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

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Keith Potter at the Whistleblowers Australia annual general meeting (see p. 11)

Media watch

Thailand ignored disaster warning

James Pringle
The Australian, 3 January 2005

THE Thai Government was officially warned seven years ago that tsunamis stemming from an earthquake on the seabed could hit southwest Thailand, but the warning was ignored for fear of frightening off tourists and investors.

The veteran meteorologist who issued the warning, Samith Dhamasaroj, was called "crazy" by some, and sidelined to an inactive position from which he later resigned.

But now, after the Boxing Day catastrophe — which by yesterday had cost 4812 lives in Thailand, half of them foreign tourists, and huge destruction of property — he has been vindicated, and put in charge of establishing a nationwide early-warning system for all natural disasters.

He said yesterday that such a system would have saved 10 to 50 per cent of the lives lost. Mr Samith, the former director general of the Thai Meteorological Department, told The Australian: "Seven years ago, as chief meteorological official, I predicted the possibility of an earthquake and tsunami in the Bay of Bengal, the Andaman Sea or around Sarawak.

"I suggested an early-warning system be put in place for tidal waves, such as alarm sirens at beachside hotels in Phuket, Phang Nga and Krabi, the three provinces which have now been hit. I alerted senior officials in these provinces, but no one paid any attention."

He said some provinces had even banned him from entering their territories because "they said I was damaging their image with foreign tourists". Thai sources said some senior provincial officials had dismissed him as "crazy".

The sources noted Mr Samith had been sidelined after his earlier warnings, the last issued in 1998. Mr Samith had stipulated at the time no hotels should be built closer than 300m from the sea, a recommendation that would have angered powerful economic forces in the region, the sources added.

But last Thursday, Thai Prime Minister Thaksin Shinawatra put Mr Samith in charge of establishing an advanced seismic and tsunami warning system for the whole nation. The brief would also take in other calamities such as storms and floods. He was named a vice-minister reporting directly to Mr Thaksin.

Mr Samith said that, after he felt the tremors in Phuket on December 26, he tried to get through to his successor at the Meteorological Department, an old friend, to ask that a tsunami warning be urgently issued — but he was unable to reach him, and other weather bureau lines were blocked.

He said meteorological officials would not make a decision because they were afraid that, if they made a wrong forecast, someone would blame them. He said there would have been enough time for warnings after the earthquake struck at 8am, followed by the tsunamis about 9.15am.

"Even half an hour should have been enough," he said.

"Now we have this tragedy, and I am very sad, because 50 per cent, or at least 10 per cent, of the people who died could have been saved if there had been warnings."

Mr Samith said he had issued his alert seven years ago after studying information on the twin dangers of earthquakes and tsunamis, after studying material published in China, Japan and the US over the previous 25 years.

In announcing Mr Samith's appointment, Mr Thaksin, who faces an election on February 6, said: "Some may say we are putting up fences after the cows have gone.

"But there are still some cows left, and more will be coming, and we need to have a strong fence."

It's silence or the sack

Bruce McDougall
Daily Telegraph, 30 December 2004

A SENIOR professor at the University of Western Sydney has been threatened with dismissal because he is publicly criticising its management and campaigning against the planned new medical school.

Director of UWS's Centre for Applied Finance, Professor Tom Valentine, has been accused of seriously damaging the university's reputation and breaching the staff code of conduct.

In an official warning the outspoken academic has been told that if he persists, he faces disciplinary action that could result in the termination of his employment.

Professor Valentine is angry about cuts to the university's programs and the decision to build a medical school while the UWS budget is in deficit.

He has attacked the university management headed by Vice-Chancellor Janice Reid as "incompetent" and called for her resignation. A letter to Professor Valentine from UWS secretary Rhonda Hawkins stated the university had "serious concerns" about his public comments on university management.

"The university has formed a preliminary view that your actions … are in breach of the code of conduct and media policy," she said in the letter.

"The university is of the view that the alleged breaches may amount to misconduct or serious misconduct."

But Professor Valentine claimed the university had breached the Protected Disclosures Act which covers whistleblowers. He planned to lodge a complaint with the NSW Ombudsman early next month.

"They're saying I've broken the rules … but they have no right to stifle comment and discussion," he told *The Daily Telegraph.*

"The letter makes it clear they object to me speaking out - not that I'm wrong - and they make no such suggestion.

"It's a clear violation of the Protected Disclosures Act where people like myself have a right, and more importantly a responsibility, to speak out."

Professor Valentine has been asked to explain his actions and ordered not to make further public statements "deriding or damaging the reputation of the university."

Yesterday a UWS spokesperson said measures taken to "renew UWS and to rein in costs" such as a cap on excessive above-salary teaching payments to academic staff were not welcomed by all.

"However, the university will not be deterred from a prudent and equitable approach to its future financial health by either poorly substantiated or frivolous self-interested criticism," the university spokesperson said.

"While we value our staff and the opinion of individual staff members, we must make decisions that benefit all staff, students and the local community. The university expects its staff to abide by the UWS code of conduct.

"This means staff must act in the best interest of the university, and positively promote the university in the community."

Professor Valentine yesterday continued to argue that the university could not afford a medical school or a local television station.

"They're cutting PhD program and the honours program," he said.

"UWS is the only university in Australia where academics aren't allowed to travel overseas.

"What they're creating is something that is not a true university."

Public service bosses hear darkest secrets

Daryl Passmore
Sunday Mail (Queensland),
21 November 2004, p. 56

HAVE you ever used cannabis or been sexually abused? What operations have you had? Were you adopted? Are you homosexual?

If you're a state public servant, your boss might want to know.

