

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

# *The Whistle*



No. 74, April 2013

Newsletter of Whistleblowers Australia



The Red Queen's  
whistleblower law in action



### Wilkie was right: whistleblower bill comes up short

Chris Merritt

*The Australian*, 22 March 2013, p. 30

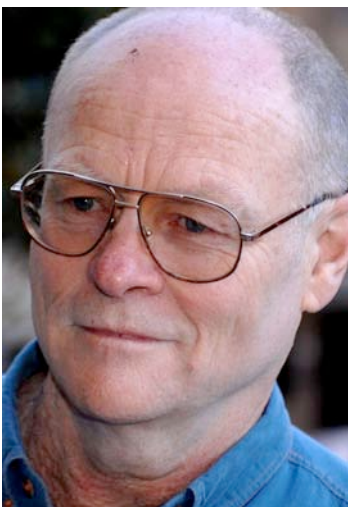
ANDREW Wilkie was right. The shortcomings he predicted would be present in the government's whistleblower bill are all there.

Amid the chaos in Canberra yesterday, Wilkie made a preliminary assessment of the bill after it was introduced by Attorney-General Mark Dreyfus.

His verdict: it needs several amendments designed to extend its reach.

At the moment, the scheme makes no provision for those in the intelligence community or for political staffers to be protected when they disclose wrongdoing to the media.

Wilkie is also concerned there is no provision allowing complaints to be lodged against ministers and that severe restrictions have been imposed on disclosures of wrongdoing to the media. In Wilkie's assessment, the bill's shortcomings mean it does not pass his "Kessing test": it would not have been sufficient to protect whistleblower Allan Kessing if it had been in force when the former senior Customs officer was convicted of making an unauthorised disclosure about criminality and security flaws at Sydney airport.



Allan Kessing

For the government, that assessment must be quite an embarrassment. Kessing's conviction was the impetus for the 2007 Labor Party policy that promised to enact a law to protect whistleblowers. The policy document mentions Kessing by name and praises him for making Australia a safer place.

If Wilkie's assessment is right — and it looks to be — it suggests that the government has decided to compromise the high-minded policy of 2007 in order to placate senior public servants.

A strong whistleblower law would present public service mandarins with a dreadful choice: if they fail to address internal complaints about shoddy administration, there would be a strong likelihood that such problems would be featured on the front page of the nation's newspapers. Worse, they would be prevented from seeking revenge on those who reveal their ineptitude to the media.

The scheme outlined in the government's bill does extend protection to public servants who reveal wrongdoing to those outside the public service. But the conditions are extreme.

Only in emergencies can disclosures be made to the media. The whistleblower must believe, on reasonable grounds, that the information they plan to leak concerns a substantial and imminent danger to health or safety. The information disclosed must be no more than is necessary to alert the media to this danger, and if the whistleblower has chosen to bypass the bureaucracy and go directly to the media there must be exceptional circumstances.

On top of that, the disclosure to the media must "not be contrary to a designated publication restriction."

That appears to mean that the protection for whistleblowers contained in this bill can be abrogated by the use of a rubber stamp containing the words: not to be disclosed outside the public service.

After all this time, it is a little disappointing that this is the best the government can do.

### Coalition exposed on whistleblower

Maris Beck and Ben Butler

*Sunday Age*, 10 February 2013, p. 9

THE Victorian state government launched a witch-hunt for a whistleblower who leaked details of its covert tactics in a pay dispute with nurses, documents have revealed.

Premier Ted Baillieu's department ordered an "extremely urgent" investigation without waiting for official approval to uncover the whistleblower's identity.

The source had provided information for a 2011 *Sunday Age* story on the government's aggressive strategies in the nursing pay showdown.

Documents obtained through freedom of information show that the Department of Premier and Cabinet launched the investigation after this newspaper published leaked cabinet-in-confidence documents signed by Health Minister David Davis.

The documents revealed a secret plan to provoke nurses into industrial action so it could force them into arbitration and force job losses.

The pursuit of the whistleblower was uncovered after an eight-month freedom of information chase to obtain the Department of Premier and Cabinet's records on non-compliant use of almost \$1.25 million across a dozen projects since 2007.

The leak investigation began on November 9, 2011, three days after the media report, and blew out the initial \$150,000 estimate by \$40,000 and an estimated three months. Two senior members of the government team that commissioned the investigation had declared conflicts of interest without preparing plans to manage their conflicts, the government's records show.

Another of the projects involving cost blowouts — which the state government tried to withhold on the grounds it would "cause damage to the international relations of the Commonwealth" — was the Queen's visit to Melbourne in 2011. The contract to plan events for the the royal visit was exempted from public tender

and ran over budget by more than \$50,000 due to unforeseen circumstances.



The Queen riding a Melbourne tram in 2011 — an unforeseen expense

The details of those circumstances remained blacked out in the final version of the document released to *The Sunday Age*.

Other non-compliance reports included:

- Non-approved expenditure of \$50,000 on “strategic advice and planning support” in 2011, a cost-blowout of almost 50 per cent on the original contract.

- Non-approved expenditure of \$70,247 on “urgent works to expand the office of the deputy premier” in 2007.

- Two cost blowouts on contracts for climate change advice totalling about \$26,500 in 2007 and 2008. The report on one of the contracts said “the secretariat recognises that the management of the contract did not follow the relevant procedures.”

- Several urgent bushfire-recovery projects including non-compliant expenditure of \$445,000 on housing for bushfire-affected residents, which the report said was started before formal approval due to an administrative oversight.

