*"All that is needed for evil to prosper is for people of good will to do nothing"*—Edmund Burke

# The Whistle

**OCTOBER 2002**

Newsletter of Whistleblowers Australia

PO Box U129, Wollongong NSW 2500

### *Stitch* relaunched, 12 August 2002

Thank you all for coming to the official launch of *The Mickelberg Stitch.* It is an important occasion.

My name in Bret Christian. I'm a journalist and a friend of Avon's for 25 years, long before the mint swindle. Way back then Avon was publishing a suburban newspaper that had the journalistic guts to make the rest of Perth's press look like an arm of government.

No target was too big, too important or too powerful for Avon to take on.

If the light of publicity needed to be shone into some dark corner, Avon and his little paper were in there with their searchlight.

Of course in no time he was tangled up in legal red tape, but with persistence and tenacity, he came through in the end.

It may seem odd to launch a book 17 years after it as first published, but *The Mickelberg Stitch* is no ordinary book.

There are many good reasons this book did not have an official launch in 1985. For start, it was pretty hard to launch a book in the middle of the night at Perth Airport. What happened was that the original edition of the book was printed in Singapore.

The book was much-anticipated. The rumours in Perth about the dynamite it contained were already around, but where were the books? Turns out it missed being loaded on the plane. I think Avon and his ever-loyal distributor Charlie Thomas were spotted jumping up and down on the runway shouting at the night sky.

That was the least of their troubles. Within a week *The Mickelberg Stitch* was the subject of a flurry of legal injunctions and was banned from every bookshop. People interstate were never given the chance to read it.

The first defamation writ against Avon personally was issued by a detective named Tony Lewandowski.

I think it's Avon's never-say-die attitude and sense of humour that have enabled him to survive so far.

To survive death by 1000 courts, literally. *The Mickelberg Stitch* launched 75 separate court actions, which have now been settled. Because he could only rarely afford a lawyer, Avon represented himself in court more than 1000 times.

The lucky few readers who got in early and bought a copy of *The Stitch* before the book was banned were riveted, fascinated and appalled by its contents.

As a journalist, it struck me what a superb work in investigative journalism this book is. Ten years ago I nominated *The Mickelberg Stitch* and its sequel, *Split Image,* for a Walkley Award, the highest journalism award in Australia. But no-one wanted to know.

*The Mickelberg Stitch* is still as fresh and relevant as the day it was written.

Avon's commitment and enthusiasm to getting the truth out there is an inspiration to us all.

It is a direct result of *The Mickelberg Stitch* that Mr Lewandowski has made his amazing confession.

If anyone can tell me a more stunning outcome in the past 100 years, I would like to hear about it.

Avon's peculiar Irish enthusiasm and excitability have sometimes got him into hot water. We'll find out how hot and how deep when he is sentenced in the Full Court of Western Australia on Thursday.

But our society badly needs its Avon Lovells to keep it honest.

They are the canaries in our coal mine — if we let them die un-noticed, we are all finished.

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Bret Christian is owner/editor of the Subiaco Post and other Perth metropolitan newspapers.

# Media watch

## Gallop is aiming at erroneous targets

Editorial, *Sunday Times* (Perth), 21 July 2002, p. 33

LIKE the muddied waters of a fish pond, it is rare in the real world for anything to be crystal clear. Take the Lewandowski affair.

A red herring in the guise of chequebook journalism has sprung to life to deliberately divert public attention from the main game.

The Lewandowski case has descended into high farce, with *The Sunday Times* being chastised by other sections of the media and in political circles for resorting to "chequebook journalism" to get a story.

From the outset *The Sunday Times* wants to place on record that It did not pay self-confessed bent police officer Tony Lewandowski for an interview.

What *The Sunday Times* did was to hire Journalist Avon Lovell on a freelance basis for material and information he had gathered over 17 years of researching the Mickelberg gold-swindling case.

The contract, now a public document before the royal commission, says that the paper agreed to pay Lovell for the purchase of material for publication.

It also agreed to pay Lovell on the basis of a contributing journalist for information and help on an interview with Tony Lewandowski and with the Mickelberg stories.

At no time did *The Sunday Times* pay Tony Lewandowski any money and there was a verbal understanding with Lovell that the money paid to him would not just be channelled directly to Lewandowski.

The paper decided to enter into a contract with Lovell in the public interest to find out from Lewandowski how secure he was, when he would come home, and if there was any further light he could throw on his affidavit.

The paper had every ethical right to make a contract with Lovell and it does not apologise for exercising that right.

The result of the royal commission's intervention should be to bring Lewandowski home to test his affidavit in the interest of justice for the Mickelberg brothers.

But so far we have witnessed extraordinary scenes at the commission this week, culminating in the arrest of Lovell for contempt.

It is hard to see how his arrest serves any useful purpose other than sending a message that the commission will not stand any defiance from witnesses. That's a message best kept for the real targets of the commission — corrupt police.

In a week of extraordinary events surely the most extraordinary came in the form of a statement from Premier Geoff Gallop when he declared: "If there is one problem in Western Australia today it has one heading and that is called chequebook journalism. We stand by our open and accountable approach to this issue …"

Dr Gallop surely can't be serious. Whatever happened to the health crisis, the issue of law and order and a host of other problems bedevilling the Government?

The inescapable presumption is that Dr Gallop is focusing on chequebook journalism as a smokescreen for his Government's inept handling of the entire Mickelberg affair.

How accountable has Dr Gallop's government been? When Lewandowski's affidavit was leaked last month *The Sunday Times* raised some pertinent questions.

Why did the Government publicly release details of the affidavit when it should have gone before the royal commission first? Why did Attorney-General Jim McGinty discuss the affidavit with former senior police officer and now Health Minister Bob Kucera, who was in charge of Belmont CIB when Peter Mickelberg was allegedly assaulted there? And who leaked the affidavit?

These questions have not been answered satisfactorily.

The Premier would better serve the people of WA by concentrating on some of the real-life problems in our State.

## Lovell questions

by A. McMenamin (Rosewater, SA)
Letter to the editor, *Sunday Times* (Perth), 28 July 2002

AT last some intelligent comment on the Lewandowski affair. Your editorial ("Gallop is aiming at erroneous targets', *TST*, July 21) reassured me there is decent journalism in WA.

Intrigued by the little coverage this matter received nationally, I tried to make some sense of it via the Internet, but the only thing that comes over is that WA's journalists hate Avon Lovell, and the feeling seems to be mutual.

Most of the writing is snide, irrationally hostile and uninformative. In vain I have looked for informed comment on the basic legal questions involved.

But the main aim seems to be to vilify Avon Lovell; to discredit him as mercenary and suggest it's his fault the Mickelbergs' appeal has stalled.

As you point out, the real problem is corrupt police. Lovell seems to have spent many years of his life working to expose corruption. Whose interest does it serve now to paint him as the villain of the piece?

What's really holding up the Mickelbergs' appeal? Is Lovell right when he says the correct place for the affidavit to be tested is in the courtroom? Does Lewandowski need legal protections?

## Whistleblowers risk heavy penalty, commission told

Leonie Lamont
*Sydney Morning Herald,* 23 July 2002, p. 4

A retired judge hearing a complaint of serious misconduct against a magistrate. said whistleblowers who revealed judicial wrongdoing could pay a heavy price.

The retired Supreme Court justice Alan Abadee, one of the three-member conduct division panel hearing a Judicial Commission complaint against the Burwood magistrate, Roland Day, said there was a lot of pressure on, people not to put "their hand up".

"Whistleblowers often pay a terrible penalty for coming forth … they become victims," he said.

The conduct division has to weigh the conflicting accounts given by the Judicial Commission's chief witness — Sergeant Anthony Robinson, a police prosecutor — and Mr Day.

Mr Day has admitted summoning Sergeant Robinson to his office to discuss a case he was hearing. But he has denied that he intimidated and threatened him, or sought to gag defence counsel from later asking for his disqualification from the case.

He has also denied being biased against the defendant, who he thought was a "serious sexual predator".

The commission has alleged a similar pattern of judicial involvement in another case involving a man on weapons and assault charges.

Sergeant Robinson has said he believes he was unfairly dealt with by at least one of his superiors after he informed them of Mr Day's communication with him. He is on stress leave.

Paul Blacket, SC, assisting the commission, said the conduct division should prefer Sergeant Robinson's account. "[Mr Day] was either mistaken or, we submit more likely, is being untruthful about what transpired," he said.

Paul Byrne, SC, for Mr Day, agreed that if the panel found even one instance of dishonesty, it amounted to serious judicial misconduct. If it agreed with Mr Day's version of events, then the complaint, while serious, did not justify sacking.

## Women whistle-blowers

National Public Radio (US)
Monday 1 July 2002

BOB EDWARDS, host: Women have exposed some of this year's biggest scandals. FBI agent Coleen Rowley accused the bureau of failing to act on terrorism intelligence. An Enron employee, Sherron Watkins, went public about what executives knew in the months preceding the company's collapse. The high-profile cases raise the question: Are women more likely to be whistle-blowers than men? NPR's Allison Aubrey reports.

ALLISON AUBREY reporting: To many women, it's an attractive theory, the idea that females are less likely to put personal gain ahead of ethics and more likely to blow the whistle when they see wrongdoing.

