

# LAWYERS, CONFIDENTIALITY AND WHISTLEBLOWING: LESSONS FROM THE MCCABE TOBACCO LITIGATION

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*In 2006, Christopher Dale leaked information about Clayton Utz's internal investigation into the events surrounding the destruction of documents that would have been relevant and damaging to their client, British American Tobacco, in the 2002 McCabe litigation. This article uses this case study to examine whether lawyers can and should act as whistleblowers against colleagues and clients who abuse the administration of justice. We argue that although lawyers must have strong obligations of confidentiality to clients and others, their role as gatekeepers of justice also demands that they be allowed to blow the whistle when they have information about clients or other lawyers using legal services to subvert the administration of justice, and be protected when they do so. The article evaluates the circumstances in which such whistleblowing is appropriate and makes suggestions about how the law should be reformed by reference to three touchstones: the nature of the relationship between the lawyer and the wrongdoer; the nature of the wrongdoing itself; and, the process used to disclose the wrongdoing.*

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## I INTRODUCTION

It's quite plain there's a great sense of miscarriage of justice in the McCabe camp and I might say some basis to reopen the matter. So what do you do? Do you just sit on that? Do you just ignore it all? It would have been a lot easier for me if I'd just remained quiet about this. It's moved way beyond any sense of pay-

back or revenge. I was motivated by my conscience — I could *not sit idly by*.  
(Christopher Dale)<sup>1</sup>

Readers of *The Sunday Age* on 29 October 2006 could hardly have missed the ‘exclusive’ with the headline: ‘Exposed: Dirty Tricks behind Top Lawyers’ Plot to Deny Justice to Cancer Victims.’<sup>2</sup> A follow-up headline was also attention-grabbing: ‘Justice Denied: How Lawyers Set Out to Defeat a Dying Woman.’<sup>3</sup> The articles detailed the outcome of an internal Clayton Utz investigation highly critical of two senior lawyers in that firm who had represented the British American Tobacco Company Services Limited (‘BATAS’) in litigation. Documents relating to the investigation had been leaked by an unnamed source. The case in question was a lawsuit brought by Rolah McCabe, who was suffering through the final stages of smoking-related cancer. The source of the newspaper stories was ultimately revealed to be Christopher Dale, formerly a partner with Clayton Utz. Dale had helped to conduct the internal review.<sup>4</sup>

Dale’s leak raised the question of whether lawyer whistleblowing to protect the administration of justice is, or should be, permissible. There has, however, been no authoritative resolution of the legal and ethical appropriateness of Dale’s whistleblowing. This article argues that it is appropriate for lawyers to whistleblow when the administration of justice is under threat, and that regulatory changes to facilitate this process are warranted.

Part II of this article briefly summarises the facts of Dale’s leak<sup>5</sup> and its significance for the administration of justice. In Part III, we explain the ethical and regulatory significance of whistleblowing, its characteristics, and the issues it raises for lawyers specifically. We argue that lawyers are justified, and indeed obligated, in whistleblowing where they have information about clients or other lawyers using legal services to subvert the administration of justice. We contend that whistleblowing should be permitted in circumstances where courts or regulatory authorities would refuse to uphold client legal privilege due to conduct that would fall into the fraud exception. We go on to

<sup>1</sup> Christopher Dale, quoted in William Birnbauer, ‘Lawyer Revealed as Smoking Source’, *The Sunday Age* (Melbourne), 28 January 2007, 15 (emphasis added).

<sup>2</sup> William Birnbauer, ‘Exposed: Dirty Tricks behind Top Lawyers’ Plot to Deny Justice to Cancer Victims’, *The Sunday Age* (Melbourne), 29 October 2006, 1.

<sup>3</sup> William Birnbauer, ‘Justice Denied: How Lawyers Set Out to Defeat a Dying Woman’, *The Sunday Age* (Melbourne), 29 October 2006, 16.

<sup>4</sup> Birnbauer, ‘Lawyer Revealed as Smoking Source’, above n 1; *Dale v Clayton Utz* [No 2] [2013] VSC 54 (26 March 2013) [18], [101] (Hollingworth J).

<sup>5</sup> See also below Part VIII.

suggest, based on the literature on whistleblowing, that there are three relevant elements in considering the appropriateness of whistleblowing, and apply these to lawyer whistleblowing: the nature of the *relationship* between the lawyer and the wrongdoer; the nature of the *wrongdoing* itself; and the *process* that the lawyer whistleblower uses to address and ultimately disclose the wrongdoing. Parts IV, V and VI of the article consider each of these three key elements in turn using Dale's case to illustrate the legal, ethical and practical difficulties for lawyers considering whistleblowing to protect the administration of justice. On the basis of this analysis, we suggest changes to the professional conduct rules to allow and protect gatekeepers of justice whistleblowing.