A government spokeswoman said: “The publishing of documents by *The Age* compromised negotiations and an independent investigation into the source of the leak was appropriate.”

She said costs relating to the royal visit had been previously released. “In

order to successfully deliver the event elements of the Queen’s visit, it was necessary to work with an event management company capable of delivering events to the standard required.”

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## True public interest in free speech too easily subjugated

*Sydney Morning Herald,*  
18 March 2013, p. 22

Readers of the *Herald* may well regard the proposed Conroy media reforms as an isolated assault on free speech. Not so.

Almost daily, media outlets have to fight court battles against the rich and powerful to try to ensure free flow of information to the public. The litigants fighting the media in these cases include people who rely on publicity when it suits them but who recoil from scrutiny.

Others are unelected individuals and organisations that seek to influence policy and laws. Some willingly use your money in their pursuits until the media discovers their flaws and tries to warn you.

The bad news is: the media’s court battles to defend free speech are waged on unfair terms. Australian laws provide little protection when the media aims to uncover and reveal information in the public interest.

The rich and powerful know the legal system works to their advantage. They have the money to use it.

At the extremes their actions would be regarded as bullying in any other sphere. Their weapons of choice include suppression orders to prevent reporting.

Such is the insidious nature of these that the *Herald* cannot report whether or not some have been granted — let alone why.

Increasingly suppression orders are used to prevent publication of details about tax records, financial bona fides for raising money and influence on government affairs. The rich and powerful are also adept at using so-called “discovery” during the legal process as a fishing expedition to shut down leaks.

Worse, they aim to discover what other information may be revealed in future, thereby co-opting the courts into future proofing the assault on free speech.

The courts are available for defamation cases to protect the legal construct of “reputation” against supposed damage — and this in a marketplace of ideas where surely the public is the best judge of who is reputable or not.

The bad news is: the public is often denied the right to judge. Litigants increasingly hide behind “commercial in confidence” to prevent the public accessing facts. And when all else fails, the rich and powerful target the bearer of bad news.

In seeking to force journalists to disclose their sources on threat of jail for contempt of court, the rich and powerful aim to deter anyone from revealing the truth. All these tactics involve utilising the legal process to delay, complicate and, at worst, stop the flow of information.

All aim to intimidate outlets that invest in quality journalism, then use checks and balances to determine the veracity of information before it is published.

But the media will not be intimidated and will keep fighting for free speech in the courts. The presumption of any judicial system must be open justice.

Legal demands to keep information secret should be resisted except in the most extreme cases.

“Non-discriminatory,” was how the Queensland Court of Appeal described open justice in a judgment in 1995. It contrasted this with the way exceptions to open justice “deny equal rights to the disputing litigants and provide a benefit to some litigants which is unavailable to members of the general public.”

Where there is a compelling case for secrecy, it should be limited to instances where, as it is often stated, “justice could not be done at all if it had to be done in public.”

Herein lies the problem. Too often the courts find perpetuation of legal process of greater public interest than the democratic flow of information.

This disparity is reflected in how courts have placed little or no weight on the journalists’ code of ethics —



“where confidences are accepted, respect them in all circumstances.”

To its credit, the legislative arm of government has made some attempts to defend the media against increasing efforts to silence it.

The federal, NSW, Victoria, West Australian and ACT jurisdictions now have shield laws, although some began too late to protect the media in current cases.



Each shield law still falls short, by giving the courts immense discretion and providing no clear protection to unpublished information journalists have gleaned.

The laws also fail in having no explicit recognition that confidentiality of sources is legitimate in the public interest. Nor do the shield laws state clearly that the overriding public interest is in the communication of facts by the media to the public.

As the law stands, judges can easily subjugate the true public interest in free speech to the alleged public interest in revealing journalist sources.

In effect, that elevates the private interest of the rich and powerful so they can pursue their legal action, giving them an advantage “unavailable to members of the general public.” Such discretion helps vested interests. That is not in the public interest.

## The habits of Empire die hard, as it is writ large

Michael West

*Sydney Morning Herald*, 11 February 2013, *BusinessDay* pp. 1, 4

If you think you have freedom of speech, think again. Directors of Empire Oil & Gas fired off legal threats in early January to a group of shareholders they claim had defamed them in an online stock forum.

“Vicious attacks,” claimed managing director Craig Marshall and co-directors Bevan Warris and Neil Joyce.

Among the slew of ultimatums from their Perth lawyer, Martin Bennett, were demands that shareholders who had allegedly libelled Empire’s directors apologise, demands that they remove “offending posts” from the internet, demands that they pay Bennett’s legal bills and, preposterously, demands that they “make an appropriate offer to compensate for the damages caused to date; [saying that] in Western Australia since 1984 the award for nominal damages is \$5000 per publication.”



“That’ll be \$5000, if you please.”

Fearful shareholders interpreted this as a demand to pay \$5000 per defamatory post. Martin Bennett responded to Fairfax Media that the interpretation that the “concerns notices” represented a demand for money were “rubbish.” “They legitimately invited settlement of genuine causes of action.”

