

# Is the General Counsel the Moral Guardian of the Organisation?

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## QUICK POLL

*Question 1 - Is the General Counsel the Moral Guardian of the Organisation?*

*Question 2 - Is the General Counsel an Officer of the Organisation?*

*Question 3 - Is it the role of in-house counsel to take advantage of uncertainties in the law?*

## Are We the Moral Guardian?

- Why should we care about ethics?
- What is the role? Hired gun or loyal ‘friend’?
- What are the rules?
- What does the paramount duty to the Court mean?
- Why is this hard in the context of inhouse practice?
- What else is relevant?
- What can be done to help?

Why should we care about ethics?

Why do we need to Consider our  
Role in Ethical Failures?

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## Parks Victoria CEO Bradley Fauteux sacked, to be investigated by IBAC

Updated 14 Sep 2016, 2:45pm

**The chief executive officer of Parks Victoria, Bradley Fauteux, has been sacked by the State Government over allegations of inappropriate conduct.**

Environment Minister Lily D'Ambrosio confirmed Mr Fauteux was asked to resign.

She said the board would ask the Independent Broad-based Anti-Corruption Commission (IBAC) to investigate the allegations.

Chair of the Parks Victoria board Andrew Fairley





## **APRA takes action against IOOF for failing to act in best interests of superannuation members**

- The individuals included in the disqualification proceedings are Managing Director Chris Kelaher, Chairperson George Venardos, Chief Financial Officer David Coulter, **General Manager – Legal, Risk and Compliance and Company Secretary Paul Vine, and General Counsel Gary Riordan.**

# THE AUSTRALIAN FINANCIAL REVIEW

## **Blame the lawyer: AMP delivers damning report on Brian Salter**

It's every in-house counsel's worst nightmare.

When the AMP board decided to investigate the fee-for-no-service scandal in response to the corporate regulator's probing, group general counsel Brian Salter's old firm Clayton Utz was brought in to do an "independent and external" investigation.

In less than two months, between when Clayton Utz provided the first draft to AMP in August and when AMP presented the report to ASIC in October, 25 drafts of the report would follow. Emails between Salter and Clayton Utz requesting changes to the report were released to the banking royal commission, when AMP decided not to assert its privilege.

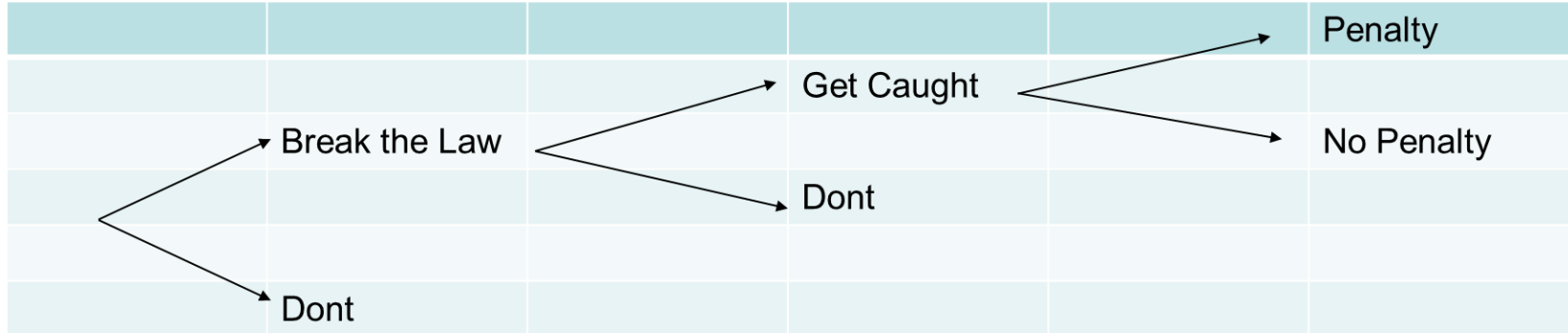
The consequences were disastrous for Salter. By the following Monday, Salter was [unceremoniously sacked by AMP's announcement to the ASX.](#)

# What is the Role of the GC?

Lets Start with a Narrow View



## Ethical Responsibility of the IHC - a Narrow View



# Lawyers not moral judges

## McCabe v British American Tobacco

- “Moral judgments have no place in the advice a lawyer gives to a client” Chief executive partner of Clayton Utz, David Fagan
- The clients are entitled to avail themselves of the full protection of the law and the lawyers are there to advance their clients' interests subject to the constraints of their professional duties and, in particular, their duties to the court. But if they operate within those constraints then they are acting appropriately
- "We don't take a moral stance and it's not up to us, as advocates for a client, to take a moral stance. Ultimately that comes to a decision by the client, not the lawyer.
- What we aspire to ensures that we act with integrity at all times, but I don't think that involves bringing moral judgment to who we act for and who we don't act for