DEBRA RODIE: If the stereotype that women are somewhat more moral is helpful in certain circumstances, more power to it. But the facts don't particularly bear it out.

AUBREY: That's Debra Rodie, a Stanford University law professor. For the record, she says, there is no gender count of whistle-blowers, but Rodie argues the Coleen Rowleys and Sherron Watkins of the world are part of an interesting new group. They're not exposing misconduct because they're women with some higher, innate moral capacity, but rather it's explained by their outsider status.

RODIE: In many corporate sectors, women are not part of the ol' boy network. And that status gives women somewhat less of a stake in being team players.

AUBREY: Perhaps female whistle-blowers are outsiders, but so too are men who speak out, says Lynne Burnabay, an attorney specializing in whistle-blower cases. She has more female clients than she did 15 years ago, but she reasons there's a simple explanation.

LYNNE BURNABAY: Most whistle-blowers are mid-level management, and I think it's the first time, at least in this country, that you see women in mid-level management positions where they have access to the kind of information that allows you to be a whistle-blower.

AUBREY: So gender doesn't play a role in motivating whistle-blowers. Steven Cohn, a lawyer with 18 years of whistle-blower cases behind him, agrees with that. But, he argues, sex does matter once the deed is done.

STEVEN COHN: Once they blow the whistle, then gender can become part of the retaliation. And it's very common for a female whistle-blower to be attacked in ways that a male whistle-blower never is attacked.

AUBREY: Women are often accused of being irrational. When that doesn't work, Cohn says defendants probe the female whistle-blower's personal life, arguing she's turning on the organization because they didn't let her spend enough time with her kids or because her romantic interest spurned her. Take, for instance, one of Cohn's current clients, a former FBI employee named Sibelle Edmunds. Cohn says when she reported misconduct in the bureau's translation unit, FBI management tried to cover up the problems. Now that there's a lawsuit, Cohn argues FBI lawyers are asking gender-loaded questions.

Mr. COHN: Did she have lunch with so-and-so, you know, she being a female and so-and-so being a male agent, with an insinuation that something's going on. Absolute garbage, ridiculousness. But the question would never even be raised in the context of a male.

AUBREY: The FBI had no comment on the case, but back to the two high-profile women whistle-blowers. They've both been spared retaliation. Coleen Rowley's case got the attention of the media early on, and the FBI director has pledged to protect her career. In Sherron Watkins' case, the respect she earned through her congressional testimony has given her leverage over Enron. In this regard, the two women buck all trends. The vast majority of whistle-blowers, Cohn says, never get public recognition. After they tell all, their careers often come to a silent, sudden end.

## EU accounting worse than Enron, says whistleblower

Ian Black and Michael White
*Sydney Morning Herald,*
3-4 August 2002, p. 15

The European Commission is embroiled in a furious row with its suspended chief accountant, Marta Andreasen, who claimed its $US98 billion ($181 billion) budget was "massively open to fraud" because it lacked even Enron's accountancy safeguards.

Ms Andreasen, who accused the commission of a cover-up, said in London: "Unlike the issues surrounding Enron and WorldCom, where you can at least trace transactions and accounts, you cannot do so within the

EU accounts as there is no system in place for tracing adjustments and changes to figures presented.

"Fraud can, therefore, lie hidden within the system, undetected and untraced."

The commission, which suspended her in May, launched a ferocious counter-attack, saying it had been a mistake to employ her in the first place.

Ms Andreasen was speaking at a Westminster press conference organised by Conservative members of the European Parliament eager to condemn the commission in general and the commissioner in charge of reform, Britain's Neil Kinnock, in particular.

Her main thrust was withering. After ignoring the complaints of the court of auditors, the EU's most powerful watchdog, for years, the EU still did not have a global-standard double-entry book-keeping system, its computers were inadequate and there were no qualified accountants supervising it, she claimed.

Mr Kinnock was unavailable for comment, but Michaele Schreyer, the EU budget commissioner, whom Ms Andreasen accuses of "discouraging me from alerting others", said it had been "a mistake" to employ an accountant whose "unsubstantiated" allegations had generated "extreme ill-feeling" among staff.

Ms Andreasen, 48, was suspended four months after starting work and faces disciplinary proceedings liable to lead to dismissal, after complaining about commission working methods, first to her superiors, and later in public.

Brussels said weaknesses in accounting systems had been reported since 1999 and examined by the court of auditors, governments and the European Parliament. Ms Andreasen agrees, but says the auditors' complaints have been ignored.

Mr Kinnock has had three years to deliver on promises of reform in Brussels and getting spending under control. His crusade was thrown into question by Ms Andreasen's claims that he tried to suppress her damning findings.

Ms Andreasen accused Mr Kinnock, a former Labour leader and political mentor of Tony Blair, of a cover-up. She says she was harassed and subjeced to a campaign of character assassination by senior Brussels officials.

Asked if she thought that Mr Kinnock, who became vice-president of the EC after a corruption scandal in 1999, had failed in his mission to clean up the Brussels bureaucracy, she replied: "Yes."

Her claims were supported by an unpublished report, compiled by the court of auditors in February. It said the EC's accounting system had "obvious risks as regards its reliability".

Ms Andreasen, a softly-spoken Spaniard who in January became the first professional accountant appointed to the post of budget execution director, was sacked from the £80,000-a-year ($230,000) job five months later after making her allegations. [*The Guardian; The Telegraph*, London]

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## In the line of fire

### A Secret Service agent blows the whistle on his agency and winds up the target of investigators

By Chitra Ragavan
*U.S. News & World Report*,
27 May 2002, p. 28

Carter Kim has spent nearly two decades chasing bad guys. The former Honolulu cop and 18-year Secret Service veteran earned top reviews and cash awards of some $13,000 for his work busting counterfeit and forgery rings. He served on the elite presidential protective detail. Today, he's the subject of an internal Secret Service investigation.

Kim's case is a doozy. The charges range from lost evidence to sloppy fieldwork to coverups. It could lead to the end of a top officer's career. But it could also besmirch the reputation of the historic Treasury Department agency best known for protecting the life of the president. In the past few years, the role of the Secret Service has grown enormously, to include high-profile missions like security operations for the Super Bowl and the Olympics in Salt Lake City. But the higher profile has brought embarrassment. At the Olympics, agents left plans for protecting Vice President Dick Cheney at a souvenir shop. The service also is fighting a federal discrimination lawsuit filed by more than 250 African-American agents. And now, *U.S. News* has learned, the service is embroiled in a controversy involving its trademark mission: investigating counterfeiting.

That was the work Kim performed, as head of criminal investigations, at the Secret Service field office in Las Vegas — and which led the 43-year-old Korean-American to file an Equal Employment Opportunity lawsuit in March. He's charging that the agency discriminated against him because of his race. Spokesman Mark Connolly said the agency would not comment on a pending case. At the heart of the matter — according to interviews and Kim's three sworn statements to the Secret Service Equal Employment Office, the U.S. Office of Special Counsel, and the Secret Service inspection division is his charge that the Secret Service mistreated him after he blew the whistle on an alleged coverup of missing evidence in the Vegas field office.

In his filed EEO complaint, Kim says that he told his boss, Special Agent in Charge Joseph Saitta, that security for the office's evidence vault was lax. Entry logs, which tracked access to the vault, were incomplete. The vault was left unlocked at night. Kim had complained of other security lapses for three years. "The office was crashing and burning," says Kim. For example, he claims that STU-keys — classified encryption devices inserted into secure telephones — were rarely locked up.

In November, the Treasury Department's inspector general alerted the Las Vegas office that an audit was imminent.

Kim alleges in his EEO complaint that Saitta told the agents not to volunteer information because "we have a one-voice policy" and Saitta was that voice. Saitta declined to comment for this story, saying he was unfamiliar with the complaint. Kim charges in a signed sworn statement before three Secret Service inspectors that, as the agents prepared for the audit, Saitta told him to create fictitious documents to hide the gaps in the entry logs. Kim says he obeyed reluctantly. "The general culture of the Secret Service is you don't tattletale on your boss," says Kim. He says he made sure the fake logs were never used.

**Faking it.** More problems were discovered: Counterfeit money, turned in by Vegas banks and casinos, went missing. Also missing were items from a "speech kit" — including fake money — that agents use to teach casinos to spot forgeries. Kim alleges, in his statement to inspectors, that Saitta told an agent to mark the missing items from the speech kit as destroyed. Even evidence seized from forgers and counterfeiters — a laptop computer, keyboards, and computer peripherals — couldn't be found. Kim charges in the discrimination complaint that Saitta ordered agents to scour the office for substitute equipment that could pass for evidence — and that Saitta even joined in the search. Before the audit, Kim, on his own initiative, says he ordered an agent to remove all the fakes. Even so, the audit found problems with the handling of evidence. Afterward, Kim set about trying to correct them.

End of story? Not quite. When the Secret Service's internal-affairs division visited Las Vegas in March for a routine inspection, Kim says he blew the whistle. A few weeks later, as Kim was preparing security arrangements for a visit to Las Vegas by former President George Bush, he found inspectors waiting for him. Kim says the agency is trying to nail him for the alleged coverup. "They took away my badge and my gun," says Kim. Kim was placed on administrative leave. Saitta has retired with full benefits. "Here's a guy who tried to do the right thing, and he's the one they're hanging," says Ronald Schmidt, one of Kim's attorneys. Kim says he deeply regrets joining the Secret Service. "I never ever thought my career would end like this."