Those are just a few of the questions given to workers sent for compulsory psychiatric tests under the controversial Section 85 of the Queensland Government Public Service Act.

The results are given to the officials who ordered the test whether the employee wants them to know or not.

"This questionnaire is most offensive," said Liberal MP and former GP Bruce Flegg, who wants the compulsory psychiatric assessments banned.

"It's six pages of the most personal, intrusive and humiliating questions I've ever seen."

Queensland Council for Civil Liberties president Ian Dearden said some questions appeared to breach anti-discrimination laws.

"It's extraordinarily intrusive and indicates why we need effective privacy legislation," he said. "The psychiatrists are acting as agents of the government departments so the departments are responsible."

Lawyers and the Queensland Public Service Union have condemned the lack of uniform guidelines on the use of Section 85 across departments.

They say the referrals are being used increasingly to bully workers who have complained about bosses, colleagues or workplace issues.

Dozens of public servants have told *The Sunday Mail* the tests have devastated their lives or careers.

Several described the psychiatric sessions as like being "mentally raped". Others say the psychiatric report's contents have become known to co-workers.

Some psychiatrists, having found no evidence of mental illness, have recommended disciplinary action.

"There are increasing examples coming forward to indicate that Section 85 is being used to intimidate staff or even force them to take stress leave or resign," Dr Flegg said.

"Employers should not have the right to information on employees' mental health in this setting.

"Use of people's medical information by an employer should be limited to sick leave or retirement due to ill-health and should be used for medical, not performance, reasons.

Premier Peter Beattie has defended the use of Section 85 referrals and says the rights of employees are safeguarded.

Call for ban on psych testing

Daryl Passmore
Sunday Mail (Queensland),
14 November 2004, p. 43

THE Liberal Party wants a ban on the use of compulsory psychiatric testing of staff by Queensland government departments.

"This particular technique has no place in the public sector," Dr Bruce Flegg, the Liberal member for Moggill, told Parliament this week.

The Sunday Mail has revealed growing concern by workplace lawyers and unionists that Section 85 of the Public Service Act, which allows senior officials to order staff to undergo tests, is being abused.

They say it is open to being used as a bullying tool. Many of those forced to undergo the tests had made complaints about staff or conditions.

Premier Peter Beattie has defended the section of the Act, saying safeguards are in place to prevent misuse.

But Dr Flegg, a former GP, said it was time to end the tests. "Employers have no right having that sort of information about people's psychiatric condition in any case.

"If they have a psychiatric problem, this practice will aggravate it. If they do not have a psychiatric problem, it is simply bullying."

McGinty name in dossier

John Flint
Sunday Times (Perth), 9 January 2005

Attorney-General Jim McGinty's handling of the Lewandowski affidavit is the subject of a complaint to the new Corruption and Crime Commission.

When former detective Tony Lewandowski revealed police corruption in the Mickelberg case, a vital opportunity was lost to catch his co-conspirators, claims former detective-sergeant Frank Scott.

Mr McGinty has so far escaped censure for tipping off his ministerial colleague and in-law Bob Kucera on the contents of Lewandowski's confidential affidavit before it was

raised in cabinet, made public or even shown to the Mickelberg brothers.

Mr Kucera, WA's Tourism Minister, was one of a group of serving and former police who helped corroborate the now-discredited evidence of Lewandowski and former CIB boss Don Hancock over 20 years.

Mr Kucera was among those whose testimony was questioned in last year's Court of Criminal Appeal judgment that quashed the Mickelberg brothers' convictions for the 1982 gold bullion swindle, citing a "substantial miscarriage of justice".

Justice Christopher Steytler said that "evidence before the court, taken with all that has gone before, raises serious questions about the reliability of the evidence previously given by Hancock, Lewandowski, Round and Gillespie and, less directly, about that given by Kucera, Cvijic, Hooft and Henley."

Mr Scott, who left the police service in 1993 after attempting to blow the whistle on corrupt activities involving Mr Hancock and others, said Lewandowski's affidavit could have been used to snare others. But Mr McGinty went public with its contents before the police royal commission would have had an opportunity to get phone taps and other surveillance in place, he claimed.

In his recent complaint to the CCC, Mr Scott wrote: "My specific complaint against the Attorney-General is that by showing that affidavit to Kucera, when he was fully aware that some police had acted corruptly and that Kucera was one of the officers suspected of committing perjury, he had compromised any further investigation and may be guilty of attempting to pervert the course of justice.

"I understand that he and Mr Kucera are close friends and are now related."

Mr McGinty, who refused to answer questions from *The Sunday Times* on the issue in 2002, has subsequently told Parliament that he briefed Mr Kucera to help him deal with questions that he felt were bound to be asked by the Opposition in the wake of the Lewandowski confession.

"I discussed that matter with him in order to enable him to be prepared to participate in that public debate," Mr McGinty told Parliament. Although Mr McGinty felt at liberty to discuss the contents of the affidavit with Mr Kucera, ironically Mr Kucera at the time was having to excuse himself when cabinet dealt with police royal commission matters.

The Lewandowski matter was clearly within the scope of the royal commission. At the time, Mr McGinty said that Lewandowski's affidavit did not directly or indirectly cast doubt on Mr Kucera's testimony — but it did, as acknowledged by the CCA.

After the Mickelberg brothers' appeal win — their eighth attempt to clear their names — Police Commissioner Karl O'Callaghan ordered an internal investigation to see if there were grounds to prosecute any of the surviving Mint swindle detectives.

Lewandowski, racked by guilt for his role in the affair, took his life last year and Mr Hancock died in a car bombing in 2001.