## II THE MCCABE CASE LEAK

It is now well known that tobacco products kill up to one half of all their users, around 6 million people per year. The harm is seriously compounded by the highly addictive nature of cigarette smoking and the fact that many users start young.<sup>6</sup> Serious global efforts are underway to restrict the marketing and sale of cigarettes, especially to children, to avoid others being exposed to second hand smoke and various other measures under the auspices of the World Health Organization Framework Convention on Tobacco Control, a treaty that has been signed by 180 parties representing 90 per cent of the world's population.<sup>7</sup>

Yet there is a long history of lawyers assisting tobacco companies to avoid public and legal scrutiny of their responsibility and culpability in relation to the marketing of cigarettes, their addictiveness and the associated harm. In the mid-1990s, it was revealed that tobacco companies in the United States of America ('USA') had, under direction from their lawyers, developed a concerted strategy to hide documents relating to the health dangers of smoking.<sup>8</sup> In Australia there is evidence that, as early as 1985, Clayton Utz established a database of scientific material that was intended to 'have

<sup>6</sup> World Health Organization, *Tobacco Fact Sheet No 339* (June 2016) <<http://www.who.int/mediacentre/factsheets/fs339/en/>>.

<sup>7</sup> *World Health Organization Framework Convention on Tobacco Control*, opened for signature 16 June 2003, 2302 UNTS 166 (entered into force 27 February 2005) <<http://apps.who.int/iris/bitstream/10665/42811/1/9241591013.pdf>>.

<sup>8</sup> Camille Cameron, 'Hired Guns and Smoking Guns: *McCabe v British American Tobacco Australia Ltd*' (2002) 25 *University of New South Wales Law Journal* 768, 781-3; Christine Parker and Adrian Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2<sup>nd</sup> ed, 2014) 119-20.

documents stored offshore, again with the intention of putting them beyond reach for discovery.<sup>9</sup> Cameron argues that ‘the Australian lawyers adjusted to the litigation culture already developed in the United Kingdom (‘UK’) and USA and firmly entrenched in the defendant’s corporate strategy.’<sup>10</sup> In 2006 the New South Wales (‘NSW’) Dust Diseases Tribunal heard evidence from Mr Gulson, former Company Secretary and in-house solicitor for BATAS, and a whistleblower in his own right, that Clayton Utz was ‘warehousing’ 230 000 documents and claiming privilege over them. The copies had been given to Clayton Utz ostensibly for legal advice and the originals at BATAS destroyed.<sup>11</sup> Gulson also gave evidence that:

The Document Retention Policy, as written, required widespread destruction of documents, including the elimination of all scientific reports after a certain time period, but only at certain specified time periods and without regard to whether a document was helpful or harmful. The Document Retention Policy itself ... was specifically designed to destroy potentially dangerous documents — documents that could be used against the BAT Group in litigation.<sup>12</sup>

The Tribunal found that BATAS’s document retention policy met the meaning of fraud in the *Evidence Act 1995* (NSW); therefore, legal professional privilege did not apply.<sup>13</sup> It ordered the release of thousands of documents<sup>14</sup> but the case settled before the release.<sup>15</sup> By July 2006, a judge of the US District of Columbia District Court had found that tobacco companies were attempting to ‘defraud the public’ by concealing the dangers of cigarette smoking, and that lawyers had played a central role in doing so.<sup>16</sup>

<sup>9</sup> Cameron, above n 8, 784.

<sup>10</sup> Ibid 781.

<sup>11</sup> Susannah Moran, ‘Cloaks of Privilege and Smoking Guns’, *The Australian Financial Review* (Sydney), 19 May 2006, 57. See also *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray* (2006) 3 DDCR 580, 586 [19] (Curtis J).

<sup>12</sup> *Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray* (2006) 3 DDCR 580, 586 [19] (Curtis J) (citations omitted).

<sup>13</sup> Ibid [56]–[57].

<sup>14</sup> Ibid [90].

<sup>15</sup> William Birnbauer, ‘Tobacco Giant Sends in Big Guns’, *The Sunday Age* (Melbourne), 3 December 2006, 6.

<sup>16</sup> *United States v Philip Morris USA Inc*, 449 F Supp 2d 1 (DC Cir, 2006). See also Matthew Harvey and Suzanne Le Mire, ‘Playing for Keeps? Tobacco Litigation, Document Retention, Corporate Culture and Legal Ethics’ (2008) 34 *Monash University Law Review* 163, 179–80.

In the 2002 *McCabe v British American Tobacco Australia Services Ltd* ('*McCabe*')<sup>17</sup> litigation, it was claimed that BATAS marketed tobacco products to children and failed to take reasonable steps to reduce the risk to consumers.<sup>18</sup> Documentary evidence was clearly critical to support or undermine the claim that the company had access to scientific evidence, held knowledge of the health effects of tobacco products, and crafted marketing strategies to enlist child smokers and conceal the health consequences of smoking.<sup>19</sup> In support of a motion to strike out BATAS' defence, the plaintiff asserted that the defendant had 'followed a strategy designed to deny to any litigant access to documents to which the litigant would have been entitled and which would be of importance to the outcome of such proceedings.'<sup>20</sup> Eames J struck out BATAS' defence on the basis that the destruction of documentary evidence relevant to the claim had made a fair trial impossible.<sup>21</sup> Some eight months later, the Victorian Court of Appeal reversed the decision and remitted the case for trial.<sup>22</sup> The Court reversed a number of Eames J's findings and accepted the defence's contentions that the handling of the documentary evidence was within the bounds of appropriate document management despite the likelihood the documents would be relevant to inevitable future litigation.<sup>23</sup> The plaintiff, Rolah McCabe, died after the appeal was argued.<sup>24</sup>

Unsurprisingly, prior to the reversal, Eames J's decision made waves<sup>25</sup> and attention inevitably turned to the role of the lawyers.<sup>26</sup> Clayton Utz publicly announced a 'sweeping internal review' with the intention of identifying any

<sup>17</sup> [2002] VSC 73 (22 March 2002) [7] (Eames J).