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# When you must report misconduct

## Experts advise whistleblowers to maintain objectivity, learn the rules, and get early legal counsel

by Katherine Uraneck
*The Scientist,* Vol. 16, No. 15,
22 July 2002, p. 41

Cherlynn Mathias agonized over whether to report her allegations of scientific misconduct to the government and sought help from her parish priest. She still recalls the image of the church's art deco rectory, where she told the priest what she had learned about the ethics of research during her year at the University of Oklahoma (OU) in Tulsa and about her fear of retribution should she report the wrongdoing. At the end of the day, the priest asked, "What's the worst they could do to you?"

She replied, "I could lose my job, lose my license, become bankrupt, lose my home."

"And if you don't turn them in?"

"I can't live with myself," she said.

A week later, Mathias sent documents titled "Allegations of Misconduct" to the US Department of Health and Human Service's Office for Human Research Protections (OHRP). She had linked alleged wrongdoing by Michael McGee, the primary investigator of a melanoma vaccine trial based at OU's Health Science Center in Tulsa, to the Institutional Review Board (IRB), and to the institution itself. She also sent documentation of improper production and safety testing of the vaccine, improper monitoring of patients, and overstatement of the treatment benefits.

The subsequent fallout brought national attention as the university's federally funded medical research trials were temporarily shut down. McGee was fired, the head of the IRB retired, and both the dean and director of research at the Tulsa campus were forced to resign. Mathias, who testified before the US Senate this past April, would never again work at OU. Nevertheless, how she blew the whistle and survived provides insight into the perils and potential benefits of reporting on wrongdoing.

### Risking reports

Last month, research institutions reported the highest incidence of misconduct activity since 1997, according to the Office of Research Integrity (ORI).[1] In 2001, sixty-one institutions opened 72 new cases to investigate 127 allegations. The previous high mark had been 60 institutions reporting 103 allegations. Chris B. Pascal, director of the ORI, attributes the rise to institutions' growing sophistication, and to the heightened awareness of scientific misconduct, rather than to an actual increase in incidences of wrongdoing. The government relies a great deal on whistleblowers in identifying and stopping such misconduct, according to Peter Poon, who is responsible for overseeing potential research misconduct at the Veterans Administration. "The whistleblower occupies a vital role in ensuring the ethical conduct of research," Poon says. "However, the scientific community maintains an ambivalent attitude toward the whistleblower."

Whistleblowing is a risky activity. Thomas Devine, legal director for the Government Accountability Project, says whistleblowers should expect some reprisal. The ORI, part of the US Department of Health and Human Services, found in a 1995 survey that more than two-thirds of whistleblowers to scientific misconduct experienced some sort of negative consequences for their actions. Retaliation can include marginalization, firings, loss of promotions, and even death threats.

Those at the greatest risk for retaliation were academics with PhDs conducting research in the basic sciences as opposed to clinically oriented physician researchers. "Before sticking their necks out, whistleblowers should carefully plan a survival strategy," cautions Devine, "so that they are not reacting to bureaucratic harassment, but rather that the system is reacting to their charges."

Mathias made no spur-of-the-moment decision, though she suspected research protocol violations from June 1999 when she began working in OU's surgery department. She observed improper enrollment of patients in clinical trials and inconsistent storage of the vaccine, which was manufactured by an assistant to McGee. "My knowledge was incremental," Matthias relates. "Not only my knowledge of what was wrong with the study, but also what the regulations were."

Mathias immersed herself in the Food and Drug Administration's regulations concerning laboratory, manufacturing, and clinical practices. She educated herself on informed consent and protection of human subjects. As her knowledge increased, so did her certainty about the research misconduct. But still, she did not blow the whistle. In October 1999, Matthias

contacted the OU's IRB, which oversees research on human subjects. Determined to work through the chain of command, Mathias met frequently with university officials over the next eight months, before she decided to take her allegations to the government.

**A strategy of calm**

Composure and self-education can aid a would-be whistleblower, according to Pascal. "[My] advice for the whistleblower is stay calm and keep your head about you," Pascal says. But few whistleblowers carefully plan their actions. "Most of the people don't think about it because they only view it as telling the truth," says Don Soeken, a Maryland-based therapist who consults with whistleblowers. "Telling the truth, you don't need a book to do that, so they don't think about it."

Additionally, few whistleblowers have any education about the process. Even when whistleblowers have knowledge, they may not avoid retaliation. Mathias was aware of the risks, she had extensive documentation, she had educated herself about the regulations, she had support from her priest, and she had attempted working within the system. But a year after she blew the whistle, Mathias found herself unemployed, depressed, and overwhelmed with legal fees. Mathias had not obtained legal advice before she contacted the OHRP, nor had she anticipated the swiftness of OU's disapproval. Mathias says that access to her building was denied, and she was placed on immediate administrative leave. "I had this fantasy that once the government got involved and Oklahoma City found out, they would realize I had done the right thing," Mathias relates.

Obtaining early legal counsel can help whistleblowers avoid some problems with administrations and can acquaint them with federal and state statutes for the protection of whistleblowers, says Ann Lugbill, an Ohio attorney who specializes in such cases. A person can also face suits for defamation and contract violations. "One of the reasons … to get a lawyer early on is because there are some things that you could do that would preclude [you] from bringing a law suit later," Lugbill says. "There are some things … that might seem to be legal but aren't, such as violating trade-secret rules."

Although federal regulations aim to prevent retaliation against whistleblowers, they do not allow a whistleblower to sue for reinstatement, damages, or back pay. "In those instances, the whistleblower's primary rights would be under the False Claims Act," said Devine, adding that false-claims cases are time consuming and laborious. "Scientific misconduct is in the statute."

Mathias eventually reached a settlement with her employers. She decided not to pursue a more significant suit because she wanted to maintain the focus on the patients and not on herself as the wronged whistleblower. "I didn't see myself as a victim," she said. "I approached it as I knew what I was doing, took the consequences and made the best of it."

Eventually Mathias was hired as the manager of clinical trials for Harris Methodist Hospital in Fort Worth. The job required her to move away from her two sons, who are finishing high school, and she now maintains two mortgages. But she does not regret her decision. "If [whistleblowers] look at it a little more as a third party, that this is the right thing to do for the scientific community," Pascal says, "then you make the allegation, you cooperate and provide the information that you can, but it is somebody else's responsibility to make the decision, not the whistleblower's."

Mathias has counseled several potential whistleblowers. "You have to be willing to risk, and if you aren't willing to take the risk, then don't do it," she advises. She encourages potential whistleblowers to "document, document, document," and to exhaust their institution's procedures on reporting of misconduct. "Only go to the government as the last resort, and be willing to accept the consequences of your actions," she cautions.

Soeken, who says he usually sees whistleblowers only after they have suffered consequences, advises others to maintain their anonymity for self-protection. "Truth and honesty cost too much," he says. "They should tell the truth, but they should do it in such a way that it gets done without endangering themselves. Saying all that, it does me no good to tell a whistleblower to not do it," he relates. "I go to bed at night and sleep nicely because I know that there are these people out there that are going to find all kinds of corruption and graft, and I've always said that they might save the world."

Katherine Uraneck
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[1] "Institutions Report Increased Misconduct Activity in 2001 Annual Reports," *Office of Research Integrity Newsletter,* 10:3, June 2002.

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# A whistle-blower rocks an industry

## Doug Durand's risky documentation of fraud at drugmaker TAP is prompting wider probes

By Charles Haddad, with Amy Barrett
*Business Week,* 24 June 2002

In his 20 years as a pharmaceutical salesman, Douglas Durand thought he had seen it all. Then, in 1995, he signed on as vice-president for sales at TAP Pharmaceutical Products Inc. in Lake Forest, Ill. Several months later, in disbelief, he listened to a conference call among his sales staff: They were openly discussing how to bribe urologists. Worried about a competing drug coming to market, they wanted to give a 2% "administration fee" up front to any doctor who agreed to prescribe TAP's new prostate cancer drug, Lupron. When one of Durand's regional managers fretted about getting caught, another quipped: "How do you think Doug would look in stripes?" Durand didn't say a word. "That conversation scared the heck out of me," he recalls. "I felt very vulnerable."

Durand didn't end up in stripes. Far from it. To protect his good name and, as he puts it, to "cover his rear," Durand began gathering the inside dope on TAP and feeding it to one of the country's leading federal prosecutors. It was the first step in what would become a six-year quest to expose massive fraud at the company. Durand's 200 pages of information were so damning that TAP pleaded guilty to conspiring with doctors to

cheat the government. And last October, after negotiating a settlement for two years, federal prosecutors announced a record $875 million fine against the company. For his efforts, Durand won an unprecedented award of $77 million, or 14% of the settlement, as allowed under the federal whistle-blower statute.

It wasn't just the 2% kickback scheme that got TAP in trouble. For years, TAP sales reps had encouraged doctors to charge government medical programs full price for Lupron they received at a discount or gratis. Doing so helped TAP establish Lupron as the prostrate treatment of choice, bringing in annual sales of $800 million, about a quarter of the company's revenues.