Before his death, Lewandowski spoke of his outrage at Mr McGinty's decision to go public with his confession.

Police were passed other fresh evidence by the Mickelbergs. But the brothers are furious, saying that this evidence was not submitted to Director of Public Prosecution Robert Cock for his consideration.

On the basis of what police had presented to him, Mr Cock determined that there was evidence that detectives had given false evidence, but there was no reasonable prospect of successfully prosecuting any of the officers, most notably Superintendent John Gillespie and retired detective-inspector Bill Round.

After reading Mr Cock's advice to the police, Mr Gillespie quit the service last month.

Mr McGinty said yesterday the complaint to the CCC was a political exercise in the lead-up to the state election.

"The exact same matter was investigated by the Anti-Corruption Commission (the predecessor of the CCC), which found nothing untoward," he said.

Mr Kucera has consistently denied any wrongdoing in the Mickelberg affair.

Crown uses courts to gain a notebook

Editorial, *The Courier-Mail* (Brisbane)
11 December 2004, p. 26

BULLYING, intimidation, abuse of freedom of information laws, erosion of accountability and now unreasonable use of the courts to harass journalists feature on the government's report card for the year. Standards are set at the top — as the young lawyer who became an important cog in bringing a semblance of democracy into the affairs of the Australian Labor Party in Queensland would have been among the first to acknowledge. But as Premier, Peter Beattie does not appear to listen to what constituents say. History will not treat him kindly on the issue of threats to the free flow of information under his administration, despite acknowledged positive attributes of his government.

The Public Advocate has accused the government of operating a culture in which community-based organisations and advocacy groups risk funding cuts for speaking out. Misuse of the cabinet document rule to conceal information otherwise available for discovery under freedom of information has wound back standards to a level approaching the worst days of the Bjelke-Petersen administration. Failure to grasp the significance of allowing police to censor information on crime has led to quick endorsement of a recommendation from the Crime and Misconduct Commission, in which the good work of counsel assisting a CMC inquiry has been effectively abandoned. And when whistleblower Wendy Erglis took defamation action against the government, it responded by seeking access to the notebooks of *Courier-Mail* journalist Margaret Wenham, one of several who wrote about the issue.

Information which journalists gather often includes material provided on the condition of confidentiality; they have gone to jail rather than breach their ethical obligations. Ironically, politicians are often the source. [When] Crown Law sought access to Wenham's notebooks and records, it did so on behalf of a client which well knew the consequences for the journalist. When Wenham

objected, on the grounds that the government was on a fishing expedition, the government took her to court to force the issue. In the hearing, the Crown acknowledged it was looking for details which did not necessarily reflect the content of articles, but information which might help it limit damages by showing that Erglis courted the media.

Wenham faced a dilemma when a judge ordered that she hand over her material, knowing full well that she risked jail for contempt if she refused to give government lawyers material from sources she might have undertaken to protect. In the outcome, she was found not to have a professional obligation of confidence; but that is not the point. Experienced lawyers cannot recall another example in the past 20 years in which the Crown has attempted to use third-party discovery to intimidate journalists. It sets a despicable precedent, and it happened on Mr Beattie's watch.

"Dobbers" drum up business for CMC

Steven Wardill
The Courier-Mail (Brisbane),
27 December 2004, p. 6

PUBLIC servants dobbed in their colleagues for alleged misconduct or corruption on almost 200 occasions last financial year. Many of the allegations were investigated but could not be substantiated, while others are still being actively investigated.

The 2003-04 annual reports of the state government's 24 departments reveal there were 189 public interest disclosures under the so-called Whistleblower Protection Act.

The act allows public servants with concerns about peers or superiors to have undisclosed complaints directed to a department's director-general and investigated.

But a high rate of unresolved cases has prompted a call for a new dedicated watchdog, while the opposition believes public servants are increasingly being intimidated out of reporting corruption under the state government.

Queensland Public Sector Union general secretary Alex Scott said yesterday the establishment of a new watchdog to specifically police whistleblowers would improve confidence.

Mr Scott said while the union had faith in the Crime and Misconduct Commission there were concerns it was over-burdened with other work, such as tracking pedophile rings.

"We have complete confidence in the CMC but we think they have got too broad a jurisdiction," he said.

Mr Scott said whistleblower protection was an integral plank in stopping corruption in post-Fitzgerald Queensland, but it was being undone by under-resourcing.

"At the end of the day whistleblower (protection) will only work if it is properly resourced," he said.

Acting Opposition Leader Jeff Seeney accused the government of developing a culture of discouraging whistleblowers.

"We have already seen (former health minister) Wendy Edmond and (then disability services minister) Judy Spence in the past really try and publicly discredit whistleblowers," he said.

Mr Seeney said there would be many more whistleblowers if public servants believed protection would be guaranteed.

But Acting Premier Terry Mackenroth said another body to monitor whistleblower accusations would cut government services.

"I think we have got enough watchdogs," he said. "We don't need any more."

The annual report figures shows the Department of Education and the Arts recorded the most disclosures with 69.

"Of these, appropriate action was taken on a case-by-case basis for 19 verified and three partially verified cases," the report said.

"Eleven disclosures were not verified and 36 were not finalised as at June 2004."

Employment and Training had the next highest with 36 disclosures, of which six were verified, eight were unsubstantiated and 22 investigations ongoing.

"Where misconduct was found, sanctions included verbal warning, performance management, official reprimands, training and criminal charges," the department's report said.

Eleven departments did not receive any complaints.