## “Arrogant and Dangerous”

“I think it is both arrogant and dangerous for in-house counsel to think they can act as the gatekeeper of corporate ethics”

Canon Australia  
Chief Legal Officer  
Lawyers Weekly

# What are the rules?

# LPP Rules

## **3. PARAMOUNT DUTY TO THE COURT AND THE ADMINISTRATION OF JUSTICE**

3.1 A solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.

## **4. OTHER FUNDAMENTAL ETHICAL DUTIES**

4.1 A solicitor must also:

4.1.1 act in the best interests of a client in any matter in which the solicitor represents the client;

4.1.2 be honest and courteous in all dealings in the course of legal practice;

4.1.3 deliver legal services competently, diligently and as promptly as reasonably possible;

4.1.4 avoid any compromise to their integrity and professional independence; and

4.1.5 comply with these Rules and the law.

# Duty to the Court = “public good”

- Nicola Roxon (as Shadow Attorney - General) re AWB warned against a slavish adherence to the needs of the client by lawyers.
- “Law is not based solely around service to a client. Rather the business of law is predicated on a social consensus that there is a public good in having a stable framework for regulating society and resolving disputes peacefully”.

# Moral conscience?

Steve Mark, NSW Legal Services

## Commissioner

- In house counsel have a duty to their client – the organization for which they work – but that duty is overridden by a primary duty to the Court and the administration of justice.
- In house counsel also have an obligation, as do all legal practitioners, to act morally and ethically.
- In lieu of the overriding duty to the court and the obligation of morality, in house counsel must thus reject a client's requests if the requests undermine the primary duty to the administration of justice and the rule of law.
- Synonymous with this very role, is the role of “gatekeeping” and acting as a corporation's moral conscience

# General Motors: Ignition Pin





# General Motors: Ignition Pin

- 30 million vehicles recalled
- Compensation paid for 124 deaths
- In addition, US\$900 million paid to the US Govt

# General Motors: Ignition Pin

"They've tried to lawyer up and play whack-a-mole with these lawsuits, and terrible things have happened," and that "Now it's time for them to come clean, be transparent and most of all make victims whole no matter when this deadly ignition caused heartbreak in their families."

US Senator McCaskill (Congressional Enquiry)



The Executive Summary of the recently released Association of Corporate Counsel (ACC) 2019 Chief Legal Officers Survey is now available.

A leap of 14 points in one year in this critical CLO reporting metric demonstrates that "The age of the chief legal officer" is established, and on a strong foundation. **The 2019 survey shows that CLOs are assuming positions of greater power and influence within their enterprises, and taking on roles beyond that of technical legal adviser.** Nearly 70 percent of CLOs surveyed indicate that the executive team almost always seeks their input on business decisions. Last year, that level was 11 percentage points lower.

# Who is an “Officer”?

*officer* of a corporation means:

(a) a director or secretary of the corporation; or

(b) a person ... who makes, or *participates in making*, decisions that affect the whole, or a *substantial part*, of the business of the corporation

# Duties of Directors and Officers

- Duty of Care and Diligence (S180).
- Business Judgment Rule:
  - Good faith and proper purpose;
  - No personal conflict; and
  - Appropriately informed.
- Good faith, proper purpose and in the best interests (S181).

# Shafron v ASIC [2012] HCA 18

- High Court did not distinguish between role as General Counsel and Company Secretary to determine if Mr Shafron would be considered an 'officer' under the Corporations Act 2001
- The corporate counsel/ company secretary was held to have been a company officer because he “participated in making decisions affecting the whole or a substantial part of James Hardie’s business”. This meant that the general counsel/company secretary was found to have a positive duty to act with due care and diligence (S180 of the Corporations Act).

# Changing Expectations

Hayne Royal Commission

“Companies motivated solely by greed; maximizing shareholder Returns”