The government calculates that TAP bilked federal and state medical programs out of $145 million throughout the 1990s. To get some sense of just how big TAP's fine is, consider that it's nearly nine times what Merrill Lynch & Co. agreed to pay in May after the New York Attorney General accused its analysts of issuing misleading investment research. The only penalty that comes close is the $750 million that hospital chain HCA Inc. paid two years ago to settle criminal and civil charges of Medicare-billing fraud.

So far, four doctors have pleaded guilty to accepting free samples of Lupron, billing Medicare for them, and pocketing the cash; they await sentencing. Six TAP executives and one urologist face trial for conspiracy to pay kickbacks and defraud Medicaid programs. None was available to comment. At the time of the settlement, TAP said: "Whatever may have happened in the past, we are determined that TAP today and tomorrow will live up to high standards of integrity and business ethics." It has since created an ethics-compliance program, and it declines to comment further. The two companies that formed TAP 25 years ago, Japan's Takeda Chemical Industries Ltd. and Abbott Laboratories, issued similar statements in October and now decline to comment on the settlement.

Durand's successful suit comes as Justice Dept. officials, the Federal Trade Commission, and state attorneys general have all launched an assault against what they believe to be sales abuses by the world's largest pharmaceutical companies. Indeed, such accusations have forced the industry to try to reform itself. The Pharmaceutical Research & Manufacturers of America recently issued voluntary guidelines banning aggressive sales tactics. "Every company is taking a long, hard look at how it does business," says Glenna M. Crooks, president of health-care consultant Strategic Health Policy International Inc. in Washington, D.C., and a longtime friend of Durand's.

It's only recently that Durand, 50, has felt comfortable talking about his experiences as a whistle-blower. A plain-spoken man, Durand was one of eight children and was raised in a blue-collar neighborhood in Pawtucket, R.I. He and his wife Elizabeth, who were high school sweethearts, clipped grocery coupons even when Durand was pulling in $100,000 a year. He worked for two decades at Merck & Co., which vets every marketing campaign with its legal and regulatory teams.

His last position there was senior regional director. "We always took the high road under Doug — including considering pulling a drug off the market when the Food & Drug Administration questioned it," says a former co-worker.

Not so at TAP. The company had a numbers-driven culture; top reps could earn $50,000 annual bonuses. They lavishly courted doctors with discounts, gifts, and trips. On his first day, Durand was stunned to learn that the company had no in-house counsel. At TAP, "legal counsel was considered a sales-prevention department," he says.

At first, Durand shrugged off such red flags. TAP had lured him with a salary of $140,000, a promise of a $50,000 bonus, and a big assignment. At that point, TAP was a niche player. Then-President Yasu Hasegawa wanted Durand to go after the mass market with treatments for prostate cancer and ulcers. "The job seemed like a great idea at the time," he says.

But Durand soon realized that Hasegawa wasn't really interested in change. When Durand talked about trying to earn the trust of doctors, reps rolled their eyes. At TAP's 1995 launch of ulcer drug Prevacid in Palm Springs, Calif., the main attraction was a party featuring "Tummy," a giant stomach that belched fire. "There was no science, no discussion of the drug," he says.

Just how little science would be used to promote the drug, Durand quickly learned. In Long Beach, Calif., he visited a urologist who had received a big-screen TV from a TAP rep. Turns out TAP had offered every urologist in the country (there are 10,000) a TV, as well as computers, fax machines, and golf vacations. Durand says his angry demands for information about other giveaways were ignored.

TVs weren't the most troubling freebie. Durand discovered that reps could not account for half of their Lupron samples, even though federal law requires it and losing track of even a single dose could have resulted in a fine of up to $1 million. Durand tried fixing the problem the TAP way: He offered an extra year's salary to those who kept accurate records. It worked. But senior management soon killed the bonus offer, and the reps stopped following the rules. "Most of what I did there was resisted, undermined," Durand says. Hasegawa, who has returned to Takeda's headquarters in Tokyo, declined to comment. At the same time, Durand says, "some of the doctors were so cocky. They'd brag, `Oh there's my Lupron boat, my Lupron summer house,"' referring to the fact that they had taken kickbacks or freebies and used them to buy some extravagance.

Durand grew increasingly concerned. Colleagues told him he didn't understand TAP's culture. He was excluded from top marketing and sales meetings. Then came the crack about how he would look in stripes. Durand's stomach knotted in fear that he would become the company scapegoat. Yet he felt trapped: If he left within a year, he wouldn't be able to collect his bonus. He also doubted that anyone would hire him if he bolted so hastily.

In desperation, he called Crooks, who had been a colleague at Merck. They met at a secluded bar near the Philadelphia airport. Appalled at his tale, she told him to "get out as quick as you can." Her advice cracked Durand's tough exterior. "After keeping all this inside for months, I finally broke down and told my wife," says Durand. She had stayed behind in

Pittsburgh to see their youngest daughter through her final year of high school.

Elizabeth Durand was terrified. She urged her husband to call the companies that had offered him jobs before he joined TAP, but the positions had been filled. Financial concerns weren't what scared her most, though. "I knew he wouldn't take the easy way out and just leave," she says. "He'd try to make things right."

Soon after, Durand began to secretly document TAP's abuses. For two months, he sneaked papers home to copy, staying up for hours to type explanatory notes. On Crooks's advice, Durand mailed his binder to Elizabeth K. Ainslie, a Philadelphia attorney with close ties to James Sheehan, an assistant U.S. attorney specializing in medical fraud. Ainslie was impressed with his material. "Many think they're whistle-blowers, but most are just disgruntled employees," she says.

Ainslie urged Durand to sue TAP under the federal whistle-blower program, which allows an insider to file a civil complaint alleging fraud against the government. Typically, the informant then meets with government attorneys; if they decide to proceed, the investigation is conducted in secret. Companies learn of it as the government issues subpoenas, but executives aren't supposed to know who blew the whistle. Usually, the company will negotiate a settlement to avoid a trial, as TAP did. If not, insiders can testify secretly against their employers.

It wasn't easy for Durand to decide to file a suit. "I didn't even know about the law when I first approached Ainslie," he says. "I wanted to leave a trail showing I was on the side of the government, not working to cover up fraud. The idea of suing as a whistle-blower intimidated me. Nobody likes a whistle-blower. I thought it could end my career." Indeed, whistle-blowers live for years as double agents with no guarantee that their personal risk will result in a trial, let alone a victory. "I asked myself all the time, is it worth taking Liz and the kids through this?" says Durand. "In the end, I always found myself believing that it was the right thing to do."

After filing the suit, Durand left TAP for Astra Merck in February, 1996, but wasn't supposed to tell his new employers about the case. For the next four years, the government conducted its own investigation into Durand's allegations, which included grilling him about the documents he had collected. It was an overwhelming experience at first. "I was put in a conference room in Philadelphia with all kinds of different federal agents," he says. "I didn't calm down until the end, when everyone started greeting my attorney as an old friend. It was then I knew that I was in good hands." Because the government often asked Durand to testify on just a day's notice, he had to scramble to make excuses to take off. He almost blew his cover early on when he ran into a group of Astra Merck executives in the Chicago airport; they thought he was vacationing in Orlando. "It was wrenching, terrible," recalls Durand. "I never knew if someone would discover me as a whistle-blower. And the government was always cryptic — inching along."

Nor is Durand's ordeal over. He still has to testify in the trials of the six TAP execs, five of whom used to work for him. Durand doesn't worry too much about TAP, though he does "feel sorry" for those indicted. His wife doesn't: "Doug banged his head against the wall, and nobody would listen," she says. "They knew what they were doing."

Durand's suit may well be the first of several that challenge potentially fraudulent practices in the drug industry. Schering-Plough Corp., Merck-Medco Managed Care LLC, the pharmacy-benefit management unit of Merck, and others have received subpoenas from the U.S. Attorney in Philadelphia. That investigation may focus on whether drugmakers gave discounts or kickbacks on certain drugs to companies such as Merck-Medco while charging higher prices to the government. All those involved say they are cooperating with the inquiry. And Merck-Medco says its actions were legal. "Thanks to Durand and other whistle-blowers, there's a revolution coming in how drug companies set pricing, " says James Moorman, president of public interest group Taxpayers Against Fraud in Washington.

At the same time, state attorneys general are going after drugmakers that may be promoting unapproved uses of their products. Pfizer Inc., for example, has disclosed that a number of state AGs, as well as the U.S. Attorney in Boston, are looking into its marketing of the popular epilepsy drug Neurontin. Those inquiries appear to follow allegations by a whistle-blower. Pfizer says it is cooperating with the authorities and points out that the inquiries concern Warner-Lambert Co., which it acquired in 2000. And the Federal Trade Commission is conducting a study of the questionable legal maneuvers drugmakers often use to delay competition from generic rivals.

Durand is more than happy to have left the industry behind. After collecting his $77 million — and paying $28 million in taxes — he retired to West Florida to be near his parents. They still like to shop at Wal-Mart, so he takes them there every week. And Durand and his wife continue to clip grocery coupons from the Sunday newspaper. But he did buy a new Lexus, a small reward for a reluctant millionaire.