Grass is greener after exposing bent men in blue

Without benefits, officers would be unwilling to blow the whistle, writes **Malcolm Brown.**
Sydney Morning Herald,
10 December 2004, p. 11

WHY M5, as this former detective is called, approached Police Internal Affairs, revealed his crooked past and co-operated in exposing corruption going back years is uncertain. He certainly knew about corruption, having served with the Major Crime Squad North-West, exposed in the Wood royal commission as having been riddled with corruption. In 1992 M5 had worked in Taskforce Pivot, which was also subject to criticism, to investigate armed robberies, commanded by the effective but sometimes ruthless Detective Sergeant John Davidson.

But M5 did come forward, revealed his doings, then entrapped former comrades by recording their reminiscences. The majority unwittingly confirmed most of M5's story — how stashes of drug money had been skimmed, criminals franchised to continue operating, stolen money "divvied" up among detectives, how people had been loaded up, evidence had been fabricated, how duty had been neglected, investigations compromised and the course of justice perverted.

Just about every avenue that could have been exploited had been, such as falsely claiming reward money and writing bogus "comfort letters" — personal references to judges which assisted certain criminals at the time of sentencing.

It was an extraordinary windfall for corruption investigators. M5's whistleblowing led to Operation Florida, mounted by the Police Integrity Commission in 2000-02, which ended the careers of many police officers. As part of the deal, M5 was given protection, including suppression of his name, and allowed

to retire on 72.5 per cent of his salary, about $40,000 a year. This week, the NSW Opposition Leader, John Brogden, expressed outrage. "This bloke bought himself a get-out-of-jail-free card and now he's been able to wangle the system and have the taxpayers of this state fund a pension for the rest of his life," he told Parliament.

Brogden's argument is that he is not entitled to it, that the highest reward he should have expected (after a life as a bent cop) was to wake up each morning a free man.

It is easy to dismiss such individuals as crooks and say they should not get special treatment. But others disagree. Ian Temby, QC, the first head of the Independent Commission Against Corruption, has no doubt. "Effective law enforcement is heavily dependent upon police and other authorities receiving inside information," he argues. "When it comes to crime and corruption, few cases could be resolved without such information.

"It is therefore a doleful necessity to deal with individuals prepared to provide information and, from time to time, it is necessary to confer benefits upon them to secure their continued co-operation. There can be nothing wrong with this as long as the benefits are disclosed in the prosecution process."

The previous police whistle-blower to come to notice, Trevor Haken, rolled over because he knew he was about to be arrested. To save his hide he ratted. Haken's ratting gave a huge impetus to the royal commission of 1994-97 headed by Justice James Wood, breaching the wall of silence which corrupt police were never able to close. Haken put himself in jeopardy and few questioned his rights to protection.

M5 might have rolled because he had found God, or was sick of the stress of a double life. More probably, he sensed internal investigators were closing in. The work he did in exposing corruption was more far-reaching than that of Haken. It showed, in Operation Florida hearings, that the rot of corruption had gone very deep, reaching levels so outrageous that in Chatswood police station there was a "future exhibits" locker, containing items that could be planted when police wanted evidence. There was also an apparent swapping arrangement with other units where detectives could get the "evidence" they needed on request. This week a man convicted in this style had his appeal upheld by the NSW Court of Criminal Appeal.

M5 got his former colleagues in relaxed situations where they talked about old times. One such event occurred at the Covent Garden Hotel, Haymarket, on May 16, 2001. Jocular remarks by colleagues, taped by M5, confirmed most of what M5 had put on record. As with Haken's activities, it was difficult and dangerous. At one point, M5 was caught, when his recorder made clicking noises and the colleague he was talking to said: "You are not going to do this to me, are you, mate?"

He did. M5 spilled the beans on many operations. One involved two killings, the 1986 murder of a patron, Phillip George Dilworth, at the Oxford Tavern, Petersham; and the tavern's one-time bar manager, Gary Mitchell, 10 years later. Both murders were surrounded by sinister factors but the saga of police malpractice and neglect of duty so contaminated the evidence that no prosecution could proceed.

Operation Florida opened up fresh cans of worms. It was accidentally discovered that there was an information-swapping racket in full flight, surrounding police promotion examinations. The subsequent PIC inquiry, Operation Jetz, brought to an end the careers of several police officers and led to changes in the system.

David Phillip Patison and Matthew John Jasper, with whom M5 was involved, were two more rogue detectives who had gone into extortion and theft from drug dealers in a big way. The pair were sentenced to lengthy jail terms.

The many police brought down by M5 know who he is. The question arises as to why his name has been suppressed.

The answer might be that he has been so useful that, within reason, he gets most things he asks for. As Temby points out: where would we be if nobody on the inside ever spilled the beans?

An excess of secrecy — restraining media comment by public sector employees and union officials

Naomi Miller and Nicholas Ruskin of
Phillips Fox
February, 2004

Media comment by public sector employees is a thorny issue. It becomes even more vexed when the public sector employee holds office as a union official. How can one employee 'serve two masters' — staying silent in the name of public interest, whilst exercising constitutional and human rights to freedom of political expression? In the recent case of Bennett v President, Human Rights and Equal Opportunity Commission [2003] FCA 1433 the Federal Court attempted to traverse this rocky path, and provide some guidance to public sector employers about how tightly they can keep the lid on employee media comment.

Facts of the case

The case involved a human rights complaint and discrimination claim brought by Peter Bennett against his employer, the Australian Customs Service (ACS). In addition to being employed by the ACS for thirty years, Bennett is also the Federal President of the Customs Officers Association (the COA) — the trade union representing customs staff.

