to one another in a variety of ways: some embody greater concern with individual rights, while others demonstrate a greater concern with institutional reform; and some are likely to address the public sector, while others address the private sector.

Figure 1. A Matrix of Perspectives on the Nature of Whistleblowing Provisions²⁶¹



Significantly, there is some correlation between Vaughn's picture and the four main legislative models or options that emerge from the country comparisons above. Measures that deploy these models, separately or in a mixture, can be seen as providing different types of incentives, both to whistleblowing and to organizational or political responsiveness to whistleblowing. Public or media provisions align strongly with the public

²⁶¹ *Id.*

dimension in Figure 1; the institutional or structural model aligns with the institutional reform dimension; the original anti-retaliation approach aligns with an individual rights dimension; and the reward or bounty model aligns—although perhaps less neatly—with the private dimension.

This consonance may be, in part, because Vaughn is drawing his lessons from similar reference points of history. Nevertheless, it tends to confirm that rather than treating these approaches as competing alternatives, to be tried as each previous approach fails, it may be important to evaluate the extent to which previous difficulties are flowing from a failure to realize how these different dimensions and options interrelate.

In fact, it may be better to view them not as alternative models, but rather as four strands that would be best woven together in a more complementary fashion. As Vaughn notes, the different perspectives may conflict, with these conflicts also helping explain some of the areas—especially anti-retaliation provisions—in which whistleblowing measures have had greatest difficulty.²⁶² But overall, Vaughn's picture and these comparisons tend to reinforce that unless legal strategies in these disparate areas are recognized and reconciled in the legislative process, truly effective whistleblowing regimes may remain elusive. Clearly, no individual segmented approach is providing a total solution in and of itself. Accordingly, these histories tend to suggest that it will be where these different perspectives can be reconciled, integrated, and deployed in a mutually-reinforcing fashion that prospects of achieving the intended outcomes would appear greatest.

B. Lessons for the Future?

Left to its present, often chaotic course, the pattern of law reform described in the previous parts looks likely to continue. In each country, pressures for new and different approaches stems, at least in large part, from

²⁶² *Id.*

the failure of the original anti-retaliation approach, to a significant degree in the United States and almost totally in Australia. Twenty years later, however, the “second round” divergence in approaches between the countries can be seen to stem not from systematic acknowledgement of that failure, but rather as a resort to try different alternative measures in each country that are assumed to be more effective.

In Australia, a major question is whether the focus on rewards and bounties prevalent in whistleblowing regimes in the United States will ever be adopted. The best guess is that rewards and bounties will indeed be taken up, but differently than in the United States, due to the significant differences in context between the two countries. The size of government and the economy in the United States means that the scale of rewards payable as a percentage of either proven fraud on government, or of regulatory penalties in the private sector, is always likely to be significantly greater, in most cases, than could be achieved from equivalent cases in a small-to-mid sized economy such as Australia’s economy. A high consciousness is likely to remain in Australia that reward and bounty mechanisms only relate to one fragment of the whistleblowing agenda. Likely, these mechanisms would only be applied to those circumstances where wrongdoing results in financially quantifiable losses, as opposed to many other types of damage or harm, or where financial penalties are imposed.

For these reasons, it is likely that reward/bounty mechanisms will continue to be eschewed with respect to public-sector whistleblower protection. However, they likely will be introduced as part of the armory of regulation for the private sector, and thus become available to corporate whistleblowers. This prediction is reinforced by the prominence of whistleblower protection as one element of international anti-corruption and accountability reforms being developed through the G-20 group of nations

in the wake of the most recent financial crisis.²⁶³ Reforms such as Dodd-Frank have increased salience for all developed countries, which is a natural result of the increased globalization of accountability and anti-corruption strategies in response to globalized business and economic risks. As a highly engaged member of the G-20, Australia is likely to be increasingly sympathetic to such international strategies, irrespective of previous cultural and political differences that may have meant significant differences in sympathy for rewards.

In the United States, in light of the successful but partial reach of the reward model, it can be predicted that the institutional/structural approach pursued in more comprehensive ways in Australia is also likely to expand. In addition, if Congress permits, movement to bolster the legislative protection that attaches to whistleblowing to the media will likely develop consistently with First Amendment traditions. Similarly, despite the existence of the constitutional “reporter’s privilege,” pressure remains for US journalism “shield laws,” like those in Australia, to be passed—even though, like previous attempts to amend the WPA, two such reform bills recently died after four years in development.²⁶⁴

It remains to be seen whether each country is likely to address the substantial failure of the original anti-retaliation model. The answer in each country is likely to be different. The nature and scale of the challenges that confound US employment law are too large to canvas here. However, in general, the absence of a more regulated approach to industrial relations likely means that use of anti-retaliation measures as a means of

²⁶³ See *Annex III: G20 Anti-Corruption Action Plan*, G20 INFO. CTR., <http://www.g20.utoronto.ca/2010/g20seoul-anticorruption.html> (last visited Oct. 22, 2012) (discussing reform plans).