## Bush zips whistleblowers' lips

www.aclu.org/action/homeland107.html

The American Civil Liberties Union (ACLU) has joined senators Chuck Grassley and Patrick Leahy in warning that the Bush Administration's proposed new cabinet-level Homeland Security Department threatens long-standing American freedoms while eliminating legal safeguards necessary to keep the agency open and accountable to the public. ACLU warns that the Bush proposal will "create an enormous agency with massive authority — including more armed federal agents with arrest powers than any other branch of government." Bush also wants to exclude the new agency from Freedom of Information Act and whistleblower protections — "the very law that helped expose intelligence-gathering missteps before September 11."

More web links related to this story are available at:
http://www.prwatch.org/spin/July_2002.html#1025503210

# Articles and reports

## Some thoughts if you are considering blowing the whistle

by Ken McLeod

**Be afraid, very afraid.** The people and organisation you are exposing will become vindictive and, having already participated in dishonesty, will continue to be dishonest. At the very least they will do everything they can to blacken your name. They will do everything they can to ruin you financially. And they will have the resources to do it.

**Be sceptical.** There's an old saying, "If you have to choose whether it was a conspiracy or a cock-up, go for the cock-up every time." Be very careful to do your research and decide objectively whether it really was malfeasance. Be careful of who you trust.

**Be honest** with your family and friends, you will need them. Whistleblowing is a lonely experience, and you will need to draw on every resource to maintain your strength. To thine own self be true; examine your motives. Is your aim to damage some enemy? Or to expose malfeasance? Different motives get different results.

**Be self-sufficient.** The guilty will ensure that you never work in your field of expertise again. You will need money to live.

**Be realistic.** The world will find your story interesting, but only that, nothing more. The legal system is not there to find the truth and punish the guilty; it is there to go through the motions while enriching the wallets and egos of the chosen few. The government is all about winning the next election, not about admitting mistakes or dishonesty. Nobody will take you on face value; they will require hard evidence. Police, journalists, politicians, will all require documents to take up your story. So keep all documents, make copies, and hide them with friends you can trust.

**Be tenacious.** Once you have started it, you should finish it. If you don't intend to finish it, don't start it.

**Be difficult.** Don't let anyone push you around, bribe or flatter you to divert you from your objectives. Don't be blackmailed.

**Be tech-savvy.** The Internet has opened a whole new world of whistleblowing. Documents can be scanned and passed around the world instantly, can be encrypted and, most importantly, be published on the Web. People will start to believe you once they have seen the evidence for themselves.

**Be adaptable.** Know that you are about to dump a career, friends, and lifestyle and will need to find new ones.

**Be proud.** If your motive is to expose malfeasance for the public good, you are doing your little bit to make the world a better place. Remember the words of the 18th century statesman, Edmund Burke: "Evil triumphs when good men stand aside and do nothing."

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## Whistleblowing and *The Trial*
### A Kafkaesque experience
### Part 2

Kim Sawyer

This is an edited version of a talk given to the Existentialist Society Meeting, Melbourne, in April this year. Part 1 appeared in the July issue of *The Whistle.*

*"Someone must have been spreading lies about Josef K for without having done anything wrong he was arrested one morning."* — F. Kafka (*The Trial,* Chapter 1).

The whistleblower has one advantage over Josef K. The whistleblower knows the names of those who judge, at least those who nominally judge. As a consequence, the whistleblower can assess the judges by their previous judgements and by their speeches. For example, I was able to judge the Chief Justice who judged my case, by his judgement in the Grimwade case, by his speech to the Law Society dinner in June 1994, and by his writing of a play entitled *The Trial.* Similarly, I was able to judge the Governor who judged my case by his judgement of another whistleblower, John Little, and by his judgement in the case of a pedophile priest, Father Glennon. Evan Whitton observed (*Trial by Voodoo,* p.312):

*The Government and good citizens of Victoria may hope that Governor McGarvie does not have to ruminate frequently on constitutional issues.*

The trial of the whistleblower, like the trial of Josef K, is also as much a trial of those who judge, as those who are judged. For, the whistleblower inevitably returns to *The Trial's* last refrain "*It was as if the shame of it should outlive him."* The whistleblower's *High Court* becomes the court of future generations, which will judge both the problem and those who judged the problem. The best defence for a whistleblower is to provide a complete record, so that the future can judge without the entanglements of the present. This is the inversion that all whistleblowers must accept. At various times, I have written about this sense of inversion. When testifying to the first *Senate Committee on Public Interest Whistleblowing,* I wrote that:

*Perhaps the most serious consequences of all is that I have lost confidence in the institutions and traditions of this country.*

I returned to this theme in my supplementary submission to the *Senate Inquiry into Higher Education* when I concluded that

*The responses to my submission of March reveal much about senior management of Australian universities; assertion without proof, failure to invoke statutes, codes and common law, and lack of independence. My submission is variously characterised by the respondents as "incorrect" and "marred by inaccuracy", and my assertions as "conjectures, impressions and unsubstantiated allegations". Yet my submission and my testimony was accompanied by sworn affidavits from other Professors, by independent legal opinion, and by supporting documentation. There is no such supporting evidence accompanying the responses of Professors Beanland, Gilbert and Crommelin. The responses demonstrate, more than I ever could, the need for an independent body to assess complaints in Australian universities.*

The inversion of their expectations often leads to the demise of the whistleblower. More than one whistleblower has perished from the despair. But the inversion may also lead to their survival. Once a whistleblower recognises that the *High Court* does not exist for them in the present system, they can become an observer of their own problem, rather than the central character. This detachment is important, because it allows the whistleblower to pursue a set of values different from those who judge them. The whistleblower can then direct their intellect more positively.

That is the strategy I have adopted. I have assumed the role of an observer of my own dilemma. It is not always easy. The condition for a whistleblower very often reduces to that of a pariah. The term whistleblowing itself connotes extreme negativity. Despite opinion polls showing that 80-90% of Australians support protection for whistleblowers, despite whistleblowing protection legislation being passed unanimously by both Houses of the US Congress, most Australians regard whistleblowers as traitors. Essentially, whistleblowing is acceptable in the abstract, it is acceptable provided that it occurs in another organisation, but it is not acceptable when it is in your own house. The non-response to whistleblowers is extraordinarily high. In the two problems I have faced, I approached six members of University councils, two Chancellors, two Deputy-Chancellors, more than ten politicians, and have appeared before three Senate Committees. Only two individuals gave assistance. One response from a member of a University Council, sums up the collective response. She indicated that *"She would keep a watch on it."* I never heard from her again. In representing whistleblowers, I have approached more than 50 politicians to lobby for Federal whistleblowing legislation. Less than 10% responded. The attitude is typified by the Victorian government's whistleblowing protection legislation passed in 2001. No whistleblower was consulted on the legislation, nor invited to attend either House of Parliament when the legislation was passed. Whistleblowing is acceptable as a principle, provided that you are not the whistleblower.

The pariah status of whistleblowers is further exemplified by the prosecution of whistleblowing cases in Australia. Only three cases have been successfully prosecuted, and none under existing whistleblowing legislation. The national response to whistleblower protection generally has failed. This is surprising given the economic benefits of whistleblowing. Surveys of corporate fraud by KPMG and Ernst and Young show that the annual aggregate cost of corporate fraud to be between $15 billion and $20 billion, with 480 companies reporting a two-year loss due to fraud of over $100 million. These analyses also show that 66% of companies found anonymous tip-offs useful in the discovery of fraud. These reports suggest that the perpetrators of fraud are becoming more sophisticated, and with increases in sophistication, the role of the whistleblower, the insider, is paramount. In May 1993, draft Federal whistleblowing legislation was introduced by Senator Chamarette. This was superseded by two Senate inquiries. The first committee, which reported on August 31, 1994, made 39 recommendations, including the establishment of a Public Interest Disclosure Agency to receive and arrange the investigation of public disclosures, and to ensure protection for those making these disclosures. The coverage of the supporting legislation was to be as wide as constitutionally possible in both the private and public sectors. These recommendations were unanimously endorsed by a second multi-party committee which reported in October 1995. None of the recommendations of the two Senate Committees has been enabled, and the Federal legislation which does exist is effectively of no use. All states have now enabled or foreshadowed whistleblowing legislation, but there have been no prosecutions. The Victorian legislation is particularly disappointing with its focus on internal organisational reference points for whistleblowers. Contrast this with the United States, where whistleblowing cases are increasingly being prosecuted under the False Claims Act of 1861, and the Whistleblower Protection Act of 1989, and where whistleblowers receive entitlements of between 15-25% of monies recovered by the government or GBO.

At the individual level, the pariah status of whistleblowers translates into harassment, harassment that is difficult to counter. In *Deadly Disclosures*, Bill De Maria wrote of my experience in my first whistleblowing case

*As a result of his tenacity Sawyer was repeatedly defamed, had his intellectual property appropriated, was directed not to speak to the media, was isolated in the work-setting, had his office burgled and his mail and telephone interfered with, was investigated by a private detective, had his access to secretarial services restricted, was made to move his office away from his research staff, and to cap it all off, was charged with serious misconduct by RMIT.*

Harassment can take various forms, from defamation by newspapers, to withdrawal by PhD students, to non-acknowledgement of work to more serious harassment. For example, following my appearance in an article in *The Age* last year, my wife and I were harassed at our house, including writing on our car, the power being switched off, and alarm systems being tampered with. Harassment of whistleblowers is very common, and very hard for the whistleblower to submit to.