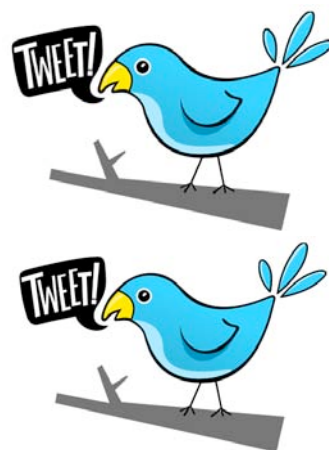
In any case, if the HotCopper posters did not respond to these “concerns notices,” they faced a lawsuit in the Supreme Court of Western Australia.

One distressed shareholder told Fairfax he had to pay hundreds of thousands of dollars. The action, he said, would ruin him and his family.

Another said he faced a marital crisis arising from the stress of the aggressive legal tactics.

“My fear is — even if I’m totally in the clear, the cost of a defence action will be enough to bankrupt me on airfares alone (let alone the lawyer’s fees). This is a really scary place to be in for the unfamiliar,” another said.

“From my perspective, it feels a lot like, basically, ‘Pay us \$X00,000 and write an apology or we will sue you for even more’. The \$X00,000 will bankrupt me and my family anyway, so what to do apart from the unthinkable?”



“That’ll be \$10,000.”

If you think you have freedom of speech, you’re wrong. Empire is merely one example. Shareholders are regularly muzzled by legal threats, gagged from publishing their opinions about company performance and management.

Over the past two years, there has been an alarming rise in the incidence of defamation threats against company shareholders and others.

HotCopper, the leading chat forum where investors exchange views on the sharemarket, is so plagued by legal threats that its managing director is leaving the country.



“I’ve received legal threats from probably 50 companies in the past couple of years but only been forced to shut down discussion on seven ASX

stocks so far,” managing director Greg D’Arcy says.

“These are Peninsula Energy, Empire Oil & Gas, Navigator Resources, Artemis Resources, Apollo Minerals, Sampson Oil & Gas and Solagran.

“Peninsula Energy was our third most popular stock of all time on HotCopper and, since banning discussion, has caused a dramatic drop in our daily usage. The lawyers are slowly killing our business. Our only option left is to move HotCopper to the USA.”

In the US, freedom of speech is protected under the constitution. In Australia, defamation laws enacted a century before the internet are supposed to protect people’s reputations from unfair attack. In reality, they can be exploited to undermine free speech and protect powerful people and corporations from scrutiny.

Such scrutiny is absolutely integral to democracy and, at the same time as this perilous rise in the suppression of information is occurring, mainstream media revenues and staffing levels are under unprecedented pressure.

This means a lot of information which ought to be reaching the public domain is not. This reporter can attest first-hand that a good deal of time is chewed up by journalists and media organisations responding to large numbers of defamation claims. These are mostly funded unwittingly by shareholders and investors.

Shareholders, in other words, are unknowingly paying to have important information about their investments withheld from them. Fairfax asked Empire’s lawyer, Martin Bennett, who was funding his legal bills. He declined to answer, although the letter of demand says the claims are being made by the directors in their personal capacities.

He did, however, agree to write a defence of the Empire directors’ actions. This will be published online on Monday.

Under reforms a few years ago to the Defamation Act, big companies are no longer allowed to sue for defamation. The logic is that they have the resources to put their own opinions widely in the public domain. But there is nothing to prevent directors from taking action, and the same outcome is

often achieved — the gagging of free speech, that is — as if the company itself were suing.

Much of the alleged defamation of Empire directors on HotCopper is questionable. Yes, some posts are clearly defamatory, but much of the commentary reviewed by this reporter seems normal and justifiable criticism. Yet, while Empire’s detractors have been muzzled, there has been nothing to shut down the vitriol on other websites written by supporters of the board.



The Empire strikes back

Besides the threats detailed above, directors have already brought defamation proceedings against three of their detractors, Darren Watson, activist Eddie Smith and a retired nurse from Queensland, Suzanne Devereux.

It would seem to be one big waste of court time and taxpayer money.

The current defamation laws are pitifully inadequate to cover the revolution in digital media. When the public now publishes by the second, globally, and it is impossible to shut down adverse commentary in other jurisdictions, it’s time for Australia to dump its antiquated defamation laws and adopt a regime in line with the US, where free speech is better protected.

If the present plague of threats continues to escalate, democracy will be all the poorer.

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## Our costly complacency on corruption

Stephen Bartos

*Canberra Times*, 5 March 2013

THE Australian Society of CPAs [Certified Public Accountants] held its international public sector conference late last month. Discussions ranged widely among Australian and numer-

ous overseas delegates. Most of the latter were from the Pacific or South-East Asia. Corruption was a topic of interest, possibly because a number of auditors were there. Audit is a powerful institution against corruption, especially fraud — but only one of what should be a suite of different mechanisms. Most jurisdictions, including the states and other countries in our region, have a better anti-corruption framework than does our federal government. It led to comments from several delegates about why the federal government seemed so complacent.

The point was raised after my talk on bringing public sector institutions out of the 19th and into the 21st century, and following a presentation by Griffith University’s Professor A. J. Brown on whistleblowing programs. Readers may recall from the *Informant* last year that new federal whistleblowing legislation has been drafted but inexplicably delayed for years, and that despite parliamentary committee recommendations there is no overarching federal anti-corruption investigative body.

Nepotism and cronyism in selection and promotion is one of the hardest forms of corruption to investigate and monitor.

The Australian Public Service has no cause for complacency. When I last wrote on the topic, I received numerous comments and emails from current and former public servants confirming that, in their view, there is corruption in the APS. Understandably, they were cagey about details. If the examples they had observed had been obvious, with documented evidence, there is little doubt that they would have been dealt with. However, it is much more common for people to see what looks like corrupt behaviour but have no “smoking gun” direct evidence. Without evidence, they can feel they have nowhere to go.