<sup>18</sup> *Ibid.* See also Cameron, above n 8, 769–70.

<sup>19</sup> *McCabe* [2002] VSC 73 (22 March 2002) [12] (Eames J).

<sup>20</sup> *Ibid* [13].

<sup>21</sup> *Ibid* [385].

<sup>22</sup> *British American Tobacco Australia Services Ltd v Cowell* (2002) 7 VR 524, 592–3 [191]–[192].

<sup>23</sup> *Ibid* 592–3 [191].

<sup>24</sup> *Ibid* 528 [3].

<sup>25</sup> See, eg, Raymond Bonner and Greg Winter, 'Shredding of Smoking Data Is Ruled Deliberate', *The New York Times* (New York), 17 April 2002, A10; David Blackwell, Nikki Tait and Virginia Marsh, 'Australian Award against BAT is First Outside US', *Financial Times* (London), 12 April 2002, 13.

<sup>26</sup> See, eg, Nikki Tait, 'Solicitor to Be Quizzed in Tobacco Lawsuit', *Financial Times* (London), 11 December 2003, 2; Richard Harrison, 'Litigation Lawyers: The More the Messier', *The Times* (London), 7 May 2002, 5.

conduct that did not meet the firm's ethical standards.<sup>27</sup> According to the Chief Executive Partner, David Fagan, this could lead to significant consequences, as 'you have got to adhere to those high standards to be a member of this firm.'<sup>28</sup> Christopher Dale, a partner at Clayton Utz, was charged with conducting the investigation. He had not been involved in the defence of BATAS in *McCabe*.<sup>29</sup> Soon after the review, Clayton Utz ceased its involvement in tobacco litigation, citing its small contribution to the firm's revenue and poor fit with its role providing strategic advice to government and corporate Australia.<sup>30</sup> One of the Clayton Utz partners involved in the *McCabe* litigation,<sup>31</sup> and investigated as part of the internal review, retired from the firm.<sup>32</sup>

After the Court of Appeal found insufficient grounds for striking out BATAS's defence, the Clayton Utz review appeared to be taken no further. The Court of Appeal's decision, however, left open the question of whether documents could be destroyed before litigation commenced even though they might be relevant to likely litigation in the future. Le Mire has argued that:

As a result of the *McCabe* case it appeared that, while lawyers could not advise the destruction of documents without risking sanction for the breach of their professional duties [due to professional conduct obligations], corporations could destroy documents almost at will up until the time litigation commenced [as long as they could show some document management purpose in doing so].<sup>33</sup>

This led the Victorian government to pass legislation in 2006 making it an indictable criminal offence to intentionally destroy or conceal a 'document or other thing of any kind [that] is, or is reasonably likely to be, required in evidence in a legal proceeding.'<sup>34</sup> Some of the activities attributed to BATAS

<sup>27</sup> Bill Pheasant, 'Clayton Utz to Run Ethics Audit', *The Australian Financial Review* (Sydney), 24 April 2002, 3.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [18], [61] (Hollingworth J).

<sup>30</sup> Clayton Utz, 'Clayton Utz to Close Tobacco Claims Litigation Practice' (Media Release, 18 July 2002) <<https://www.claytonutz.com/knowledge/2002/july/clayton-utz-to-close-tobacco-claims-litigation-practice>>.

<sup>31</sup> *McCabe v British American Tobacco Services Ltd* (2002) 7 VR 524.

<sup>32</sup> Birnbauer, 'Justice Denied', above n 3.

<sup>33</sup> Suzanne Le Mire, 'Document Destruction and Corporate Culture: A Victorian Initiative' (2006) 19 *Australian Journal of Corporate Law* 304, 308 (citations omitted).

<sup>34</sup> *Crimes Act 1958* (Vic) s 254(1)(a), as inserted by *Crimes (Document Destruction) Act 2006* (Vic) s 3. The *Evidence (Document Unavailability) Act 2006* (Vic) further enlarged and clari-

and its lawyers may have been considered criminal, had the legislation been in place at the time.

By 2006 Dale's relationship with Clayton Utz had broken down,<sup>35</sup> and in September, Dale discussed the internal review he had conducted of the lawyers' behaviour in the *McCabe* litigation with the McCabe family's lawyer, Peter Gordon. William Birnbauer, a journalist with *The Sunday Age*, was also present.<sup>36</sup> Subsequently, Dale sent documents from the review to Gordon, who passed them on to Birnbauer.<sup>37</sup> As the Supreme Court of Victoria determined, Dale believed that these documents evidenced the 'following iniquities: the warehousing and destruction of documents over many years; and the way in which the laws of discovery had been abused'.<sup>38</sup> On 29 October 2006, Birnbauer published two newspaper articles in *The Sunday Age* relying on the information contained in the documents, although not identifying who had provided them to him.<sup>39</sup> Birnbauer subsequently published an article in *The Sunday Age* on 28 January 2007 identifying Dale as the source of the documents.<sup>40</sup> The newspaper articles focus primarily on claims that Clayton Utz lawyers assisted their client in misleading the court and perverting the course of justice by destroying scientific documents that would have been relevant to litigation, hiding the extent and purpose of the destruction, and avoiding discovery of certain documents without adequate grounds.