Perhaps of greater cost to the whistleblower is the requirement of flawlessness. The whistleblower is not only judged on their assertions, but on their work and on all aspects of their life, typically their perforations. The most common strategy of the perpetrator is to create noise, so that the bystanders cannot determine right from wrong. The first advice I received from politician when I approached him was "*You better not have any skeletons in your cupboard."* The first threat I received from a perpetrator was "*There is a malicious rumour going around about you."* Josef K summarised the problem (p.154)

*And all the time his case was going ahead, all the time, up there in the attic, the Court officials were sitting poring over the documents of his trial, was he supposed to be attending to the affairs of the bank? Wasn't it rather like a form of torture, which, with the Court's backing, was connected with the lawsuit and was supposed to be an integral part of it? And when the people in the bank were judging his work, would they perhaps take account of the special situation he was placed in? No, none of them ever would.*

The fact that the stigma of whistleblowing never leaves a whistleblower was confirmed for me in 1998 when I sought advice relating to the offer of a donation and offers of consultancies to staff by a student of the university. The previous case was used by my detractors as evidence of some serial propensity to blow the whistle. Yet the inquiry which resulted into the student matter was not initiated by me, and the publicity which accompanied the matter was not initiated by me. Nonetheless, I bore much of the cost, and the process of inversion of the first case recurred. If Josef K had survived his trial, he would have experienced the same recurrence. The whistleblower is always remembered.

My actions in two cases at universities have led to significant tightening of policies, relating to the disbursement of research funds, student donations and student-staff relations. They have also highlighted the need for better accountability in universities, and it is significant that my call for a national university ombudsman was the only recommendation supported by all parties to the *Senate Inquiry into Higher Education* last year. But, as for all whistleblowers, there is no attribution. That too is an inversion.

### *The Bystander Problem*

***"All that is needed for evil to prosper is for people of good will to do nothing." — Edmund Burke.***

A whistleblowing trial, like the trial of Josef K, has four important players. They are the perpetrator of the malfeasance, the whistleblower, the judges, and the bystanders. It is the bystander that determines the problem. Unsurprisingly, Edmund Burke's maxim has been adopted by Whistleblowers Australia and whistleblowing groups across the world. It is, of course, the victims' cry when seeking the assistance of a Good Samaritan.

When bystanders do nothing, whistleblowers are silenced. Bystanders are the accomplices of perpetators, for they are the ones who remove the air and remove the lung power of whistleblowers. Bystanders come in three varieties. There is the silent, risk averse bystander who distinguishes between the truth and falsity of the matter. But, due to contractual and other obligations, the silent bystander chooses to remain silent. There is the appeasing bystander, who like the whistleblower discerns the wrongdoing, but appeases his inaction by flawing the whistleblower. The appeaser trades-off the original malfeasance with other attributes, such as reputational risk to the organisation, and the personal attributes of the whistleblower. Finally, there is the aggressive bystander who eventually becomes the accomplice of the perpetrator.

I have encountered all three types of bystander in the two whistleblowing problems. In the first case, 15 colleagues supported me. Only two were left in the Department after three years. All of the bystanders remained. In the second case, only one member of the Faculty supported me publicly, and he suffered as a result. The matters I had raised were never discussed at a Faculty meeting. It was always ironic for me to see the issues discussed on the front page of the *Sydney Morning Herald* and *The Age*, yet never discussed in the workplace.

The bystander problem was elevated to a syndrome, the Genovese Syndrome, by the killing of Kitty Genovese in New York on March 13, 1964. There were 38 witnesses to her murder, but only one called the police. But it was too late for Kitty Genovese. Thirty-eight people "*did not want to get involved.*" The nonfeasance of the 38 bystanders determined Kitty Genovese's death. The nonfeasance of the bystanders also determines the outcome for a whistleblower. The silence of the bystander is the most powerful weapon of those who want to silence whistleblowers.

Just as they search for a *High Court*, whistleblowers also search for a bystander who **does** want to get involved. The search for the *High Court*, and the search for the involved bystander are inseparable and become the whistleblowers' search for independence.

When the shame becomes the shame of the present, and not of the past, perhaps then we will achieve that independence. Until then, like Josef K, whistleblowers will continue to seek their *High Court.*

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## Blowing the whistle: changing culture best policy, practice

**Transparency International media release, 9 August 2002**

Despite spectacular corporate crashes such as Enron, HIH and World.com and stockholders venting their fury on global markets, demands for greater transparency and accountability are still falling on deaf ears.

This was the view of Commonwealth Ombudsman Ron McLeod, a keynote speaker at this week's Whistleblowers conference in Sydney convened by Transparency International, the anti-corruption watchdog.

Mr McLeod, who is also Ombudsman for the ACT, deals annually with more than 20,000 complaints alleging maladministration, fraud and misconduct in the public sector.

"Unfortunately, whistleblowing is often a dialogue between the hearing impaired and the inarticulate," he said.

Commonwealth legislation aimed at protecting whistleblowers has been languishing in Canberra for almost a decade. The proposed legislation is currently under consideration by the Senate. Pressure is building from quarters impatient to see some action including the ACCC. The consumer watchdog recently released a discussion paper advocating indemnity from prosecution for "the first thru the door" as an antidote to a culture of "dobbing" where fear discourages whistleblowers from reporting fraud and mismanagement.

ACCC Commissioner Sitesh Bhojani told the conference that the watchdog's leniency policy of "first thru the door" should not be taken literally. He said that modern communications enabled whistleblowers to communicate easily with the ACCC, and that contact could be initiated by fax, phone or email.

E-dobbing and hotlines dominated discussion at the TI conference, with BHP-Billiton executive Holly Lindsay reporting that global helplines are now an integral component of reputation management, risk management and protection for both employees and employers in the global business environment.

Ms Lindsay, a macroeconomist with the Reserve Bank prior to joining BHP five years ago, underscored the need for transnational corporations to acknowledge that business culture differs from country to country, creating an ethical minefield for senior management and staff.

In relation to facilitation payments, we have to ask ourselves: "Is the type and amount of payment consistent with locally accepted practice?"

Ms Lindsay said that if the answer was affirmative, then a payment might be made, provided it was accounted for and recorded, and referred to senior management for approval.

The activity described by Ms Lindsay was at the heart of the recently released Bribe Payers' Index commissioned by Transparency International. Responses to a 2002 survey of business executives and officials provided a comparative analysis of countries where the business culture exhibited a willingness to pay bribes to conduct business in foreign markets.

In that study, Australian executives were identified as the least likely business community to break the law by paying bribes to secure business in emerging markets, especially developing countries susceptible to a climate of corruption.

In stark contrast to the "anything goes" attitude of some countries to business practices, in Australia the government is under pressure from some quarters to criminalise corruption in the business sector and impose harsher penalties for offences.

The jury will remain out as long as debate rages between advocates of leniency for whistleblowers (provided whistleblowers are not perpetrators themselves) thereby encouraging whistleblowing and advocates of tougher measures dealing with private and public sector fraud and mismanagement.

Companies that pay lip service to the concept of good governance came under fire at the conference, especially companies that paid consultants to compose mission statements and Codes of Conduct which then gathered dust in filing cabinets while executives accepted "hush money" to keep dirty linen out of sight.

KPMG Fraud and Forensic specialist Brett Warfield, an advisor to senior executives in Asia-Pacific on fraud control, put a strong case for a policy of prevention as a key component of Risk Management Strategy.

A former financial investigator with ICAC (the Independent Commission Against Corruption), Royal Commissions into the Building Industry and the NSW Police, Mr Warfield pointed to the need for companies to break the cone of silence that can lead to losses running into millions of dollars as well as a loss of public confidence in the level of integrity in the marketplace.

"Hotlines are valuable but they are only one component of a holistic approach to responsible management and organisational accountability," he said. "There is also a need for confidentiality in managing hotlines as most employees are afraid to report allegations to personnel in the organisation itself. Changing the culture through responsible management is a powerful deterrent to fraud, however, it is advisable for calls made to hotlines to be fielded by trained independent investigators who are qualified to determine whether calls are vexatious."

Former NSW Ombudsman David Landa and International Director of Whistleblowers Australia Dr Brian Martin profiled whistleblowers as motivated individuals who invariably agonized before speaking out.

This was supported by Director of the Police Association of NSW Research and Resource Centre Greg Chilvers who cited numerous examples of whistleblowers who had paid a very high price for being outspoken. Nevertheless, all three speakers conceded that the courage of whistleblowers was often a powerful catalyst for change.

Mr Chilvers was particularly critical of the culture of brotherhood that has defied attempts by successive governments to rid the NSW Police of corruption. Like Brian Martin, Greg Chilvers argued that the many organisations including law enforcement agencies and universities failed to implement policy for detecting and preventing internal corruption, indicating a lack of understanding of the causes and consequences of corruption.

The Whistleblowers Conference was sponsored by Transparency International, in association with the Corruption Prevention Network (NSW), KPMG Forensic and Edmund Rice Business Ethics Initiative. TI Australia will make papers from the conference available on its website, www.transparency.org.au in the near future

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# Whistleblowing: betrayal or public duty?