Corrupt public servants generally try to hide their trail. As one cynical accountant commented during question time, arguably there might be more corruption in the Commonwealth because federal public servants are smarter, and thus better at hiding their wrongdoing. It is very hard for a body to uncover clever corruption without independent investigative powers.

If corruption involves senior managers, they can not only hide evidence but also persecute anyone who might reveal it. That is why stronger whistleblowing protections and an independent investigative body are so needed.

There is no reason to suppose that corruption is rife in the APS — but, equally, without these mechanisms, there is no reason to believe it is absent. Establishment of an anti-corruption body would be a winning each-way bet for the public service. If there is little corruption and the body has a tiny workload, that will be good news. If it does uncover corruption, that too will be good, because it will stop it spreading and prevent taxpayers from being ripped off.

The lack of resources devoted to investigating corruption in the APS was illustrated by revelations last month that, due to “chronic under-resourcing,” the Australian Commission for Law Enforcement Integrity had been forced to second staff to help with its oversight of the Australian Customs and Border Protection Service. Where had they come from? Unfortunately, some had come from Customs itself.



Hidden menace ... The recent focus on alleged graft within Customs distracts from the potential problem of wider corruption across the federal bureaucracy. Photo: Customs

There is, however, a view among many senior public servants that stronger anti-corruption measures are not needed precisely because if there is corruption in the APS, Australia will be better off if it remains hidden. This view, although wrong, is not entirely baseless. One of the most widely cited measures of country corruption, Transparency International's *Corruptions Perception Index*, measures not actual corruption but how corrupt a country is perceived to be by selected experts. Hidden corruption is less likely to be perceived. So a country

good at keeping a lid on corrupt activities by its public service will rate higher in the index. It is a view that would resonate with some members of the present government. If it were not for the NSW Independent Commission Against Corruption's investigations into former senior NSW Labor figures, the government would not be fighting quite as desperately to hold NSW seats.

It is possible — no matter how great the present level of denial might be — that a federal equivalent of the NSW commission would reveal a high level of corruption. In the short term, this would tarnish Australia's reputation. But consider how much better that would be than having hidden corruption grow until finally it erupts in a scandal so gross that nobody can sweep it aside.

I have also heard a view that anti-corruption bodies generate their own work. That is, in the absence of corruption, they will drum up cases so as to keep their staff occupied. The trouble with this view is that there is not a skerrick of evidence that this happens in the jurisdictions that do have such bodies. It is a false premise that some bureaucrats use to frighten ministers.

The third objection is that anti-corruption measures are expensive, that they cost more to put in place than the cost of the corruption itself. Again, to the extent this is true it is only in the short term. If people start to think they can get away with corruption, then it will spread, and over time the costs will be large.

The World Bank tries very hard to combat corruption because it is so closely correlated with poverty. Without measures to control corruption, it is hard for a country to make progress (see *Strengthening governance: tackling corruption*, World Bank, 2012). Although Australia has nothing like the corruption common in the very poorest countries, we also have a level of complacency about our national public service that is puzzling to our neighbours. They know that people are much the same, in whatever system, and if presented with temptation and no control or oversight, a percentage will lapse. That percentage is likely to be higher in very poor countries where the rewards are proportionately higher.

Nevertheless, Australian public servants are people too, with all the virtues and failings of people everywhere. It is patronising and wrong to suppose that our public servants are universally better than those in other countries.

Our corruption, though, can take other forms. One particular concern raised after my last article on this subject was the extent of nepotism and cronyism in selection and promotion. This is one of the hardest forms of corruption to investigate and monitor. A complaint may be real, or just sour grapes on the part of an unsuccessful applicant. Selection and promotion “on merit” is not objective, because it depends on an interpretation of merit. This is difficult territory. It is, however, important because, if we count salary and full overheads, a corrupt selection decision can have costs of many millions of dollars over the life of the person unfairly put into a position — to say nothing of any misery they inflict on co-workers.

When Prime Minister Julia Gillard began her push into western Sydney last week, the *Financial Review's* Phillip Coorey quoted an anonymous Labor MP saying Gillard “should make a major announcement or statement on corruption to tackle head-on the damage being inflicted on Labor in NSW by the ICAC inquiry into members of the former NSW state government.”

If this government is to gain the high ground in improving the quality of public administration, it should make a serious commitment to strong, independent anti-corruption bodies with real teeth to investigate. There are some senior figures still pushing for action on integrity. They notably include Labor senator John Faulkner. He gave an outstanding speech in December last year to an “integrity in government” conference, noting that in the “roll-call of democracies committed to strengthening a global culture of transparency and accountability ... Australia is a notable absentee.” The government should heed the warning that — without action — our integrity standards will sooner or later fail.

**Stephen Bartos is the executive director of ACIL Tasman and a former senior public servant.**



## The tax office, “hired assassins” and how to gag dissent

Chris Seage  
*Crikey*, 5 February 2013

The nation's tax office has been accused of hiring psychiatrists to diagnose and even coerce complainants during legal disputes. *Crikey's* freedom of information requests and interviews reveal a worrying culture.

The Australian Taxation Office has been accused of sending employees to “hired assassin” psychiatrists to silence dissent, discredit whistleblowers and terminate their employment. Taxation professionals say the ATO has not only ignored calls for tighter regulation of these powers but appears to have intensified its use of psychiatry to label taxpayers they are in legal dispute with as “high conflict people.”