The tobacco company claimed confidentiality over the leaked documents and initiated a number of legal actions to prevent their further use. These cases all settled with only preliminary consideration by the courts of the substantive issues.<sup>41</sup> The matter has also been briefly considered in litigation

ried court discretions in the event evidence was concealed or destroyed. Two state inquiries released reports in May and June 2004 prior to the passage of these pieces of legislation: Law Reform Committee, Parliament of Victoria, *Administration of Justice Offences: Final Report* (2004); Peter A Sallmann, 'Document Destruction and Civil Litigation in Victoria' (Report, Attorney-General's Department, 1 May 2004). See also *ibid* for discussion of the *Crimes (Document Destruction) Act 2006* (Vic).

<sup>35</sup> *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [110] (Hollingworth J).

<sup>36</sup> *Ibid* [94]–[95], [97].

<sup>37</sup> *Ibid* [95].

<sup>38</sup> *Ibid* [96].

<sup>39</sup> Birnbauer, 'Dirty Tricks Behind Top Lawyers', above n 2; Birnbauer, 'Justice Denied', above n 3.

<sup>40</sup> Birnbauer, 'Lawyer Revealed as Smoking Source', above n 1; *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [101].

<sup>41</sup> Between November 2006 and June 2007, two British American Tobacco companies in Australia sought restraining orders and injunctions against further use of the leaked material against Fairfax Publications, Slater & Gordon and Peter Gordon (the *McCabe* lawyers),



between Dale and the firm Clayton Utz, concerning his departure from the firm.<sup>42</sup> There has been no authoritative legal decision as to the appropriateness or otherwise of Dale's leak.

Meanwhile, global tobacco companies continue their fight against tobacco control measures with the help of their lawyers, such as bans on advertising and plain packaging. Indeed, a recent decision by the Permanent Court of Arbitration found Philip Morris Asia's challenge to Australia's plain packaging laws under an Australia-Hong Kong bilateral investment treaty to be an 'abuse of rights' because Philip Morris Asia had acquired Philip Morris Australia solely for the purpose of challenging Australia's plain packaging laws under the agreement with Hong Kong.<sup>43</sup> This and other revelations, such as the 'Panama Papers' leak,<sup>44</sup> show that there is still a need to examine, debate and change the way in which lawyers work with powerful and rich clients to avoid

Roxanne Cowell (McCabe's executor) and Dale: see especially *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 109 (22 February 2007); *British American Tobacco Australia Limited v Gordon* [2009] VSC 619 (24 December 2009); *British American Tobacco Australia Services Ltd v John Fairfax Publications Pty Ltd* [2006] NSWSC 1197 (2 November 2006); *British American Tobacco Australia Services Ltd v John Fairfax Publications* [2006] NSWSC 1175 (7 November 2006); *British American Tobacco Australia Services v Fairfax* [2006] NSWSC 1328 (9 November 2006); *British American Tobacco Australia Ltd v Gordon* [2006] NSWSC 1473 (1 December 2006); *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 109 (22 February 2007); *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 230 (16 March 2007); *British American Tobacco Australia Ltd v Gordon* [2007] NSWSC 292 (22 March 2007); *McCabe v British American Tobacco Australia Services Ltd* [2007] VSC 216 (22 June 2007; 6 July 2007); *Cowell v British American Tobacco Australia Services Ltd* [2007] VSCA 301 (14 December 2007); *British American Tobacco Australia v Gordon* [2009] VSC 77 (27 March 2009). These proceedings all settled with a number of restraining orders made by consent. Cowell was (reportedly) the last to settle in March 2011: Richard Ackland, 'End to a 10-Year Wrestle with Smoke', *The Sydney Morning Herald* (Sydney), 2 April 2011, 8.

<sup>42</sup> *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [96], [108], [118]. This judgment concerns Dale's successful application to injunct Alan Myers QC from acting for Clayton Utz in Dale's action against Clayton Utz for wrongful dismissal and breach of the partnership agreement. The injunction was granted on the basis that Dale had previously sought Myers' advice on related matters: at [154]–[156], [175]–[176].

<sup>43</sup> *Philip Morris Asia Ltd v Australia* (Permanent Court of Arbitration, Case No 2012–12, 17 December 2015) 184–5 [585]–[588].

<sup>44</sup> The 'Panama Papers' whistleblower has exposed the way Mossack Fonseca, a Panama law firm, aided aggressive tax planning. It is not known whether the anonymous 'Panama Papers' whistleblower is a lawyer with the firm, but like Dale, he or she had access to confidential lawyer–client information and blew the whistle with the intention of exposing a series of global injustices perpetrated by lawyers helping clients abuse the legal system: see especially Luke Harding, 'Panama Papers Source Breaks Silence Over "Scale of Injustices"', *The Guardian* (online), 7 May 2016 <<https://www.theguardian.com/news/2016/may/06/panama-papers-source-breaks-silence-over-scale-of-injustices?>>.

legal scrutiny, undermine the purposes of law and regulation, and thus avoid democratic control.