## A conference report

Brian Martin

David Landa was NSW Ombudsman from 1988-1995 as well as serving in many other public roles. In recent years he has developed an interest in whistleblowing, especially on what can be done to set up realistic protocols so that disclosures can be made safely and the organisation benefit from the information provided. He took the initiative to organise a conference titled "Whistleblowing: betrayal or public duty?" that was held on 6 August in Sydney.

About 85 people attended, most of them representatives of public sector organisations, with relatively few from the private sector. Landa tried mightily to attract private sector participation but with only limited success. The conference was organised by Transparency International, an independent anticorruption body, and sponsored by the firm KPMG Forensic, and held in the KPMG building in downtown Sydney.

Landa opened the conference. He noted that whistleblower codes and

laws are not achieving their aim: they are reactive in the sense that they deal with problems that arise after a disclosure. What is needed instead, he said, are proactive solutions that allow organisations to benefit from disclosures. That means trustworthy protocols are needed to make disclosures.

The first main speaker was Commissioner Sitesh Bhojani from the Australian Competition & Consumer Commission. He focussed on what the ACCC is doing to challenge cartels, which are increasingly of global scope. When corporations collude in price-fixing or other illegal behaviour, this is very hard to expose without help from insiders. Therefore, the ACCC is proposing a leniency policy that gives immunity to the first cartel participant (except for the ringleader) to reveal the cartel to the ACCC.

I was the next speaker, representing Whistleblowers Australia. I started by giving examples of whistleblower disasters, such as the Bill Toomer case, where the whistleblower's career is destroyed, vast sums are expended, the organisation receives bad publicity, morale declines and the original problem is not fixed. I then looked at six arenas for seeking solutions: (1) designing the organisation so that problems do not arise; (2) managers fixing problems; (3) employees speaking out about problems; (4) outside groups, such as consumer groups, speaking out about problems; (5) watchdog bodies such as ombudsmen dealing with problems; (6) organisations collapsing due to their problems. For each of these arenas, there are top-down solutions, such as improved watchdog bodies. My preference, though, was for empowerment solutions, including employee participation in designing organisations and improving employees' skills in organisational politics.

Greg Chilvers of the Police Association of NSW spoke at length about the case of Wheadon, a police whistleblower who came to grief, with the familiar litany of lack of protection, harassment and breach of the duty of care. Chilver's assessment was that fear and secrecy remain the keys to the NSW police culture after the Royal Commission.

The next two speakers dealt with hotlines, which are dedicated telephone lines to handle employee complaints. Holly Lindsay of BHP Billiton told of the multinational's approach to ethical business conduct, which involves a charter, a booklet with guidelines and sample situations, a fraud hotline and ethics panel. From BHP Billiton's point of view, some of the biggest difficulties involve doing business in countries where bribery is a way of life. Lindsay spoke only of the policy, giving no information about the actual scale of corruption and misconduct in the organisation. But at least she was there. No other corporations were willing to send a speaker.

Brett Warfield told of KPMG Forensic's hotline service. Companies that want to provide an independent hotline for their employees, rather than an internal reporting system, pay KPMG to run the service. The advantage is that KPMG is seen as independent. Warfield said that nine out of ten calls are one-off, so there is only one shot at getting information. Those callers who are willing to work with KPMG can have a bigger influence on what happens afterwards. KPMG finds that most calls are accurate, with few vexatious allegations. Warfield emphasised that hotlines are only one part of a wider approach to dealing with unethical behaviour.

Ron McLeod, Commonwealth Ombudsman, gave an overview of how his office deals with whistleblower disclosures. He concluded his talk with a list of ten practical suggestions for whistleblowers, most of which you will also hear from experienced members of Whistleblowers Australia.

Kieran Pehm, Deputy Commissioner of the NSW Independent Commission Against Corruption (ICAC), noted the value of whistleblowers. Like others, he noted that various corporate collapses such as Enron were a sign that whistleblowing was needed much earlier, before problems became so serious. He reported on surveys of management and staff about awareness of the NSW Protected Disclosures Act. Managers have a much higher awareness than staff, suggesting a need to increase awareness. He acknowledged that ICAC needed to do better with protected disclosures, given concerns by Whistleblowers Australia, saying that ICAC is now more attentive to the need to consult with whistleblowers before referring complaints back to their employer.

The final speaker was Quentin Dempster, ABC journalist for the 7.30 Report and author of the important book *Whistleblowers.* He was candid about the shortcomings of the media but also harsh on corporate cultures, saying that with so many whistleblower stories around, it was time for a change in corporate attitudes — but nothing was changing. Until changes occur, the media would remain an avenue of last resort for whistleblowers.

After the talks, there were relatively few questions from the audience. Was this because participants were not really interested or because it was too risky for them to speak up? The tea and lunch breaks provided an opportunity for those who wanted to follow up specific points. The conference was a useful contribution in putting whistleblowing on the agenda for more agencies. They would learn a lot by talking to members of Whistleblowers Australia but I suspect they were much more comfortable attending the conference.

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## Blowing the official whistle

Address by Ron McLeod AM, Commonwealth Ombudsman, to, Transparency International Whistleblowing Symposium, Sydney, 6 August 2002

[To fit within *The Whistle*'s length guidelines, the opening one third of Ron McLeod's talk, discussing how the Commonwealth Ombudsman deals with whistleblower disclosures, has been omitted. For the entire talk see www.transparency.org.au]

Let me now turn to some observations based on my own experience with whistleblower disclosures.

A whistleblower in most contexts has to have courage; courage to stand up to people who do not want to hear; courage to set himself or herself apart from an organisation and their work mates and colleagues; courage to persevere in the face of personal cost and with potential risks to career, financial security and personal esteem.

A system of management fails to the extent that it depends on a whistleblower's courage and persistence to bring major problems to notice, because it should be open to anyone with a concern to be able to raise that concern in an appropriate way without fear of reprisal. That there are whistleblowers in some organisations says a lot about the nature of the organisation and the people in it.

Before a whistleblower makes a disclosure they usually spend a lot of time thinking about the issue and the implications of disclosure. Once they decide to proceed they are usually steeled in their resolve to see it through. As a consequence they can often not be easy people to deal with. They have views which are different from the expressed views of most of their colleagues – although colleagues who might not be prepared to come forward themselves may privately agree with them. They express an intent to diminish or remove something they consider unsatisfactory, when most around them would prefer to remain silent. They are generally very single-minded, whereas their supervisors or managers often see the issues in more global terms.

Whistleblowers can sometimes operate in profound contradiction to or ignorance of the full picture. They see what they believe to be a failure, but there is often a serious question about whether they are right about that. Sometimes, they may be mistaken, and what seems wrong is right or reasonable only when all the facts and other policy considerations are brought into account. A whistleblower brings this sometimes incomplete or inaccurate information to the attention of people who may not want to know what the whistleblower feels obliged to tell them. Unfortunately, whistleblowing is often a dialogue between the hearing impaired and the inarticulate.

Most whistleblowers I have had anything to do with were not put off by fear, or by threat, or by exhaustion. Sometimes, threats and delay are seen as symptoms of a more widespread problem than that exemplified by their original concern. That is, their actions, and the fact they are not discouraged by indifference or hostility, can be contrary to what might be expected of many people facing setbacks.

However, they can also be impatient for action. Having often harboured or agonised over a problem for some time before bringing it to notice, they sometimes find it hard to understand why others they share their knowledge with appear not to be seized with the same urgency or sense of importance in responding to the disclosure in a relatively short time frame.

Sometimes this apparent inaction will lead the whistleblower to try to hurry the process of inquiry, by threatening disclosures to politicians or the media. Generally this escalation of an issue will push the parties further apart, it can complicate the handling of an objective investigation and can introduce an antagonistic element which may have been absent.

At times, whistleblowers do not help the process by resorting to personal abuse when a problem may be systemic rather than personal. They may make threats, which unfortunately all too often lead to threats being made in response. They can become very angry about any insult or offence to themselves, but they can be prone to make wild and sweepingly offensive statements about others. They often demand proof at a higher level than they are able to offer to support their own allegations. They can seem narrowly focused on a particular issue, or even obsessed by it. But then they expand the field of discussion, whether they're winning or losing on the initial point. They can be impractical and politically or socially naïve; they fail too often to recognise that a small win is a win nonetheless and not just the first concession in what they believe will be a continuing process. Sometimes the issue takes on a life of its own. The persistence of the whistleblower can create hostility from management, which may see the problem as having been addressed satisfactorily or which wants to avoid getting distracted from their main objectives by becoming embroiled in what is seen as a lower order issue.

Whistleblower disclosures can sometimes get mixed up with personal work related issues. While motivation in itself is not of great relevance, the important issue being the substance of the disclosures, if the whistleblower is experiencing difficulties of adjustment in the work place, this can sometimes cloud the issue. Some managers may question whether the whistleblower is ill-suited to his or her work and view the disclosure as simply another way of expressing the person's dissatisfaction. Or is it, as whistleblowing advocates would have it, that any adverse employment related consequences visited upon the person are usually as a direct result of the perceived sin of whistleblowing?