*Crikey* has obtained information under freedom of information about psychiatric seminars rolled out last month to ATO legal and HR managers by psychiatrist Dr Kipling Walker from the National Health Group. An email exchange between Dom Sheil — a senior principal lawyer in the ATO, who oversees compensation for taxpayers — and Dr Walker reveals the arrangement. Sheil writes:

Here is a link to the website I mentioned on dealing with personality disorders in legal disputes — the High Conflict Institute.

I have five of their books on high conflict people (HCPs for those of us in the know). I reckon the best is *It's All Your Fault! 12 Tips for Managing People Who Blame Others for Everything*.

I think you would like the first part of the book that identifies the 4 personality disorders at issue: borderline, narcissistic, histrionic, antisocial.

Somewhere in the material they also talk about the corpus callosum, amygdala and motor neurons of HCP's. That's very cerebral stuff (pardon the pun) might be of interest to you as a brain specialist!

Tony Greco, the senior tax advisor for the Institute of Public Accountants, tells *Crikey* it's wrong to label taxpayers who challenge ATO decisions. “Under the self-assessment system the

ATO have rights to challenge an assessment but so do taxpayers. The tax office doesn't like losing but they should not label taxpayers who are merely exercising their rights under the law,” he said.

Steve Davies, the founder of *OZloop*, who is active in the open government sphere, says the actions of the ATO lawyer mirror the adversarial nature of the legal profession. “[It] provides a mechanism to label employees who object to the bullying as ‘high conflict people’ with personality disorders,” he told *Crikey*.

“The perspective being advocated medicalises conflict and in doing so provides a mechanism for ATO lawyers and HR staff to mandate psychiatric intervention where they lack the medical qualifications to make such judgments. This gives rise to a direct conflict of interest.”

In November 2012 the House Standing Committee on Education and Employment tabled a report into bullying, finding the reports of public sector cases “particularly concerning.” The committee accepted submissions from aggrieved public servants that the fitness for duty test or the mental health referral powers that enable the Commonwealth and its agencies to compel/direct employees to attend a medical examination with a psychiatrist is being used “against workers who are allegedly not performing their duties” and to “intimidate or further bully workers who made complaints about workplace bullying or other working conditions.”

The Committee was not persuaded by the claims of Annwyn Godwin, the Public Service Commission's merit protection commissioner, that the review powers available to public servants provide “sufficient safeguards” and that the referral powers have been “exercised responsibly” or “in good faith.” And the committee was not convinced by the justifications of Stephen Sedgwick, the Australian Public Service commissioner, that the “referral powers provide agencies with a flexible tool that allows them to manage genuine cases of illness, including mental illness.”

Law and public policy expert JA James from [APSBullying.com](http://APSBullying.com) was the first to publicly articulate the Commonwealth's use of compulsory

psychiatric referrals against employees in 2011. She examined the literature behind “pathologising” determined litigants in the paper *The Commonwealth's Cry of “Vexatious Litigant.”*

“There is a trend in the Commonwealth in misusing labels such as ‘vexatious’ or ‘querulous paranoia’ against genuine litigants and complainants to devalue and dismiss their claims with the intent of preventing the legitimate exercise of their legal and policy rights,” she told *Crikey*. “In some cases, such pathologising by Commonwealth lawyers is based on discredited literature from the late 1800s.”

Stephen Strelecky is a former Jewish ATO officer who won a very public compensation case last year against the ATO over anti-Semitic remarks made by a colleague in the ATO's Box Hill branch. He complained to management about the abuse and requested a transfer out but managers refused. One day Strelecky told his manager the abuse was continuing and he was feeling stressed because they would not transfer him or the offender out of the area. The ATO responded by referring Strelecky to eight psychiatric assessments over a two-year period.

Strelecky's case also draws parallels with the Serene Teffaha case, the whistleblower that blew the lid off the ATO's “tick and flick” culture of determining taxpayer objections. Teffaha, a senior lawyer engaged as a tax technical specialist, was also not granted a transfer out of her work area where she was being bullied. ATO officers referred her to a psychiatrist — as revealed by documents obtained by *Crikey* — within two weeks of lodging her complaint, without her knowledge. Both Strelecky and Teffaha complained to Assistant Treasurer David Bradbury, who has parliamentary responsibility for ATO administrative matters. Bradbury has never responded to them.

For the remainder of this article, plus many links, see *Crikey*, <http://www.crikey.com.au>

## BOOK REVIEW

### Secret manoeuvres in the dark

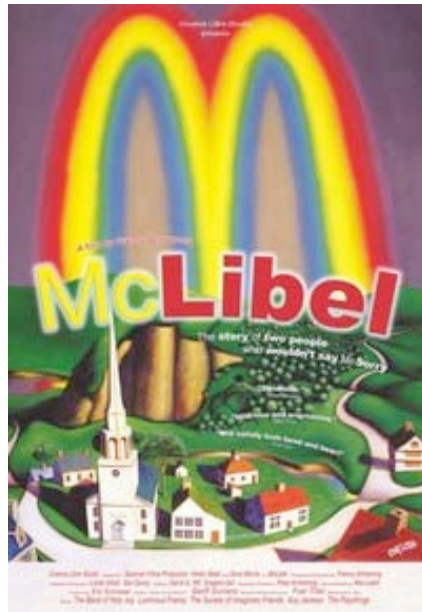
Reviewed by Brian Martin

In the 1980s, the small anarchist group London Greenpeace — not related to Greenpeace International — produced a leaflet, “What’s wrong with McDonald’s?”, about the poor nutritional value of McDonald’s food, low wages of workers and environmental impacts of beef production, among other issues. McDonald’s top management, being highly sensitive to criticism, hired two separate security firms to collect information on the group. Each of the firms hired individuals to infiltrate the activist group — which wasn’t hard.