### III THE SIGNIFICANCE OF WHISTLEBLOWING

#### A *The Ethical and Regulatory Significance of Whistleblowing*

Whistleblowing has been defined as 'disclosure by organization members (former or current) of illegal, immoral or illegitimate practices under the control of their employers, to persons or organizations that may be able to effect action.'<sup>45</sup> It is a process whereby an organisational insider with knowledge of wrongdoing takes steps to disclose that information to a party capable of intervention. Whistleblowing can include a range of behaviours from public disclosures to the reprimanding of misbehaving colleagues.<sup>46</sup>

The modern preoccupation with whistleblowing<sup>47</sup> can be traced back to the post World War Two exposure of Nazi abuses, the revelation of government wrongdoing in the Watergate scandal, the My Lai massacre in the Vietnam War, and the work of social scientists exposing human ethical frailty when faced with authority.<sup>48</sup> Contemporary concern with encouraging whistleblowing is based on recognition of the potential of whistleblowing to prevent abuses of human rights. It is also an attempt by the regulatory state to harness the potential of individuals to extend its regulatory power.<sup>49</sup> A number of regulatory reforms have been introduced to encourage and protect public and private whistleblowers. This is consistent with an overall approach to governance in which regulation increasingly occurs via polycentric

<sup>45</sup> Janet P Near and Marcia P Miceli, 'Organizational Dissidence: The Case of Whistle-Blowing' (1985) 4 *Journal of Business Ethics* 1, 4.

<sup>46</sup> See, eg, Kim Loyens and Jeroen Maesschalck, 'Whistleblowing and Power' in A J Brown et al (eds), *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) 154, 157.

<sup>47</sup> See, eg, A J Brown et al (eds), *International Handbook on Whistleblowing Research* (Edward Elgar, 2014); Ralph Nader, Peter J Petkas and Kate Blackwell (eds), *Whistle Blowing* (Grossman Publishers, 1972); Yvonne Cripps, *The Legal Implications of Disclosure in the Public Interest: An Analysis of Prohibitions and Protections with Particular Reference to Employers and Employees* (Sweet and Maxwell, 2<sup>nd</sup> ed, 1994); Robert G Vaughn, *The Successes and Failures of Whistleblower Laws* (Edward Elgar, 2012).

<sup>48</sup> See especially Vaughn, above n 47, chs 2, 5.

<sup>49</sup> Yuval Feldman and Orly Lobel, 'Individuals as Enforcers: The Design of Employee Reporting Systems' in Christine Parker and Vibeke Lehmann Nielsen (eds), *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2010) 263.

networks of state and non-state actors who both regulate and are regulated, rather than states having a monopoly on regulatory enforcement.<sup>50</sup>

Regulatory initiatives that seek to harness or encourage whistleblowers include whistleblower protection regimes,<sup>51</sup> bounty schemes,<sup>52</sup> and structural regulations requiring organisations to put in place internal ethical infrastructures that facilitate and support whistleblower activity.<sup>53</sup>

In Australia, there are different regimes for private and public sector whistleblowers. The *Public Interest Disclosure Act 2013* (Cth) ('PID Act') is focused on whistleblowing protections for Commonwealth public servants,<sup>54</sup> and each state has also introduced whistleblower protections for public sector employees.<sup>55</sup> Amendments to the *Corporations Act 2001* (Cth) ('Corporations Act') in 2004 have put in place limited protections for certain individuals who blow the whistle on breaches of the *Corporations Act* in the private sector.<sup>56</sup> The Australian Securities Exchange Corporate Governance Council also recommends that listed companies have a code of conduct to '[i]dentify the

<sup>50</sup> Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2 *Regulation and Governance* 137, 137; Burkard Eberlein et al, 'Transnational Business Governance Interactions: Conceptualization and Framework for Analysis' (2014) 8 *Regulation and Governance* 1.

<sup>51</sup> Protection regimes attempt to alleviate or suspend the effect of the inhibitory laws for whistleblowers that fall within their ambit: see, eg, *Public Interest Disclosure Act 2013* (Cth) s 6(c); *Corporations Act 2001* (Cth) pt 9.4AAA.

<sup>52</sup> Bounty schemes aim to address the whistleblower's fear about their future after disclosure by providing financial bonuses to whistleblowers: see, eg, *Dodd-Frank Wall Street Reform and Consumer Protection Act*, 12 USC § 922 (2010) and its supporting infrastructure at United States Securities and Exchange Commission, *2015 Annual Report to Congress on the Dodd-Frank Whistleblower Program*, 16 November 2015, 4–5, which implemented the whistleblower bounty scheme.

<sup>53</sup> This is reflected in regulation that seeks to 'deputize organization insiders as monitors': Björn Fasterling, 'Whistleblower Protection: A Comparative Law Perspective' in A J Brown, et al (eds), *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) 331, 340. See Katherine Griffiths, 'Banks Must Appoint a Whistleblowers' Champion', *The Times* (online), 7 October 2015 <<http://www.thetimes.co.uk/tto/business/industries/banking/article4578064.ece>>; Christine Parker et al, 'The Ethical Infrastructure of Legal Practice in Larger Law Firms: Values, Policy and Behaviour' (2008) 31 *University of New South Wales Law Journal* 158.

<sup>54</sup> Terry Morehead Dworkin and A J Brown, 'The Money or the Media? Lessons from Contrasting Developments in US and Australian Whistleblowing Laws' (2013) 11 *Seattle Journal for Social Justice* 653, 683–91.

<sup>55</sup> *Ibid* 691–3. See also the now-withdrawn Standards Australia, *Australian Standard: Whistleblower Protection Programs for Entities* (Standards Australia, 2003).