On several occasions in 1998, Bennett was interviewed on radio about customs issues, such as drug trafficking. Bennett advocated the establishment of a single border protection agency, which would have resulted in a restructure of the ACS. Bennett insisted that his public comments were made in his capacity as Federal President of the COA, and that the changes he was advocating were of significant public interest, would better serve the community and would lead to greater efficiency. Bennett also made public comments regarding proposed staff cuts for waterfront customs officers.

The ACS warned Bennett to desist from further public comment and

refused his requests for formal permission to speak to the media. Eventually, the ACS charged Bennett with failing to comply with regulation 7(13) of the Public Service Regulations 1935 (Cth). Regulation 7(13) sets out:

> An APS employee must not, except in the course of his or her duties as an APS employee or with the Agency Head's express authority, give or disclose, directly or indirectly, any information about public business or anything of which the employee has official knowledge.

The ACS conducted an inquiry into Bennett's alleged contravention of regulation 7(13), and found the charge proven. A salary penalty was imposed on Bennett, and in 2000, despite objecting to the move, he was reassigned to new duties.

In response, Bennett brought a complaint to the Human Rights and Equal Opportunity Commission (HREOC), claiming that:

- The ACS had violated his human and constitutional rights by impeding his right to freedom of expression
- The ACS had discriminated against him on the basis of trade union activity and political opinion.

HREOC declined to conduct an inquiry into Bennett's complaints, as it was satisfied that it was an inherent requirement of any public service position that an employee would 'not criticise his or her employer in the media in any way.' Therefore the ACS' conduct did not constitute discrimination. Furthermore, HREOC held that there are limits to freedom of expression for public servants where neutrality and loyalty are required, and in order to protect 'public order.' Bennett appealed to the Federal Court.

Federal Court findings

The human rights complaint

Justice Finn of the Federal Court held regulation 7(13), prohibiting, either directly or indirectly, the disclosure by a public servant of any information about public business or official knowledge, to be invalid as it infringes the implied constitutional freedom of political communication.

Justice Finn noted that the regulation was 'archaic' and 'draconian.' Applying the High Court case of Lange v Australian Broadcasting Corporation (1997) 189 CLR 520, Justice Finn concluded that regulation 7(13) 'is an impediment to the community being informed as to whether the democratic machinery is in good working order.'

The legitimate ends of protecting cabinet secrecy, national security and privacy could be secured by a less burdensome and more precise restriction than the general prohibition in regulation 7(13). The concepts of responsible and open government, and the enactment of freedom of information legislation have become hallmarks of contemporary Australian democracy, and the 'surfeit of secrecy' (i.e. excess of secrecy) promoted by regulation 7(13) is no longer necessary or proper in our system of government.

Justice Finn also held that the conduct of the ACS was inconsistent with Bennett's human rights under the International Convention on Civil and Political Rights, as the prohibitions against public comment were not necessary for the protection of public order. When asking whether or not an impediment to free expression is necessary for public order, Justice Finn noted that the necessity of the impediment must be balanced against our contemporary model of open government.

In defence of Bennett's human rights complaint, the ACS argued that even if regulation 7(13) was invalid, Bennett was under a common law contractual duty to serve his employer in good faith, with fidelity and loyalty. By disobeying the ACS' directions to desist from making public comment, Bennett had contravened his duty of fidelity and therefore the disciplinary actions of the ACS were justified.

As HREOC had failed to make any direct findings on this point, Justice Finn remitted the matter to HREOC to decide upon this issue. However, he noted that he 'generally agreed' with Bennett's submissions as there had never been any agreement between the parties that the directions of the ACS were 'lawful and reasonable.' He noted that an employee's duty of loyalty and fidelity:

- is possessed of notorious uncertainties
- should only be applied in a public service setting in a way that 'does not unnecessarily or unreasonably impair the freedom of communication about government and political matters which the Constitution requires'
- must be applied with due regard to the constitutional conventions that underpin our system of responsible government.

The discrimination claim

The Human Rights and Equal Opportunity Commission Act 1986 (the Act) prohibits discrimination on the basis of political opinion or trade union activity, but does not preclude discrimination based on the inherent requirements of a job. Bennett's media comments, made in his role as Federal President of the COA, obviously came within the realm of both political opinion and trade union activity, and therefore, the onus fell on the ACS to prove that silence and fidelity were inherent requirements of Bennett's job.

As HREOC failed to make any direct findings on this point, Justice Finn again remitted the question of duty and fidelity to HREOC to consider in the context of the discrimination claim. Yet despite not making a finding on this point, Justice Finn perhaps revealed both his views and the possible future approach of the courts to this issue. He went on to favourably cite the Southern Australian Public Sector Management Regulations 1995 and the UK Civil Service Management Code. These instruments expressly allow union officials to publicly comment on matters relevant to the union, such as work conditions for union members.

Finally, Justice Finn concluded that any proper consideration of the loyalty obligation of an employee-union official must:

- provide (limited) recognition to the dual loyalties of a public servant union official
- not privilege the position of the employer to the exclusion of the union in relation to comment on matters where, as union official, the employee is properly to be expected to act on behalf of union members.

Lessons for public sector employers

This case is an important one for all public sector employers, including for statutory agencies and authorities. It remains to be seen whether or not HREOC will uphold the sentiments of Justice Finn when deciding upon the matters that have been remitted to it. It may well be that this case sees subsequent appeals. If this decision is upheld then it indicates a shift in the judicial approach to the obligations of public sector employees. Whilst the silence of public sector employees may well indicate their fidelity, courts may increasingly evaluate the benefit of this silence against the interests of openness and democracy. Courts may begin to approach public sector employment as a balancing act, recognising that whilst, 'official secrecy has a necessary and proper province in our system of government, a surfeit of secrecy does not.'

