

The Role of the General Counsel in Corporate Misconduct

Nick Galloway, Regional Counsel Australia and New
Zealand, South East Asia, PPG Industries Australia Pty Ltd
Margaret Gillespie, Chief Legal Counsel, Executive Director
Legal Risk and Compliance, Parks Victoria

Breaking news Turnbull says all MPs and senators will be forced to disclose citizenship status to P

Print Email Facebook Twitter More

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



SEVEN SPORT | 7 AFL RLWC TENNIS CRICKET FOOTBALL RUGBY



Senior AFL executives sacked for inappropriate relationships with colleagues

Commercial manager Richard Simkiss and football operations boss Simon Lethlean each sacked over affairs with younger female

SHARE

\$1m for knowing nothing



Our man in Baghdad ... Trevor Flunge at the Cole inquiry yesterday, and how he appeared on duty in Iraq in 2003.

By Cynthia Banham and Marian Wilkinson
February 28, 2006
Page 1 of 2 | [Single page](#)

Related coverage

- [Voters don't believe Coalition on AWB](#)
- [Comment: ... but support for PM is rock solid](#)
- [Unreliable memoirs fail to excite](#)
- [Graphic: Voter attitudes to the AWB fiasco](#)

THE Federal Government has admitted it paid the

Catholic Church 'hiding behind the law' over historic abuse compensation claims

7.30 By Louise Milligan

Updated 12 Oct 2017, 10:19pm



The clips we have just seen represent the in-house counsel's worst nightmare. We are going to talk today about our role in managing corporate misconduct and then give you some ideas about how you can assist your organisation avoid it. We all know we have a paramount duty to the court, we understand it in the context of our own professional conduct but how does it extend to our company's conduct or officers within that company? What are the expectations of the General Counsel. Is it the same duty as external lawyers? Or something

different?

What do you think

We will give you our backgrounds, we are both general counsel but operate in very different contexts.

I am Nick Galloway, I am Regional Counsel Australia and NZ and SEA of PPG Industries Australia Pty Ltd, a technical paint manufacturer which has its head office in the US. I deal with the complexity of working for commercial entity which is a wholly owned subsidiary of *PPG INC*? **I report to a lawyer who works for XXX who is located in Hong Kong. {Describe the corporate structure} Knowing who my client is can be a challenge as can be the different ethical standards encountered across the locations I am responsible for. My day to day duties are focused on *providing legal advice*. ?? However, I also act as a director on the Board of the Australian subsidiary but this Board does not have a proper governance role???? *I made this up***

I am Margaret Gillespie, I am Chief Legal Counsel and Executive Director of Legal, Risk and Compliance at Parks Victoria, a Victorian Government statutory corporation. I report to the CEO and sit on the Executive Management team. I undertake the Board Secretariat function in addition to looking after audit, insurance, risk, compliance, information management and HSE. In addition to my general counsel role I have a management role. I am the executive support to the Audit Risk and Compliance Committee and I also attend each Board meeting to be available to provide advice. I also work in the context of the Victorian Government's integrity framework.

I was unlucky enough to be caught in a corporate scandal last year where the Chief Executive was sacked for a breach of integrity. I discovered that breach and reported it to the Chair. The Board then acted quickly.

Social media

ACC social media hash tags are:

- #byinhouse
- #ACCNatCon17
- #ACCAustralia

For this session #ethicalvoice

ACC twitter tag is: @ACC Australia

[# Insert polling instructions]

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

Question 2 - Are You an Officer of the Organisation?

The Role of GC in Corporate Misconduct

- Is there a role for the GC?
- What elements need to be considered?
- What should you do if you decide you have a role?
- Is there anything proactive you can do to reduce the likelihood of misconduct occurring?

By in-house counsel, for in-house counsel.SM

So we are going to discuss what exactly is required of In house lawyers?

The professional conduct rules state:

XXX

This is not particularly enlightening

In the Rola McCabe case, Clayton Utz were criticised for their approach to the case. Their

Fundamentals – the 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.