<sup>56</sup> *Corporations Act 2001* (Cth) pt 9.4AAA, as inserted by *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) sch 4 pt 2.

measures the organisation follows to encourage the reporting of unlawful or unethical behaviour' and 'include a reference to how the organisation protects "whistleblowers" who report violations in good faith.'<sup>57</sup>

Regulations encouraging and protecting whistleblowers now constitute an important mechanism by which governments and private companies signal their legitimacy and accountability. Citizens and other observers may believe that a 'leaky government is, over time, a trustworthy government.'<sup>58</sup> Indeed, as David E Pozen argues in relation to the executive branch of government:

If members of the public believe leaking is pervasive, then they should expect to learn about most of the nefarious or unlawful things the executive branch might be doing, along with any associated internal disagreements, whether or not the President wants them to.<sup>59</sup>

For private organisations too, encouraging internal whistleblowing can be a useful risk management strategy by providing early warning of difficult to detect misconduct, such as corporate crime or fraud.<sup>60</sup> It can thus enhance the transparency, integrity and resilience of global markets as well as government.<sup>61</sup> As Brown, Mazurski and Olsen note, '[c]urrent levels of whistleblowing play an important role in an objective sense, as a contribution to the integrity-promoting efforts of organisations and the public sector generally.'<sup>62</sup>

### B *Lawyers as Whistleblowers*

In this context, lawyers hold special appeal as potential whistleblowers. They are trained and able to spot illegality and abuses of the justice system. Their duty to the administration of justice and to the court is considered to be

<sup>57</sup> Australian Securities Exchange Corporate Governance Council, *Corporate Governance Principles and Recommendations* (at 27 March 2014) 20.

<sup>58</sup> David E Pozen, 'The Leaky Leviathan: Why the Government Condemns and Condone Unlawful Disclosures of Information' (2013) 127 *Harvard Law Review* 512, 575.

<sup>59</sup> *Ibid* 574.

<sup>60</sup> Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 *Common Law World Review* 144, 144, 146–7.

<sup>61</sup> See Terry Morehead Dworkin, 'SOX and Whistleblowing' (2007) 105 *Michigan Law Review* 1757, 1779.

<sup>62</sup> A J Brown, Evalynn Mazurski and Jane Olsen, 'The Incidence and Significance of Whistleblowing' in A J Brown (ed), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (ANU Press, 2008) 41.

paramount; prioritised over the duty to their client.<sup>63</sup> This duty could place a responsibility on the lawyer to respond to, prevent or perhaps expose misconduct that affects the administration of justice. In addition, lawyers are likely to have access to information about wrongdoing that is not available to those outside the lawyer–client relationship, including specific information about abuses of the legal system and the cover up of wrongdoing.<sup>64</sup> Indeed it may often be a lawyer who has the opportunity to review and reflect on the company's strategy and behaviour who is more likely to be able to see the big picture of cover up and abuse of the justice system by the company or its lawyers. Thus, lawyer whistleblowing may bring to light misconduct that would not otherwise come to the attention of appropriate authorities or the public, yet may harm the administration of justice.

Yet whistleblowing by lawyers is rare, and whistleblowing against client interests, and in order to promote the administration of justice, is even rarer. In most of the cases that have come to public attention in Australia involving whistleblowing lawyers, the lawyer appears to have been driven by a desire to protect or assist the client.<sup>65</sup> The lawyer appointed by the Australian government to represent Schapelle Corby, later convicted of drug trafficking, disclosed to the media that Corby's Bali legal team had suggested that the government should provide funds to bribe the appeal judges.<sup>66</sup> The barrister acting for Mohamed Haneef, charged with terrorism offences, revealed a record of interview with the police to a journalist, reportedly in an attempt to clear his client (but without the client's consent).<sup>67</sup> In New Zealand, a lawyer was found to have been in contempt of court after releasing to the media a confidential report about the poor construction of a bridge that gave access to his clients' farm and later collapsed causing the death of a third party.<sup>68</sup> He

<sup>63</sup> Law Council of Australia, *Australian Solicitors' Conduct Rules* (at 24 August 2015) r 3.1 ('ASCR'). The ASCR are in place in Victoria, New South Wales, Queensland, South Australia and the Australian Capital Territory, with some minor variations between States.

<sup>64</sup> Sung Hui Kim, 'Gatekeepers Inside Out' (2008) 21 *Georgetown Journal of Legal Ethics* 411, 452. Cf Robert Eli Rosen, 'Problem-Setting and Serving the Organizational Client: Legal Diagnosis and Professional Independence' (2001) 56 *University of Miami Law Review* 79, which argues that lawyers should see the big picture, although clients sometimes frame the problem for lawyers so that they cannot.

<sup>65</sup> While this appears to motivate most lawyer whistleblowers, it is certainly not universally the case: see, eg, Michael Pelly, 'Schapelle Corby Lawyer Robin Tampoe Struck Off for Misconduct', *The Australian* (Sydney), 12 June 2009, 3.

<sup>66</sup> *Legal Practitioners Complaints Committee v Trowell* (2009) 62 SR (WA) 1, 80 [375]–[376].

<sup>67</sup> Rachel Spencer, 'Legal Ethics and the Media: Are the Ethics of Lawyers and Journalists Irretrievably at Odds?' (2012) 15 *Legal Ethics* 83, 108.