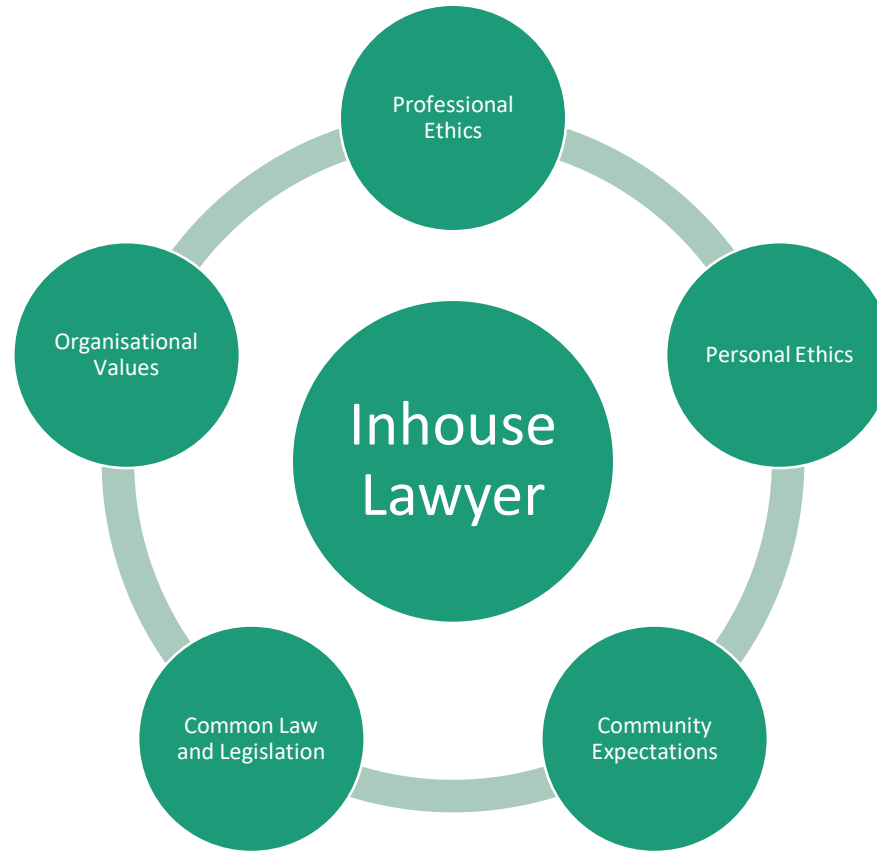
# Richard Moorhead asks 400 GCs

“My Role is to Exploit the Law for Commercial Ends”

“Where the Law is uncertain, I help the business benefit from that uncertainty”



**What other ethical standards might you be subject to?**



# ACC Guidance for In-House Counsel on Ethical Decision Making - Dr Simon Longstaff

- Act in a spirit of public service.
- Obligation to the court is a commitment to justice.
- Subject to this, the in-house lawyer must act in best interest of client.
- Must discern between clients interests and ‘wants’.
- Adviser not mere agent.
- In-house lawyers owe their client benefit of full range and depth of knowledge and skill – not just technical expertise in law.
- The practice of law requires moral courage.

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## AWB ex-chairman Trevor Flugge fined \$50k over Iraq food-for-oil scandal

By Emma Younger

Updated 10 Apr 2017, 2:02pm

**Former Australian Wheat Board (AWB) chairman Trevor Flugge has been fined \$50,000 and banned from managing a corporation for five years for failing to properly investigate \$223 million in kickbacks paid to Saddam Hussein's regime in Iraq.**

But Victorian Supreme Court judge Ross Robson found Mr Flugge's reputation for honesty had not been tarnished by the civil case brought by the corporate regulator, which failed to prove he had

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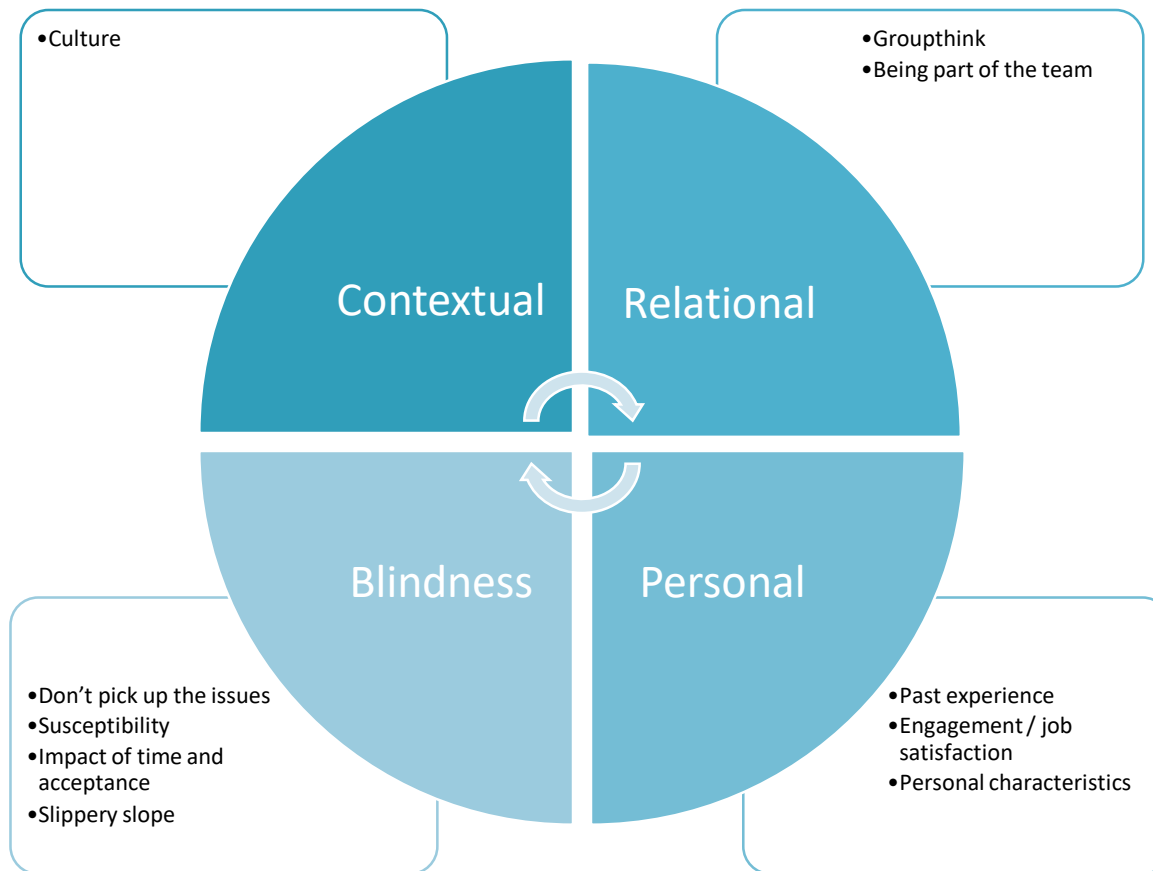