Judge limits protections allowed to federal whistle-blowers

Associated Press
25 December 2004

Some federal doctors and medical researchers do not enjoy the same protections to blow the whistle on wrongdoing as other government employees, an administrative law judge has ruled.

The Nov. 9 decision, by Judge Raphael Ben-Ami of the United States Merit Systems Protection Board, held that Dr. Jonathan Fishbein, a specialist for the National Institutes of Health, could not invoke the Whistleblower Protection Act to keep from being fired.

Dr. Fishbein was hired by the institutes in 2003 to help improve AIDS research practices.

He told the protection board that he was being fired because he had raised concerns about sloppy practices that might endanger patient safety. The institutes said that he was being fired for poor performance and that he had failed to complete his two-year probationary period successfully.

The whistle-blower law was enacted more than a decade ago to strengthen federal workers' protections when they make accusations of government wrongdoing. It gives them outlets like the board to seek legal protection.

But Judge Ben-Ami ruled that Dr. Fishbein was not covered by the law, because he was a so-called Title 42 employee and therefore enjoyed "no appeal rights" during his probationary period.

Dr. Fishbein was hired under Title 42 of the federal code, which allows the government to pay research and medical experts as special consultants, giving them salaries higher than the civil servant maximums. The law is intended to help the government compete against high-paying private industries. Dr. Fishbein was paid $178,000 a year, slightly more than the $175,700 that members of President Bush's cabinet receive.

Dr. Fishbein was among several employees of the national institutes who had raised concerns about a study in Africa involving the AIDS drug nevirapine.

Documents showed that the way the research was conducted violated federal patient safety rules and suffered from record-keeping and patient monitoring problems. But the study's general conclusion that the drug could be used safely in single doses to protect babies from H.I.V. was approved.

Dr. Fishbein's lawyers are now appealing Judge Ben-Ami's decision to the full board.

One of them, Steve Kohn, said federal agencies like the national institutes had markedly increased their recruitment and hiring of employees under Title 42 in recent years, leaving an entire class of federal workers without whistle-blower protections.

Kris Kolesnik, executive director of the National Whistleblower Center, an advocacy group in Washington, said of the judge's ruling: "This is a major setback for drug safety. Many of these employees, such as Dr. Fishbein, hold sensitive health- and safety-related positions. Without protections, these employees will not blow the whistle."

More than 3,900 Title 42 employees work for the national institutes, according to the Department of Health and Human Services, the agency's parent.

In February, a House subcommittee chairman, Representative James C. Greenwood of Pennsylvania, expressed concern that Title 42 was being used inappropriately by the institutes to raise administrators' salaries to as much as $225,000 a year.

The law should be reserved for "limited scientific hires," Mr. Greenwood said, "not an alternative compensation scheme that permits high-level N.I.H. officials to continue exercising broad-based, inherently governmental functions while being paid significantly higher salaries than if they had remained in the federal Civil Service system."

Attempt to discredit whistle-blower alleged

Group says his FDA colleagues made calls

Marc Kaufman
Washington Post,
24 November 2004, page A19

Managers at the Food and Drug Administration last month anonymously called a group that protects whistle-blowers in an attempt to discredit an outspoken agency safety officer who was challenging the FDA's drug safety policies, the legal director of the whistle-blower group said yesterday.

Tom Devine of the nonprofit Government Accountability Project (GAP) said the anonymous callers did not identify themselves but he is "100 percent positive" they were managers at the FDA because of their phone numbers and other identifying information. He said he initially took the callers' concerns seriously but later came to see the calls as an effort to smear the whistle-blower, Associate Director David J. Graham of the Office of Drug Safety.

Last week, Graham, a 20-year FDA veteran, said at a Senate hearing that FDA policies have left the American public "virtually defenseless" against the kind of safety problems that led to the abrupt withdrawal in September of the popular arthritis drug Vioxx.

He named five other prescription medications that he said pose serious safety risks that are not being adequately addressed by the FDA.

Although the FDA initially sharply criticized Graham's testimony — one top official called him "irresponsible" and a practitioner of "junk science" — the agency yesterday tightened the restrictions on one of the five drugs Graham had criticized, the acne medication Accutane.

In a statement regarding the GAP allegations, the FDA said yesterday that it "acknowledges the right of its employees to raise their concerns to oversight groups."

The agency said that it had no prior knowledge of any employee's contact with the whistle-blower group and that it is working to improve a process for ensuring that internal differences of scientific opinion are fully incorporated into its decision-making. "The agency promotes vigorous debate of the tough scientific questions it confronts every day," the statement said.

The allegation that the FDA used deceptive practices against Graham came two days after the Government Accountability Project agreed to take him on as a client.

Devine said Graham had asked five weeks ago for advice about overcoming his supervisors' opposition to the publication of his critical findings about Vioxx. The anonymous calls followed several weeks later, Devine said.

"The calls came under the guise of being anonymous whistle-blowers," Devine said. "They were clearly working together and shared allegations — mostly that Dr. Graham's research was unreliable and that there were serious questions of possible scientific misconduct with his study. They said Graham wouldn't address their concerns, and that he was a demagogue and a bully."

Devine said that after several conversations, he persuaded the callers to provide documents to support their accusations, and Devine then challenged Graham based on what was provided.

"It became clear to me that Dr. Graham could reasonably explain any questions about the research, and that the callers were trying to smear him," Devine said. "After that, I called their bluff for more information and that was the end of it. It was all a red herring, and it made me believe Dr. Graham far more."