<sup>68</sup> *Solicitor-General (NZ) v Miss Alice* [2007] 2 NZLR 783.

was apparently motivated by a belief that his clients had suffered a miscarriage of justice when the coroner blamed them for poorly maintaining the bridge. Dale, on the other hand, provides an example of a lawyer who blew the whistle for the purpose of exposing what he regarded to be an injustice perpetrated by his own firm and its client. His leak was contrary to the interests of his firm's client, and arguably, the firm itself.

As Sissela Bok explains, whistleblowing is ethically problematic precisely because it breaches shared understandings of loyalty and confidentiality within a relationship.<sup>69</sup> Lawyers' obligations of confidentiality and loyalty to their clients makes whistleblowing in the interests of the administration of justice particularly problematic. Legal practitioners are representatives, agents or zealous advocates for their clients as well as gatekeepers of the justice system.<sup>70</sup> The law and professional conduct rules enforce strong expectations of confidentiality on lawyers and other professionals because it is to the benefit of a society as a whole that individuals can seek the advice or aid of a lawyer, doctor, psychologist or accountant without fear of their confidences being disclosed. Strong lawyer-client confidentiality obligations can help lawyers provide better advice and representation, allow lawyers a chance to dissuade clients from illegal/immoral conduct, and ensure long-term trust in lawyers and the legal system.<sup>71</sup>

Lawyers' confidentiality obligations to clients are enshrined in the professional conduct rules enforced by the disciplinary system,<sup>72</sup> are implied into the terms of every lawyer-client contract, and are also enforceable under equitable principles of confidentiality. Moreover, client legal privilege, which protects lawyer-client confidentiality from enforced disclosure by courts and various enforcement authorities, has been recognised by the High Court of Australia as a fundamental common law principle, not just a rule of evi-

<sup>69</sup> Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (Vintage Books, 1984) 120. She argues that the justification for keeping information confidential is generally based on concern for 'human autonomy regarding personal information, respect for relationships, respect for the bonds and promises that protect shared information'.

<sup>70</sup> See, eg, David Luban, *Lawyers and Justice: An Ethical Study* (Princeton University Press, 1988); Daniel Markovits, *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age* (Princeton University Press, 2008); Parker and Evans, above n 8, 1–29.

<sup>71</sup> See Leslie C Levin, 'Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others' (1994) 47 *Rutgers Law Review* 81; Parker and Evans, above n 8, 97.

<sup>72</sup> ASCR r 9.

dence.<sup>73</sup> This privilege covers information communicated from the client to the lawyer for the purposes of legal advice and also information communicated to the lawyer by third party experts for the purposes of preparation for litigation. The protection afforded by this privilege is not unlimited. It does not attach to information that was imparted for the purpose of facilitating or furthering the commission of a crime, fraud or civil offence.<sup>74</sup> This limitation provides a judicially defined concept within which lawyer whistleblowing could be supported. This exception has been held to extend to communications 'to frustrate the processes of law',<sup>75</sup> and which 'may be described as a "fraud on justice"'.<sup>76</sup>

There are also obligations of confidentiality akin to the privilege, even to opposing parties for material disclosed for the purposes of litigation,<sup>77</sup> and equity can enforce confidentiality in any situation where information was communicated confidentially with an expectation that confidentiality would be maintained.<sup>78</sup> It is suggested that the justice system would not operate effectively if parties could not freely disclose information to the court and to the other side without the promise that it will not be used for purposes other than the resolution of the dispute. The lawyer's role as gatekeeper of justice challenges the idea that they should treat the protection of confidential information as overriding even the values of truth and justice in a particular case.<sup>79</sup>

<sup>73</sup> *Baker v Campbell* (1983) 153 CLR 52. This means that, until legislated otherwise, the privilege may apply in all settings in which some authority purports to have power to require the disclosure of information (orally or in writing).

<sup>74</sup> See especially *R v Cox* (1884) 14 QBD 153.

<sup>75</sup> *R v Bell; Ex parte Lees* (1980) 146 CLR 141, 156 (Stephen J).

<sup>76</sup> *British American Tobacco Australia Ltd v Gordon* [2009] VSC 619 (24 December 2009) [158] (Kaye J), quoting *A-G (NT) v Kearney* (1985) 158 CLR 500, 514 (Gibbs CJ). See also *British American Tobacco Australia Ltd v Gordon* [2009] VSC 77 (27 March 2009) [23]–[25] (Byrne J).

<sup>77</sup> See Matthew Groves, 'The Implied Undertaking Restricting the Use of Material Obtained during Legal Proceedings' (2003) 23 *Australian Bar Review* 314.

<sup>78</sup> See generally G E Dal Pont, *Law of Confidentiality* (LexisNexis, 2015). Lawyers have been enjoined from acting against a party on the other side on the basis of confidentiality obligations.

<sup>79</sup> Bok, above n 69, 121–3. See also Donald Nicolson and Julian Webb, *Professional Legal Ethics: Critical Interrogations* (Oxford University Press, 1999) 253–76; Richard H S Tur, 'Confidentiality and Accountability' (1992) 1 *Griffith Law Review* 73; William Simon, *The Practice of Justice: A Theory of Lawyers' Ethics* (Harvard University Press, 1998) 54–62.

