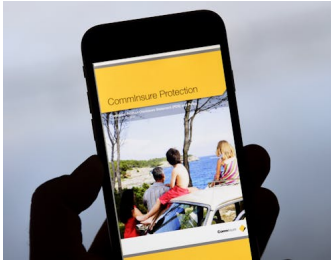


## Canada offers Australia a blueprint for protecting and motivating corporate whistleblowers

Written by The Conversation

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Dr. Benjamin Koh blew the whistle on former employee Commsure in 2016 for their systemic program of denying valid insurance payments. AAP Image/Dave Hunt

As the Australian government considers [how to incentivise and protect corporate whistleblowers](#), it could look to Canada's system. The securities regulator for Canada's largest and most populous province, the Ontario Securities Commission, launched its [whistleblower program](#) last year.

The program is accompanied by some important changes in law to protect whistleblowers from retaliation, but also a bounty to motivate employees to inform authorities of any wrongdoing. Both of these are sorely lacking in Australia's corporate environment.

The Canadian changes were inspired, at least to some extent, by the whistleblower provisions introduced in the US as a result of the [Dodd-Frank Wall Street Reform and Consumer Protection Act 2010](#). However while Ontario did embrace some of these changes, there are some notable differences.

For a start, any provisions in an employment agreement that prevents employees from whistleblowing are now void, thanks to changes to the Ontario Securities Act. Any reprisal action employers take against whistleblowers is now also an offence.

The Dodd Frank Act had introduced similar provisions and provided a right for whistleblowers to [sue their employer](#) if they'd retaliated against them. The Ontario government is considering introducing legislation to grant whistleblowers a similar right.

In Australia, similar legislation to protect whistleblowers from reprisals is unlikely to be controversial. However, the introduction of a financial award or bounty system would be more

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contentious. [Lawyers acting for businesses argue](#) argue that it undermines internal compliance and can end up rewarding those who are complicit in the illegal behaviour.

Despite these claims, Ontario did decide to introduce a financial award for reporting breaches of Ontario securities law to the Ontario Securities Commission. The point of the program is not to compensate whistleblowers for losses they may suffer, but to motivate them to come forward with high quality information. This information would otherwise be difficult to obtain, so it helps regulators increase the number and efficiency of investigations.

The regulators also hope the threat of being reported for misconduct will motivate companies to improve internal whistleblower reporting systems and to deal more proactively with illegal behaviour. This approach works with the [Ontario Securities Commission's credit for cooperation program](#), where companies that self-report violations early are dealt with more leniently than those reported by a whistleblower.

Unlike the [whistleblower bounty program in the US](#) which is paid for and administered by the Securities and Exchange Commission, the Ontario Securities Commission award program is designed to be self-funding. Because of this, the awards in Canada are likely to be lower, usually between 5% and 15% of the total sanctions imposed where these amounts total CAD\$1 million or more. Under the Securities and Exchange Commission's program, the award is set at between 10% and 30%.

Also unlike the Securities and Exchange Commission's program, awards made under the Ontario Securities Commission's program are capped at a maximum of CAD\$1.5 million, irrespective of whether or not the Commission collects the sanctions. But this can increase to a maximum of CAD\$5 million if sanctions of over CAD\$10 million are actually collected.

The Ontario system illustrates that it's possible to design a cost effective system, with lower awards than in the US, to drive improvements in companies' responses to reports of illegal behaviour. In fact, Heidi Franken, chief of the Ontario Securities Commission's Office of the Whistleblower, reported that since the launch of their program the Office has received a significant increase in persons coming forward with valuable information.

To be effective, however, any system Australia implements should contain a real prospect of

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significant penalties, so that at least some whistleblowers will receive an award.

In Ontario, the Ontario Securities Commission can ensure whistleblowers are paid because it has a broad power to seek disgorgement of profits and [administrative penalties of up to CAD\\$1 million for each breach](#). It does so via proceedings held before an administrative tribunal, comprised of Commissioners from the Ontario Securities Commission.

The Ontario Securities Commission is usually successful in these proceedings and penalties are only overturned infrequently on appeal. This is because courts give a high degree of deference to the decisions of this specialised administrative tribunal.

Australia's regulator, the Australian Securities and Investments Commission (ASIC), doesn't have a similar power and [ASIC's current powers](#) to obtain civil penalties are weak in comparison.

So for a whistleblowing award program to work in Australia, the federal government may need to enhance ASIC's powers or find an alternative source of funds to pay whistleblower bounties.

*Janet Austin is a Visiting International Research Fellow at Flinders University*

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