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

By in-house counsel, for in-house counsel.SM

Travers summarised the firm's position in heroic terms, saying some of its reputation was forged in hard-fought litigation.

". . . one of the legacies of adversarial litigation is that cases are often fought robustly with participants prepared to engage in some tough tactics. If you go in hard for your clients, then sometimes opposing parties will try and bring you down. Our obligation was to stand behind BATAS in the difficult times we had encountered. We could not cease to act - that would have been to abandon the client."



Home / Business

MAY 4 2012

High Court rules against Hardie directors

Leonie Lamont

[f SHARE](#) [TWEET](#) [✉](#) [MORE](#)

DIRECTORS and senior company officers have been put on notice by the High Court that they risk their corporate life if they fail to exercise due care and diligence in ensuring the accuracy of their public statements.



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).

By in-house counsel, for in-house counsel.SM

Mr Shafron was GC and Company Secretary

Background

In 2001 two subsidiaries of James Hardie group were exposed to major liabilities associated with asbestos related claims. The Group restructured and set up a Foundation to deal with the claims. In February 2001 the board of directors made an announcement to ASX that the foundation had sufficient funds to meet all anticipated asbestos compensation claims. That announcement was misleading because the Foundation was underfunded by \$1.5 billion.

The High Court did not go on to say what their view would be if Mr Shafron had only been acting as legal adviser but

"All of the tasks Mr Shafron performed were undertaken in fulfilment of his responsibilities as GC and Co Sec... because of his qualifications and the position in which he was employed his responsibilities as GC and Co Sec extended to profering advice about the {ASX} disclosures should be met. And when he procured advice of others and put that advice before the Board for its use, his responsibilities could, and in this case did, extend to identifying the limit of the advice that the third party gave.'

Suggests that if your role is senior and you have an influence on the

decision-makers, then you may be an officer and you owe the duties of an officer.

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
 - Appropriately informed.
- Good faith, proper purpose and in the best interests (S181)

Are you an Officer of the Organisation?

By in-house counsel, for in-house counsel.SM

General Motors: Ignition Pin



By in-house counsel, for in-house counsel.SM

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)

Ad closed by Google

Report this ad

Ads by Google ⓘ

WORLD

Here Are Some Of The Ads Russia Paid To Promote On Facebook

The ads are separate from 80,000 other Facebook posts that have so far been linked back to Russia.

© 02/11/2017 8:50 AM AEDT

By in-house counsel, for in-house counsel.SM

Sen. Al Franken (D-Minn.) directed particularly pointed criticism at Facebook on Tuesday during a hearing before the Senate Judiciary Subcommittee on Crime and Terrorism, asking Facebook general counsel Colin Stretch how Russian operatives could get away with paying for these ads in rubles yet raise no flags.

"Why did Facebook, which prides itself on processing billions of data points simultaneously, somehow not make the connection that electoral ads paid for in rubles were coming from Russia?" Franken asked.

"Those are two data points," he added, driving the point home. "How could you not connect those two dots?"

Stretch acknowledged the company could have done better, casting it as "a signal we should've been alert to and we missed."

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

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,”

By in-house counsel, for in-house counsel.SM

Lawyer's Weekly, 9 October 2012

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

Breaking news Paradise Papers leak reveals evidence of links between Trump administration and Put

Print Email Facebook Twitter More

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



ns/ Nations

Why do in-house counsel fail to raise these issues?

AWB as a case study

- see role as technical commercial/legal advice
- Over-identify with commercial objectives
- Rationalization of why it might be acceptable
- Group think
- Personal weakness
- Slippery slope - acceptance

By in-house counsel, for in-house counsel.SM

AWB was the exclusive marketer of Australian wheat exports. In order to gain market share of the lucrative Iraqi market, AWB paid a fictitious transport fee to a Jordanian trucking company controlled by Saddam Hussein. This was in direct contravention of the UN 'food for oil' program which was part of the sanctions against that regime.