Because London Greenpeace had only a few members, the new recruits — the infiltrators — were welcomed; they provided energy for campaigning on various issues. At some meetings, there were several infiltrators attending, a good proportion of the attendance. The infiltrators produced reports for McDonald’s, including detailed comments about each person involved. Because the two security firms didn’t know about each other’s operation, they reported on each other’s infiltrators.

With the information acquired from this surveillance operation, McDonald’s management sued five members of London Greenpeace for defamation over the group’s leaflet. Three of them caved in to this intimidation, but two — Helen Steel and Dave Morris — defended themselves in court, and the rest is history. It was the longest court case in British history. Although McDonald’s won legally, it was a massive public relations disaster for the company.

One of the side aspects of the case was that McDonald’s was forced to produce its files about the surveillance operation, including reports from the various infiltrators into London Greenpeace. These documents provide exceptional insight into how corporate spying operates.



Activists called McDonald’s legal action “McLibel,” and this became the title of a film about the saga.

Eveline Lubbers is an activist researcher who specialises in investigating corporate and police spying on activists. Her latest and most important work is the book *Secret Manoeuvres in the Dark*. In it, she recounts the McDonald’s case in detail, providing great insight into corporate spying and its links with police spying.

This is just one of several extended case studies in the book. Together, they reveal an enormous amount about spying on activists.

In the 1970s and 1980s, the company Nestlé was subject to a major consumer boycott over its sales of powdered milk for infants in poor countries. Initially, top management and its public relations firms used a strategy of ignoring the boycott, but under new leadership a different approach was tried. A private consultant, Rafael Pagan, was hired and given ample funding.

Pagan initiated a strategy of dividing the opposition. He made overtures to some of the church groups involved in the campaign, and eventually succeeded in splitting them from the boycott through promises of improved corporate behaviour. As well, Pagan helped set up an ostensibly independent organisation, Nestlé Infant Formula

Audit Commission, that seemed like it provided the regulation necessary.

Lubbers notes that corporate spying is done to find out what’s going on, and to prepare corporate counter-strategies. Corporate strategy and corporate surveillance of activists go hand in hand. Pagan went on to set up his own company that, among other projects, worked to undermine support for the boycott targeting apartheid in South Africa.

Lubbers notes that “Pagan had a military career before he became a company strategist.” She gives many examples of links between private investigators and the police, military and intelligence communities, including common backgrounds, personal connections and mobility between jobs in these sectors. Private investigators often use their links with police to obtain confidential information. Those with police, military and intelligence backgrounds and connections often see activists as the enemy rather than as citizens exercising their basic rights.



Corporate and police spying can be incredibly damaging to activists. It produces inside information that can be used to thwart activist efforts. Infiltrators sometimes try to influence campaign directions and encourage use of aggressive and violent tactics that would discredit activists.

Even more damaging, in many cases, is the impact on group morale. Exposure of infiltrators strikes at the trust essential for activists to work together. Some infiltrators have held paid jobs in their target organisations and were seen as experienced and



effective campaigners. In some cases, other activists refused to believe the allegations against infiltrators, despite damning evidence. Usually, groups did not want publicity about infiltration, which has meant that there is relatively little public information about these sorts of operations. This is another reason by Lubbers' book is so important.

Whistleblowers need to be aware about the possibilities of surveillance and infiltration. Some whistleblowers come under surveillance themselves. Allan Kessing, accused of leaking the Customs Department report he co-authored about airport security, has told about the extraordinary government expenditure to hire people to watch and follow him (see the January issue of *The Whistle*). Others are subject to surveillance but never know about it at the time.

Activists are prime targets. When the NSW Police released its files on political spying, many activists discovered there had been infiltrators in their groups, reporting all sorts of personal details to the police.

For anyone concerned about justice and fair play, the possibility of spying needs to be taken into account. For example, if in the course of your work you obtain evidence of environmental vandalism, one possibility is to leak documents to an environmental group. But what if the group has been infiltrated? Or what if spies have obtained access to the group's computer files through remote access? Your anonymity and your disclosure may be compromised.

The best antidote to spying is disclosure. In this, Lubbers' impressive work is vital in two ways: it is a potent disclosure itself and it shows how to go about exposing spying on activists. She advocates "activist research"; hopefully some researchers will follow her example.

I thank Sharon Callaghan and Majken Sørensen for valuable comments on a draft of this review.



Eveline Lubbers, *Secret Manoeuvres in the Dark: Corporate and Police Spying on Activists* (London: Pluto Press, 2012)

#### BOOK REVIEW

### The successes and failures of whistleblower laws

Reviewed by Brian Martin

Whistleblower laws are a source of both hope and frustration. When whistleblowers suffer reprisals, as so many of them do, the solution is widely assumed to be legal protection. When journalists ring me about whistleblowing matters, they frequently ask about whistleblower laws, assuming they are more important than anything else. However, many whistleblowers have learned to their dismay that legal protection looks much better on paper than it pans out in reality.