# How do in house lawyers navigate this changed landscape?

AWB as a case study:

- See role as technical commercial/legal advice;
- Over-identify with commercial objectives as ‘trusted adviser’;
- Rationalization of why it might be acceptable;
- Group think/ Poor culture;
- Personal weakness; and
- Slippery slope – acceptance.

# Elements of ethical dilemmas - Gentilin



# What can you do? Prevention

- Be aware of the psychology- question yourself.
- Ensure Leadership commitment and understanding of lawyers role.
- Help develop a compliance culture and a code of conduct and raise awareness.
- Understand where your risks lie.
- Look at acceptance of Gifts and conflict of interest – these can be ‘slippery slope’ issues leading to bigger things.
- Whistleblower protections – external hotlines, internal systems that offer encouragement and protection.

# Our ethical framework

## Victorian Public Sector values

Responsiveness  
Integrity  
Impartiality  
Accountability  
Respect  
Leadership  
Human Rights

## Our commitments

### As stewards of Victoria's parks we will:

1. **Put safety first**  
We prioritise safety, acting consciously every day to keep ourselves and our teams safe
2. **Provide excellent customer service**  
We actively listen to, consult with and respond to our customers
3. **Collaborate**  
We work cooperatively towards achieving the organisation's goals
4. **Lead Innovation**  
We think creatively, share knowledge, and remain open to new ways of thinking and operating
5. **Be accountable**  
We take responsibility for the results of our decisions, actions and behaviours
6. **Act with Integrity**  
We are open, honest and ethical and treat all people with respect
7. **Lead environmental and heritage management**  
We are responsible managers of our environment and heritage
8. **Earn the community's trust**  
We manage our resources to benefit the community

## Our guiding principles

- We don't accept harm occurring to ourselves and the people we work with so we look out for each other, both physically and mentally
- We facilitate appropriate access to parks
- We help each other to progress the work of Parks Victoria
- We are constantly trying to improve how we do things. We are careful to make decisions based on best evidence and experience
- We act humanely and ethically in our treatment of animals
- We take the necessary decisions and actions to actively manage a healthy ecosystem
- We support and encourage those who call out behaviours and actions that contravene our ethical framework
- We respect each other and keep our workplaces free from discrimination, harassment and bullying
- We respect Traditional Owners as partners in the management of Country
- We strive for 100% compliance with environmental and heritage regulations and disclose all breaches
- We depend on community trust; we spend money on behalf of the community and other funders and will carefully manage our time and resources



# What do you do if you have an ethical issue?

- Personal Values (Listen to your ‘gut’).
- Risk and Reputation – ‘Herald-Sun’ test.
- Public Policy considerations/Community Expectations.
- Assess Your Role –technical lawyer/officer.
- If you are an officer, how to act in the best interests of the organization?
- Do you have a Code of Conduct? What are your obligations?
- IBAC / ICAC/ Ombudsman.
- Find a trusted adviser to discuss (take care that you are not breaching any confidence – ACC can help).
- Raise it with your CEO. If they are involved, raise it with the Chair of the Audit Committee or the Chair of the Board.

# ACC Resources

- # Deon Wong
- ACC “Guidance for In-House Counsel on Ethical Decision Making”
- [# Ethics Committee]

**Thank You**