Whistleblowers also need to keep in mind that public administration is the art of the possible. It is rare that there is one, universally accepted single solution to an administrative problem. More commonly there are a variety of approaches that are not the same. The fiscal purists might not be persuaded by arguments for a comprehensive and durable solution; or the lawyers might get in the way of commonsense. Sometimes, there might be a consensus on the best solution, but it is impossible to persuade a Minister or the Government. Sometimes the will of the Government might be vetoed by Parliament. Perfection in public administration is something to be desired, but often not achieved. There should be no scourging when despite all efforts the ideal has not been able to be achieved. In my years of public service, I have always tried to get the best possible result for the public and to exhort others to do the same — but that is not always the same as the best result, and what is the 'best result' is often only in the mind of the beholder.

There are many questions that need to be considered. Would a rational organisation respond so extremely to a single disclosure? Is the organisation in question more or less than robust than others when it comes to accepting criticism? What is the proper benchmark against which to assess the organisation's treatment of the whistleblower? Would a rational whistleblower have persisted to the point of alienating neutral managers and even some of those who supported him or her?

This last point is particularly relevant to investigative bodies like my own. We start from a neutral position, we pride ourselves on being independent and objective. At times though we are seen by some whistleblowers as simply part of a wider conspiracy and in league with the agency concerned in

covering up the issue, or in not giving proper credence to the allegations. My own investigators are highly professional, but they are also human. They don't enjoy being abused by complainants who believe we are stalling or too readily siding with agencies.

In short, what I am saying is that whistleblowers are not always right and sometimes they are their own worst enemies in the way they conduct themselves. As Brian Martin said this morning, ascertaining the truth can often be an extremely difficult thing to do. That is not to say that whistleblowers are never right, they often are, and they should be encouraged. But only the naive would believe that all whistleblowers are on the side of the angels, and the presumption that organisations will always act to frustrate their efforts is a false one.

On that note, and in the interests of providing support to future whistleblowers, let me close by offering some practical suggestions to them on how they should best go about pursuing a matter, in a way likely to maximise the cooperation of the relevant authorities.

*First,* think carefully about what you have to say and limit yourself to that subject. Try to separate out the subject of your whistleblowing from interpersonal conflicts or disagreements about policy choices.

*Second,* try to find out what you can, to protect yourself and others. Make yourself aware of your rights and the protections available to you under any legislative scheme that applies to the area you are proposing to be critical of.

*Third,* think very carefully about the consequences of what you are saying for yourself and others. People are more likely to respond positively when they do not feel that they are under personal attack. If the problem is a systemic one, say so without personalising it; if it's a personal issue, keep to the facts and let others draw their conclusions. The last thing you need to be doing is defending a defamation action.

*Fourth,* unless it is impossible or impracticable, raise your concerns first with the relevant agency head. My experience is that they are usually as keen as anyone else to deal with problems.

*Fifth,* if the agency head cannot provide a satisfactory result, take the matter up with any independent watchdog organisations that exist to oversight the body in question, such as an Auditor-General, an Ombudsman or an industry complaints body. Remember, however, that these external review bodies are entitled to decide the scope and manner of their investigations.

*Sixth,* keep your cool. Pursue your concerns by concentrating on the facts and try to keep emotion out of the debate. Don't antagonise those whose support you are seeking and accept that they are entitled to be guarded about your allegations until they have fully investigated them. Don't assume that leading questions by investigators reflect conclusions they have already reached, accept that they are part of the process of eliciting supporting information or of testing the validity of material which has been provided. Don't hold back on any information you have to back up your claims.

*Seventh,* always keep an eye on the main game. Remember that sometimes a less than perfect solution is the best that can be achieved and never forget that a small win is a win all the same.

*Eighth,* […] think very carefully about going to the media. The media is not generally interested in reporting on good public administration - in fact, the reverse is generally the case; nor is it usually interested in the protection of the whistleblower. Its interest is in the story and whether it will help to sell newspapers or improve ratings for a day or two. With rare exceptions, the media does not have the capacity to make the protracted inquiries necessary to establish truth or falsity. The media also thrives on conflict and controversy, so ask yourself if presentation of your case in this type of environment is likely to advance the resolution of your concerns. If you have not been able to achieve a result through other means, think about escalation to the relevant Minister. Going to the media should be seen as a last resort.

*Ninth,* always consider the possibility that you may be wrong. A belief may be genuine, but incorrect or only partially correct. Others may, quite reasonably, not agree with you. You are not the fount of all knowledge and in matters involving judgements about issues which are not black and white, those paid to accept responsibility for decision making have the right to reach their own conclusions. They will be judged ultimately by their actions.

*Finally,* whatever the result, when the disclosure is made and dealt with, put the whistleblowing behind you and get on with your life. Close the door, and do not look back. If you have been unsuccessful, don't let the experience sour your attitude to life. Becoming embittered will only hurt you. Embrace the philosophy that you did what you believed to be the right thing at the time, you are now older and wiser, and it is time to move on.

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## And our peers in particular

An addendum to the item in *The Whistle,* No. 1/2001

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I reported a case of an ingenious way to induce indirect professional difficulties for whistleblowers in science. It deals with a peer — fellow of a Royal Society — who effectively tried to victimise a legitimate criticism of trivially wrong science, moreover announced in a "cold-fusion" style, using a fraud. I supplied a copy of the article, enhanced with additional relevant facts, to the representatives of the No-Name Royal Society. After all, the Society has clearly claimed its interest in scientific ethics, e.g. at www.rsc.ca/english/symposium_2000.html "The Royal Society of … is a dynamic organization dedicated to the … consideration of important topics by the organization of annual symposia. This year's symposium is concerned with: Science and Ethics." This is to mention that during one subsequent year, and after repeated reminders, I have not received a single line of response. Based on this observation, I would conclude as follows: The Royal Society of … is a dynamic organization dedicated to the fight of any kind of misconduct in science as long as it is *on the other side of the fence.*

## Whistleblowers Australia contacts

**New South Wales**
**"Caring & Sharing" meetings** We listen to your story, provide feedback and possibly guidance for your next few steps. Held every Tuesday night 7:30 p.m., Presbyterian Church Hall, 7-A Campbell St., Balmain 2041.
**General meetings** held in the Church Hall on the first Sunday in the month commencing at 1:30 p.m. (or come at 12:30 p.m. for lunch and discussion). The July general meeting is the AGM.
**Contacts:** Cynthia Kardell, phone/fax 02 9484 6895, or messages phone 02 9810 9468; fax 02 9555 6268.
*Website:* http://www.whistleblowers.org.au/
**Goulburn:** Rob Cumming, 0428 483 155.
**Wollongong:** Brian Martin, 02 4221 3763. *Website:* http://www.uow.edu.au/arts/sts/bmartin/dissent/

**Canberra contact:** Peter Bennett, phone 02 6254 1850, fax 02 6254 3755, email customs_officers@iprimus.com.au

**Queensland contacts:** Feliks Perera, phone/fax 07 5448 8218. Also Whistleblowers Action Group contact: Greg McMahon, 07 3378 7232 (a/h).

**South Australian contacts:** Matilda Bawden, 08 8258 8744 (a/h); John Pezy, 08 8337 8912

**Tasmanian contact:** Isla MacGregor, islamacg@southcom.com

**Victorian contacts:** Anthony Quinn 03 9741 7044 or 0408 592 163; Christina Schwerin 03 5144 3007; Mervin Vogt, 03-9786 5308.

**Western Australian contacts:** Avon Lovell, 08 9242 3999 (b/h); John White, 08 9382 1919 (a/h).

## From the editor

Dramatic events have been occurring in Western Australia concerning the case of the three Mickelberg brothers who went to gaol over a gold swindle. Avon Lovell, now WBA's Vice-President, wrote a book, *The Mickelberg Stitch,* revealing flaws in the police case against the Mickelbergs. Defamation cases brought by the WA police kept the book out of circulation for a decade and required Lovell to attend court over 1000 times! The stunning news this year is detective Tony Lewandowski's admission that he was involved in framing the Mickelbergs. Lovell was instrumental in encouraging Lewandowski to come forward, but he in turn has come under attack. WBA's other Vice-President, Christina Schwerin, has circulated untold emails and newspaper clippings about the case. A couple of items only are included in this issue of *The Whistle.* Those interested in more detail should contact Christina at christina_schwerin@yahoo.com.

Many individuals kindly sent along relevant items from the media, including Sharon Beder, Albert Cardona, Don Eldridge, Melissa Raven and Christina Schwerin.

Send all articles, letters and other items of interest to me at bmartin@uow.edu.au (the best option for me) or PO Box U129, Wollongong NSW 2500. You can ring me at 02-4221 3763 or 02-4228 7860.

Brian Martin, editor

Associate editors:
- Don Eldridge
- Isla MacGregor
- Kim Sawyer

## Whistleblowers Australia membership

Membership of WBA involves an annual fee of $25, payable to Whistleblowers Australia. Membership includes an annual subscription to *The Whistle*, and members receive discounts to seminars, invitations to briefings/discussion groups, plus input into policy and submissions.
If you want to subscribe to *The Whistle* but not join WBA, then the annual subscription fee is $25.

***Send memberships and subscriptions to Feliks Perera, National Treasurer, 1/5 Wayne Ave, Marcoola Qld 4564. Phone/Fax 07 5448 8218.***

The activities of Whistleblowers Australia depend entirely on voluntary work by members and supporters. We value your ideas, time, expertise and involvement.

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