For two decades, members of Whistleblowers Australia have pushed for whistleblower laws, and at the same time have been persistent critics of the weaknesses of the laws on the books. It should be noted that governments, in passing whistleblower laws for all the states and territories in Australia, have seldom consulted whistleblowers — or, when they have, not taken much notice of their advice.

In recent years, much attention has been on federal whistleblower legislation, long promised and just as long in delivery. Some who follow the details think weak laws are worse than nothing. They give the appearance of protection without the substance.

If you'd like a broad perspective on whistleblower laws, the definitive treatment is Robert G. Vaughn's new book *The Successes and Failures of Whistleblower Laws*. Vaughn is a lawyer and legal academic at American University in Washington, DC. He is exceptionally well qualified to comment, having been on one of Ralph Nader's teams in the 1970s involved with highlighting the problems of whistleblowers and promoting protection.

To help explain the passing of the first major whistleblower law, Vaughn describes a series of social changes that laid the ground in US public opinion. This is a revealing exercise, showing that whistleblower protection should not be separated from social change more generally.

In the US, the traditional attitude towards authorities was conformity and acceptance of the line of command. Speaking out is a challenge to hierarchical authority and had long been seen as traitorous. Public opinion had to change before the plight of whistleblowers could be seen as worthy of concern.

During the 1960s and 1970s in the US, several events generated public awareness that challenged unthinking acceptance of authority. Stanley Milgram carried out experiments showing that many US citizens were so trusting of authority they were willing to apply electric shocks to experimental subjects to a dangerous level and beyond.



The Milgram experiment

Philip Zimbardo ran a different psychology experiment — a simulated prison — that showed randomly

assigned students quickly adopted the roles of prisoners and prison guards, dangerously so. These experiments received wide publicity and made people aware of the dangers of automatically accepting the orders of superiors.

In the 1950s and 1960s, the US civil rights movement used nonviolent action — protest marches, bus boycotts, lunch-counter sit-ins and other methods — to challenge the system of racial segregation in southern states. The courageous actions of black people and their supporters attuned the public to the need to challenge discrimination and abuse, including by breaking unjust laws.

The most prominent US whistleblower in the 1960s and 1970s was A. Ernest Fitzgerald, who worked for the US Defense Department monitoring project costs. After exposing a \$2 billion cost overrun for the C-5A aircraft, Fitzgerald suffered a series of classic reprisals. He testified to Congress repeatedly as well as writing a book.



Ernest Fitzgerald

Then came Watergate, the downfall for President Richard Nixon. White House officials ordered the “plumbers”, an illegal operation unit, to break into the office of Daniel Ellsberg’s psychiatrist. Ellsberg had leaked the Pentagon Papers, which exposed the true history of the Vietnam war, to the media. Nixon’s abortive attempts to cover up this burglary and the later break-in at Watergate eventually led to his resig-

nation. The Watergate scandal was the trigger for the Civil Service Reform Act of 1978, which authorised a massive reorganisation of government bodies. Included in the act was a provision for whistleblower protection.

In terms of recognising and seeking to protect whistleblowers, the US was far ahead of any other country. Vaughn shows very well the impact of several factors in laying the ground for this important innovation: changed public attitudes towards obedience, a prominent whistleblower case, and a dramatic demonstration of corruption in high places.

Whistleblower protection is sometimes justified in terms of cost-effectiveness, for example stopping corruption. Vaughn shows that this approach is too limited. Whistleblowing is important as part of a democratic process of empowering citizens to challenge abuses. It can be seen as allied to the tradition of civil disobedience exemplified by the civil rights movement. It is a type of activism for a better society.

Vaughn provides a careful, detailed analysis of the Civil Service Reform Act, focusing on the whistleblower provision. He speculates about what an informed observer at the time might have forecast as the fate of the act, concluding that optimism was not necessarily justified. One of the problems was that by incorporating whistleblower protection in legislation, it became separated from the traditions of dissent and democratic participation that had stimulated it. Vaughn writes:

... the rich ethical debate about whistleblowing generated considerable support for it. Debate regarding the statute emphasizes administrative or judicial interpretation of it; rather than focusing on the reasons for protecting whistleblowers, this emphasis leads to the often arcane criteria of statutory interpretation enabling agencies and courts to ignore the connection of that statutory language to the values that generated it. (p. 115)

In a chapter titled “Institutional failure,” Vaughn documents the shortcomings of the systems set up to handle whistleblower disclosures. At the centre of the picture is the Office of

Special Counsel (OSC), given the power to require federal government agencies to investigate claims about misconduct and respond in writing. The OSC was presented as the solution for whistleblowers, but it turned out to be a false idol. The OSC was inadequately funded for its function. Even worse, most of its heads were ineffective and were more sympathetic to employers than to whistleblowers.

One of the expectations of the OSC was to take action against agencies for reprisals against whistleblowers. However, it hardly ever happens. Vaughn says, “Practically, these actions seem to be a ‘dead letter’.” (p. 176).



Many whistleblowers in Australia have argued for a stand-alone agency with the mandate to handle disclosures, investigations and action against recalcitrant bureaucrats. However, the experience with the OSC over several decades suggests that having a dedicated agency, however attractive in theory, is no guarantee of effective protection in practice.