Devine said that, under his organization's rules, he could not identify the callers because they initially contacted GAP as whistle-blowers themselves. But he said he is certain they were supervisors at the FDA because of the details of the arguments they made and the phone numbers from which they called. In addition, he said that, after identifying the callers to his satisfaction, he referred to them by name during subsequent phone conversations. He said the callers were surprised by his identifications but did not tell him he was wrong. […]

During his 20 years in the Office of Drug Safety, [Graham] fought passionately to bring about the recall of the diabetes drug Rezulin, the diet pills Fen-Phen and Redux, the cholesterol-lowering drug Baycol, the heartburn remedy Propulsid, and the antihistamine Seldane.

Graham, 50, was trained as a physician at Johns Hopkins and Yale universities and has spent his entire career at the FDA's drug safety office. A deeply religious Roman Catholic, he has said that his faith serves as a spur to his work. Some see him as a crusading hero, while others believe he unfairly fixates on certain drugs and fails to take into account the patients who are helped by those medications.

His influence has been enormous. In his congressional testimony, Graham said that, in the course of his career, he had recommended that 12 drugs be taken off the market, and that 10 of them were subsequently removed.

The news that Graham had sought whistle-blower assistance and protection — and that FDA managers had sought to undermine his credibility — was first reported yesterday in the online edition of *BMJ,* formerly known as the *British Medical Journal.*

In that account, Devine said the FDA was "employing a classic law of whistleblower reprisal — the smokescreen syndrome — which shifts the spotlight from the message to the messenger. The agency attempted to discredit Dr. Graham rather than provide any scientific evidence contradicting his conclusions."

Graham could not be reached yesterday for comment. […]

Crisis deepens at the US Food and Drug Administration

Jeanne Lenzer
BMJ, Volume 329,
4 December 2004, p. 1308

The US Food and Drug Administration, rocked by controversy in recent months, has now admitted that a senior management official secretly contacted a whistleblower group. That official attempted to discredit Dr David Graham, the FDA's scientist who criticised the agency during US Senate hearings, saying that the FDA failed to protect the public when it approved rofecoxib (Vioxx, Merck) — despite evidence suggesting that the drug caused heart attacks and strokes (*BMJ* 2004;329:1255, 27 Nov).

The FDA issued a statement on 26 November saying, "FDA had no prior knowledge of any employee's contact with the Government Accountability Project." In addition to acknowledging that the employee is "not anonymous" to the project, the FDA said the "employee has chosen to not divulge their identity, and FDA respects the right of any of its employees to protect their privacy in cases such as this."

Dr Graham's attorney, Tom Devine, legal director of the Government Accountability Project, said the FDA is "fudging on whether there was advance planning" to discredit Dr Graham. "There was more than one manager who contacted me."

Mr Devine also told the *BMJ* that Steven Galson, acting director of the FDA's Center for Drug Evaluation and Research, "engaged in the extraordinary move of personally contacting the *Lancet* editor, Richard Horton, to block publication of the Vioxx study."

According to an article in newspaper *USA Today,* Dr Horton wrote in an email to Dr Galson that his intervention was "very unusual indeed," and appeared to be intended to "delay or stop publication of research that was clearly of serious public interest."

The timing of the campaign to discredit Dr Graham and of the calls to the *Lancet* is significant, said Mr Devine, as they "both climaxed the

weekend before Dr Graham's testimony in US Senate hearings."

Senator Chuck Grassley, chair of the Senate committee that held hearings on rofecoxib, Merck, and the FDA, has called for the Inspector General to investigate the FDA's involvement in the attempts to discredit Dr Graham.

Dr Graham told the *BMJ* that when another drug safety officer, Dr Andrew Mosholder, concluded that selective serotonin reuptake inhibitor antidepressants caused increased suicidal tendency among teens, the FDA prevented him from presenting his findings at an advisory meeting and suppressed his report. When the report was leaked "the FDA's reaction was to do a criminal investigation into the leak. I was named as one of the targets of the investigation along with Dr Mosholder."

Calling the investigation a "plumbing operation," Dr Graham said a culture of intimidation and fear permeates the agency making it difficult for drug safety officers to protect the public.

The criminal investigation was also illegal, according to Mr Devine. He said, "The agency continued to try to catch the leaker even after the inquiry showed that Dr Mosholder's findings were correct. It's extraordinary. Presumably a scientific agency would pursue more civil practices. The FDA is in a class by itself for its almost obsessive intolerance of dissent. Other agencies fire their dissenters. The FDA launches criminal investigations."

Observers inside and outside the beleaguered agency say that the recent controversies point to systemic problems that go beyond any one drug or drug company — or even the FDA itself.

Speaking on condition of anonymity, an FDA drug safety officer told the *BMJ* that the agency has been virtually paralysed since the scandals erupted. "We can't go on like this," said the officer, "Either David will go — or they [management] will have to go." Dr Graham is "somebody we greatly admire and support," he said, adding that whether or not Dr Graham stays at FDA "the problems will remain."

"The public is very vulnerable," said the officer, who called for provisional approvals of drugs with reviews two years after the release of a new drug.

The officer said that a planned investigation by the Government Accountability Office (*BMJ* 2004; 329:935, 23 Oct) would help shed light on the ties between FDA and industry. He joined with other critics in calling for an end to the FDA being partially funded by fees paid by drug companies for drug reviews.

"That money needs to completely go. The NIH [National Institutes of Health] budget is enormous, but we get next to nothing. Maybe Congress could give us [funding]."

The FDA has declined to comment on questions regarding Dr Graham beyond their prepared statement.