²⁶⁴ See Free Flow of Information Act of 2007, H.R. 2102, 110th Cong. (2007); see, e.g., Jonathan Peters, *WikiLeaks Would Not Qualify to Claim Federal Reporter’s Privilege in Any Form*, 63 FED. COMM. L. J. 667, 688 (2011), available at http://www.law.indiana.edu/fclj/pubs/v63/no3/Vol.63-3_2011-May_Art.-04_Peters.pdf.

compensating whistleblowers and changing organizational behavior is likely to remain an ongoing, piecemeal battle. While regulators such as the OSC may recently be inclined to engage in this battle with more energy and effectiveness than previously, at least for the public sector,²⁶⁵ more substantial questions are likely to remain.

The potential response in Australia, however, is somewhat clearer. It is now increasingly understood that the decision of most Australian legislatures to copy the US civil action compensation provisions—rather than embed compensation provisions in Australia’s existing framework of industrial relations and employment rights—may not have been the wisest choice. The relative simplicity with which the United Kingdom was able to achieve the second of these approaches in 1998 tends to underscore the misdirected nature of Australian choices to not work with existing framework. On paper, it should be relatively simple for Australia to rectify this mistake and also embed the whistleblowing duties and obligations of employees and employers in its employment law regimes—especially since consolidation of these regimes since 2006—as indicated by the most recent law reform proposals.

The primary obstacle to taking this path appears to have been a conceptual one. As can be seen from the strength of focus on the structural/institutional and public/media dimensions, whistleblowing legislation is perceived primarily as a public accountability or open-government measure, rather than as a measure also aimed at individual and organizational justice. As Vaughn notes, however, too strong a focus on open government inevitably “shows less concern with injury to the

²⁶⁵ See Mark Cohen, U.S. Dep’t of Justice, Keynote Address at Whistleblowing for Change: Leveraging Whistleblower Protection Laws to Promote Whistleblowing in the Public Interest (March 11, 2013).

employment relationship.”²⁶⁶ He writes:

Although the employment relationship generates necessary information and employment actions may be the principal forms of retaliation, the open-government perspective is information-based rather than employment-based. This external focus generates justifications for protection in the open-government perspective that are at odds with some of the justifications supporting whistleblower protection in the employment one.²⁶⁷

This may be why Australian governments appear satisfied if whistleblowing regimes are succeeding in flushing out information about wrongdoing and enabling it to be addressed, and have far less regard for the outcomes for whistleblowers themselves. In both countries, the priority appears to be a more integrated understanding of the perspectives that inform whistleblowing laws. Further, this understanding needs to be used to reinvent compensation provisions that are more tailored, lower-cost, and adaptive to the unique circumstances and types of damage that flow from failures in whistleblower support and protection.

V. CONCLUSION

The answer to the question in the title of this article—*The Money or the Media?*—is that neither of these important focuses of recent whistleblowing law reform, in the United States and Australia, respectively, are likely to prove sufficient in and of themselves. Rather, this article has reviewed key developments in whistleblowing law reform in each country in order to arrive at a more coherent and integrated overview of how the general process of reform might best be approached.

The first part charted the shift in focus from an original anti-retaliation or

²⁶⁶ VAUGHN, *supra* note 158, at 293.

²⁶⁷ *Id.*

organizational justice model of whistleblower protection in the United States, to recent expansion of the reward or bounty model, with some signs of development in institutional or structural approaches to embedding whistleblowing in the management and regulatory structures of organizations. Relatively absent was movement to expand the role of public or media whistleblowing as an element of the regimes. By contrast, the second part described the shift in focus in Australia from a similar original anti-retaliation or organizational justice model, to a major reliance on institutional or structural approaches, and, most recently, the expanded role of public or media whistleblowing with no significant development towards incorporating the reward or bounty model of whistleblowing.

Despite the contrasting choices, the third part of the article discussed the significance of the fact that the same four distinct legislative models can be identified at work through these aggregations of laws. The identification of these approaches aligns with other scholarship to help provide a new framework for understanding and evaluating the wisdom of legislative choices to date. Measures that deploy these models, separately or jointly, can be seen as providing different types of incentives, both to whistleblowing and to organizational or political responsiveness to whistleblowing. However, the piecemeal nature of reform choices in both countries tends to underscore the lack of an agreed understanding among policymakers of the different dimensions and models and bodies of law with which they are dealing. When law reform trends in each country are analyzed, recent activity can be seen to stem not from systematic acknowledgement of the failure of key approaches, but a resort to alternative measures with greater assumed effectiveness.

In Australia, the failure of the original anti-retaliation approach and the need to supplement the institutional/structural approach has led, almost naturally, to new attempts to try other approaches. Indeed, we find it likely that the reward approach will also now be taken up, at least in part. However, in the United States, in light of the successful but necessarily

partial reach of the reward model, we predict that the institutional/structural approach long pursued in Australia is also likely to expand.

This begs the question of what reforms are best to be pursued as each country also returns to the fundamental problem of the substantial failure of the original anti-retaliation model. As we have shown, each country is making at least some efforts to address this problem, at least for its federal public sector, but the problem itself remains very substantial. The ultimate answer in each country is likely to be different, but the objective remains the same. Overall, we conclude that legislative efforts that effectively integrate and reconcile these different approaches provide the most likely path to greater success in protecting whistleblowers and encouraging whistleblowing.