Institutional failure has been only part of the problem in the US. Another major obstacle to effective whistleblower protection has been the courts. Vaughn, through a careful analysis, shows how the courts have consistently interpreted whistleblower laws in favour of employers. What looks like an ironclad case from a whistleblower’s point of view can be rejected by judges who read meanings into the law that legislators never intended. The US Congress has repeatedly revised the law to deal with narrow court interpretations, only to be repeatedly foiled by judges seemingly determined to take the employer’s side. Vaughn documents a range of methods by which judges do this, such as ignoring legislative intent, cherry-picking



precedents and manufacturing requirements not present in the letter of the law. Vaughn explains this judicial prejudice as deriving from a deep-seated employer orientation that clashes with the intent of Congress in passing laws with an orientation to open government.



The US Court of Appeals for the Federal Circuit had usually ruled against whistleblowers

The initial focus of *The Successes and Failures of Whistleblower Laws* is US laws for public sector employees. From this foundation, Vaughn moves on to cover a range of other important issues, including legislation covering the private sector, national security whistleblowing, anonymous whistleblowing, and global whistleblower laws. Vaughn refers to circumstances in a number of other countries, including Australia. In describing whistleblower-support activities by “civil society” — namely outside of government and the private sector — he focuses on two organisations: the Government Accountability Project (GAP) in the US and Public Concern at Work (PCAW) in Britain.

Vaughn gives a brief rundown on advice for whistleblowers, without attempting to cover this area thoroughly. His attention is always on whistleblower laws. GAP and PCAW are important in this context because of their influence on the introduction and modification of whistleblower laws in the US and Britain. In contrast, the influence of Whistleblowers Australia on Australian whistleblower laws is less obvious.

*The Successes and Failures of Whistleblower Laws* is carefully argued and comprehensively referenced. It is the work of a lawyer in its attention to detail and precedent, but is accessible to non-lawyers who are willing to put in the effort. It is a long book, and most impressive in its exposition of arguments and evidence for and against various facets of

whistleblower legislation. Anyone who puts in significant effort promoting whistleblower laws — for example, writing to or talking with politicians — can benefit from studying relevant parts of the book.

Vaughn’s treatment of the history and politics of Australian whistleblower legislation is limited in scope and detail, and some who are intimately familiar with this area might have quibbles. A more useful approach is to look to his book’s overall framework and argument as a way of better understanding the Australian experience — and its likely future.

In the preface, Vaughn describes his involvement with US whistleblower laws from the 1970s. After this, he is too modest about his contributions. At various points in the book, where he discusses a significant article, a footnote at the end of the chapter reveals that he was the author of the article. This is the work of a concerned observer who has been very close to developments, especially in the US.

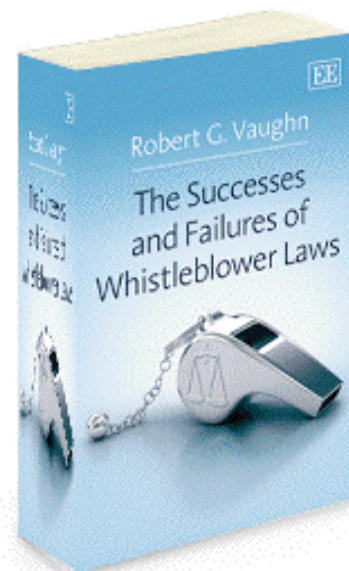


Robert Vaughn

In the semi-final chapter, Vaughn presents four perspectives on whistleblower laws: employment, open-government, market regulation and human rights. This is a helpful framework. Whistleblowers often think in terms of human rights whereas their employers use the employment perspective. The mix and clash of perspectives helps explain some of the persistent tensions concerning whistleblowing, including rhetorical support for whistleblower protection versus the actual unsympathetic treatment of whistleblowers.

Finally, Vaughn addresses the ethical justifications for whistleblowing. Before the introduction of whistleblower laws, those who spoke out often justified their actions in terms of free speech, public benefit and codes of professional practice. These justifications are readily understandable to and engage with concerns among the wider public. When whistleblower laws are passed, attention often shifts to the letter of the law and failures to apply the law. This means that the ethical justifications are relegated to the background while legal technicalities come to the fore, which is unfortunate for the wider project of promoting a society in which speaking out about problems is safe and routine.

Vaughn’s overall task is to judge both the successes and failures of whistleblower laws. He judiciously notes the pluses and minuses along the way. The sidelining of ethical concerns might be counted as one of the minuses, counteracted by the greater protection or deterrent effect sometimes provided by legislation. Vaughn does not pass a final judgement on whistleblower laws, but provides all the information and arguments you need if you want to do so yourself.



Robert G. Vaughn, *The Successes and Failures of Whistleblower Laws* (Cheltenham: Edward Elgar, 2012)



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## Whistleblowers Australia contacts

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**Postal address** PO Box U129, Wollongong NSW 2500

### New South Wales

**“Caring & sharing” meetings** We listen to your story, provide feedback and possibly guidance for your next few steps. Held by arrangement at 7.00pm on the 2nd and 4th Tuesday nights of each month, Presbyterian Church (Crypt), 7-A Campbell Street, Balmain 2041. Ring beforehand to arrange a meeting.

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## Whistleblower laws: pro and con

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The law when it's on your side



The law when it's against you

## 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.

To subscribe to *The Whistle* but not join WBA, the annual subscription fee is \$25.

The activities of Whistleblowers Australia depend entirely on voluntary work by members and supporters. We value your ideas, time, expertise and involvement. Whistleblowers Australia is funded almost entirely from membership fees, donations and bequests.

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