The in-house lawyers were found, in subsequent investigations (Cole Inquiry) to have been aware of the scheme and to have not raised the alarm that it was in contravention of the sanctions.

So what stopped them?

Rationalisation?

Over-identification with clients commercial point of view

Convincing themselves that their role is primarily about providing technical advice on commercial matters

Result in wilful or unintended 'ethical blindness'.

Dennis Gentilin wrote a book *The Origins of Ethical Failures* following his role as whistleblower at NAB foreign exchange trading scandals

Identified four elements

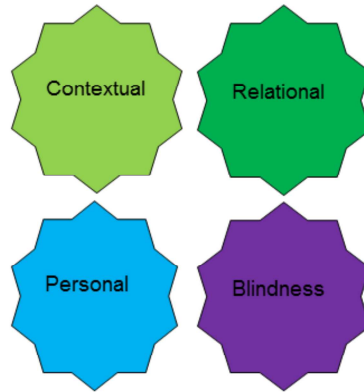
Context – prevailing culture

Relational – being part of a team- group dynamics - accept what is done

Personal – may not feel personally strong, fearful or can rationalise

Blindness – just not see it or “slippery slope” of accepting a bit of bad which leads to acceptance of hugely bad over time

Elements of Ethical Failures- Gentilin



Is the General Counsel the Moral Guardian of the Organisation?

By in-house counsel, for in-house counsel.SM

What can be done?: Prevention

- Be aware of the psychology- question yourself
- Ensure Leadership commitment
- Develop a compliance culture
- Develop and implement a code of conduct
- Understand where the 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
- Training for all staff to give them the awareness of the issues, the psychology and the language to talk about issues, this should lead to on-going discussions eg an item in team meetings
- Regular maintenance and review of system

By in-house counsel, for in-house counsel.SM

1. Leadership commitment – GC is not only officer with this responsibility- all have it but by being aware of the risks you can proactively champion managing them. It is necessary to develop a corporate culture of compliance and ethical conduct.
2. Develop a code of conduct – the Victorian Public sector has a code of conduct, which deals with such things as integrity , accountabilities etc at Parks Victoria we have developed additional commitments which deal with compliance and developing public trust.
3. Understand your key risks – is it procurement? Dealing with foreign transactions which could lead to bribery?
4. Develop a clear policy around accepting gifts, hospitality and dealing with conflicts of interest. The Victorian Ombudsman recently identified these risks as ‘slippery slope’ issues or ‘from little things big things grow’
5. Whistleblower protections. The Corporations Act offers limited protections. Most public sectors provide a regime but at a minimum you need to offer a way for whistleblowers to be able to report. The DET in Victoria, following an IBAC investigation into corruption set up an external service. They found it was extensively used at first, but once staff saw management acting on their concerns they begun to trust management and using the hotline less often.
6. Training – run discussions with staff so they understand the code of conduct, the procedures, the psychology and how to raise a

complaint.

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 regulators 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?: Assess

- Personal Values (Listen to your 'gut')
- Assess Your Role
- Risk and Reputation – 'Herald-Sun' test
- Are you an officer, how to act in the best interests of the organization?
- Do you have a leadership role?
- Public Policy considerations
- Community Expectations
- IBAC / ICAC/ Ombudsman
- ASX Corporate Governance Principles
- Regulators ASIC, ASX, EPA, APRA

What do you do if you do find an ethical issue?: Act

Before doing anything (including not acting!)

- Find a trusted adviser (don't try to handle it on your own) and discuss the matter, take great 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 or Head of Department.
- You may need to resign

By in-house counsel, for in-house counsel.SM

It may be that by raising the issue it will not be acted upon and you will find that your position is untenable. It is helpful to ensure you have some savings so you are not tempted to rationalise out of fear.

Speaking to a trusted adviser – can be a range of people. I have used the Victorian Government Solicitor on one occasion and most recently I used the Chair of the Audit Committee as a sounding board before reporting the conduct to the Chair.