Ruling sends press freedom reeling

Ambrose Evans-Pritchard
Sydney Morning Herald,
19 October 2004, p. 10

The European Court has quietly brushed aside 50 years of international case law in a landmark judgement on press freedom by ruling that Brussels does not have to comply with European human rights codes.

In a judgement with profound implications for civil liberties, European judges backed efforts by the European Commission to obtain the computers, address books, phone records and 1000 pages of notes seized by Belgian police — on EU instructions — from Hans-Martin Tillack, the former Brussels correspondent of the German news magazine *Stern*.

It is a test case of whether the European Court will adhere to the democratic freedoms and liberal principles upheld for the last half-century by Europe's leading rights watchdog, the non-EU Court of Human Rights in Strasbourg, or whether it will pursue a more authoritarian line as its power grows.

Tillack had written a series of hard-hitting exposés of EU fraud and skulduggery, relying on inside sources. By obtaining his archive of investigative files amassed over five years, the commission can identify sources and "burn" a generation of EU whistleblowers.

Tillack was arrested by Belgian police in March [2004] and held incommunicado for 10 hours for allegedly bribing an official to obtain internal EU documents.

The action was requested "urgently" by the EU's anti-fraud office, which said Tillack was about to leave for the United States. In fact, he was moving back to Hamburg.

Leaked anti-fraud office documents have since shown that the allegation was concocted over dinner between two commission chairmen.

Raymond Kendall, the former Interpol chief and now head of an anti-fraud office oversight board, testified to the House of Lords in May that officials had acted improperly "purely on the basis of hearsay" and were "obviously" in collusion with Belgian police to identify Tillack's sources.

Tillack filed a lawsuit at the European Court with the backing of the International Federation of Journalists to block commission access to his records.

The federation pleaded that the EU's attempt to identify a journalist's sources in that way was a "flagrant violation" of press protection established over many years in European Convention law.

If the commission was allowed to sift through his records, it would render investigative journalism "virtually impossible" in Brussels.

The EU's Court of First Instance ruled against Tillack last week on the grounds that the case was a strictly Belgian matter.

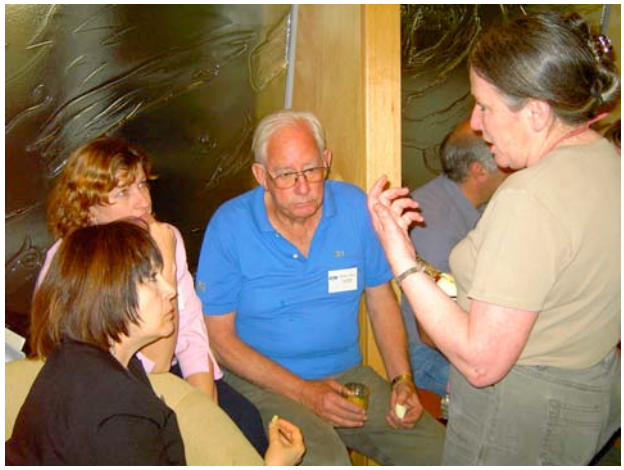
The European judges accepted commission claims that it played no role in Tillack's arrest, despite the leaked anti-fraud office documents that show it orchestrated the raid from the outset.

Pictures from the WBA annual general meeting and conference

John Pezy took many photos at the WBA's AGM and conference, held in Melbourne on 27-28 November 2004. On front cover is Keith Potter at the conference dinner just before receiving a certificate of his life membership in WBA. Keith was a founding member of WBA and had earlier been granted life membership in recognition of his many contributions to whistleblowing.

Greg McMahon, Bill Toomer, Jean Lennane and Keith Potter at the conference dinner

Bill De Maria and Matilda Bawden



Shelley Pezy, Matilda Bawden and Peter Bowden listen to Cynthia Kardell during a break in the conference proceedings

Jean Lennane speaking at the conference

Matilda Bawden is a member of the WBA national committee.

Peter Bowden is a member of the WBA national committee.

Bill De Maria is Australia's leading researcher on whistleblowing.

Cynthia Kardell is WBA national secretary and president of the NSW branch.

Jean Lennane is WBA national president.

Greg McMahon is WBA national director.

Shelley Pezy is a South Australian member of WBA.

Keith Potter: see above.

Bill Toomer is a founder member of WBA. His case is one of WBA's whistleblower cases of national significance.

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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 are held in the Church Hall on the first Sunday in the month commencing at 1:30 pm. (Please confirm before attending.) The July general meeting is the AGM.
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Letter from Keith Potter

Fifty-two-year-old Des Kelly, a 32-year career public servant, stands charged with leaking to the media a planned policy statement by the Howard government regarding Veteran's entitlements. The leak led to an immediate back-down by the government. Whistleblower laws will not protect Des. If found guilty he could be jailed for up to two years (*Age,* 1 November 2004). The offender should be thanked — not punished!

The law does not protect public servants who disclose wrongdoing to other than the "approved authority." No protection is provided to those who make unauthorised disclosure to a parliamentarian or to the media. Nor does the legislation protect unauthorised disclosure of proposed policy, no matter how defective.

Even if found not guilty, the stigma of suspected "disloyalty" will remain. Probable retribution would simply be deferred until the connection could no longer be reasonably established.

Will Dana Vale, Minister for Veterans Affairs, please publicly thank Mr Kelly if he is found guilty?

Will Prime Minister Howard please implement all recommendations of the 1994 Senate Standing Committee on Public Interest Whistleblowing?

Keith Potter
(life member of Whistleblowers Australia)

Whistleblowers Australia membership

Membership of WBA involves an annual fee of $25, payable to Whistleblowers Australia, renewable each June. 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.

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/Fax 07 5448 8218.