ACC Resources

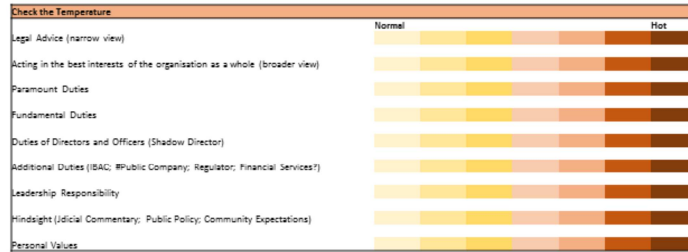
- # Deon Wong
- ACC “Guidance for In-House Counsel on Ethical Decision Making”
- [# Ethics Committee]

Thank You

Whistleblower Developments

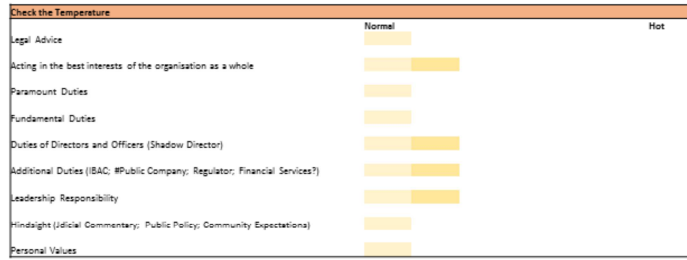
- Treasury Laws Amendment (Whistleblowers) Bill 2017
- Proposed Regime
 - Who can report
 - “misconduct” and “improper state of affairs”
 - To whom (broadened and harmonized)
 - Anonymity and Protection
 - Compensation
 - Immunity
 - Reverse Onus
- What Next?

How Hot Is It?

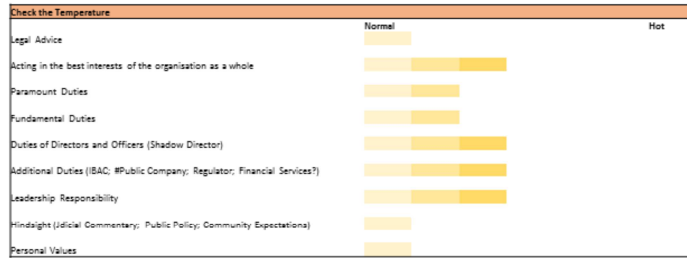


Consider: what is my role; which hat am I wearing?; In what capacity am I acting?

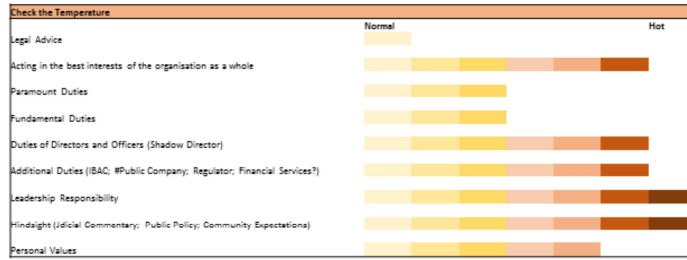
The temperature can change as information comes to light.
 Case Study # Initial Temperature Check.



By in-house counsel, for in-house counsel.SM



By in-house counsel, for in-house counsel.SM



By in-house counsel, for in-house counsel.SM

Duties of Directors and Officers

The [Corporations Act 2001](#) (Cth) requires that a company director or other officer exercise their powers and discharge their duties with care and diligence [s 180]. This duty is subject to a business judgment rule that requires a director making a business judgment to:

- make the judgment in good faith and for a proper purpose;
- not to have a material personal interest in the subject matter of the judgment;
- inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate;
- rationally believe that the judgment is in the best interests of the corporation.

In addition, directors and other officers of companies must exercise their powers and discharge their duties in good faith in the best interests of the corporation and for a proper purpose [s 181]. They are prohibited from improperly using their position to gain an advantage for themselves or someone else or to cause detriment to the corporation [s 182] and are prohibited from using information obtained as a consequence of their role with the company to gain an advantage for themselves or someone else or to cause detriment to the corporation [s 183]