### C Lawyer Whistleblowing and Gatekeeper of Justice Obligations

Reinier Kraakman pointed out in the 1980s that lawyers and other private professionals could supplement government regulation, and discourage corporations and their managements from engaging in misconduct, by withholding their support from illegal or unethical actions.<sup>80</sup> As John Coffee Jr explains in his influential book on gatekeepers, professionals (including lawyers) lend corporations their ‘reputational capital’ and ‘thus [enable] investors or the market to rely on the corporation’s own disclosures or assurances where they otherwise might not.’<sup>81</sup> It follows that the market relies on professionals to act as gatekeepers and not pledge their reputation to clients who act dishonestly or illegally, and that it is in gatekeepers’ own interests to preserve their reputation.

Where lawyers assist in illegal conduct, they are held legally responsible. An Australian example is the lawyer who advised company directors to breach their duties under the *Corporations Act* by phoenixing their companies (that is, winding up the original company and reconstituting a new company) to avoid paying properly due debts. The lawyer was sanctioned for being ‘involved’ in the contravention.<sup>82</sup> This is a rare example in Australia, but in the USA, agencies such as the Securities Exchange Commission (‘SEC’) and Inland Revenue Service have pursued lawyers, and encouraged lawyer regulatory authorities to discipline lawyers, when they have failed to meet agency views of acceptable standards.<sup>83</sup> Lawyer participation in or instigation of a client’s illegal conduct is a clear failure of the lawyer’s obligation as gatekeeper of the justice system. Whistleblowing lies at the other extreme of the spectrum of lawyer responses to client wrongdoing, and may be the most

<sup>80</sup> Reinier H Kraakman, ‘Corporate Liability Strategies and the Costs of Legal Controls’ (1984) 93 *Yale Law Journal* 857; Reinier H Kraakman, ‘Gatekeepers: The Anatomy of a Third-Party Enforcement Strategy’ (1986) 2 *Journal of Law, Economics, and Organization* 53. See also Ronald J Gilson, ‘The Devolution of the Legal Profession: A Demand Side Perspective’ (1990) 49(4) *Maryland Law Review* 869, 883.

<sup>81</sup> John C Coffee Jr, *Gatekeepers: The Professions and Corporate Governance* (Oxford University Press, 2006) 2.

<sup>82</sup> *Australian Securities and Investment Commission v Somerville* [2009] NSWSC 934 (8 September 2009) [47]–[49], (Windeyer AJ).

<sup>83</sup> Robert J Wilczek, ‘Corporate Confidentiality: Problems and Dilemmas of Corporate Counsel’ (1982) 7 *Delaware Journal of Corporate Law* 221, 226. See, eg, *Sarbanes-Oxley Act of 2002*, 15 USCS § 7242(a) (LexisNexis 2016), where lawyers can be caught within the ambit of the *Sarbanes-Oxley Act* if they mislead an auditor engaged in the preparation of financial statements; John C Coffee Jr, ‘Can Lawyers Wear Blinders? Gatekeepers and Third-Party Opinions’ (2005) 84 *Texas Law Review* 59, 67–8.



appropriate response to client wrongdoing in some circumstances. Lawyers practicing before the SEC are required to engage in internal whistleblowing should they become aware of 'a material violation of securities law or breach of fiduciary duty'.<sup>84</sup> The more ambitious requirement initially proposed as part of the *Sarbanes-Oxley Act of 2002*, 15 USCS (2016) (but not legislated) completed the picture by explicitly requiring lawyers to notify their 'noisy withdrawal' externally to the SEC where internal reporting did not lead to an adequate response, thus actually mandating a form of whistleblowing.<sup>85</sup>

There are a few instances where Australian lawyers have a mandatory obligation to report to an external body, regardless of duties of confidentiality owed to the firm or the client. These provide implicit exceptions to confidentiality. These include trust account breaches,<sup>86</sup> reporting of cash transactions over a certain amount (to prevent money laundering),<sup>87</sup> and in some jurisdictions, reporting of some criminal conduct.<sup>88</sup> The most proactive monitoring and strictest enforcement occurs in relation to trust accounting regulatory requirements. The existence of these mandated whistleblowing requirements suggests that whistleblowing can coexist with strong confidentiality protections provided that the scope of the whistleblowing is clear, justified and well understood.

The literature on gatekeeping generally stops short of advocating that lawyers should be mandated to whistleblow in relation to organisational miscon-

<sup>84</sup> *Sarbanes-Oxley Act of 2002*, 15 USCS § 7245(1) (LexisNexis 2016).

<sup>85</sup> David Waters, 'The Wisdom of Whistleblowing: The *Sarbanes-Oxley Act of 2002* and the "Noisy Withdrawal" Provision' (2010) 34 *Journal of the Legal Profession* 411, 412.

<sup>86</sup> *Legal Profession Uniform Law 2014* (NSW) s 154 (obligation to report irregularities); *Legal Profession Uniform Law Application Act 2014* (Vic) sch 1 ss 154 (obligation to report irregularities), 466 (suspending client legal privilege and failure to comply may amount to unsatisfactory conduct or misconduct); *Legal Profession Act 2007* (Qld) ss 260 (obligation to report irregularities), 544(4) (failure to comply may amount to unsatisfactory conduct or misconduct); *Legal Profession Act 2008* (WA) ss 227 (obligation to report irregularities), 520(5) (failure to provide information or documents is an offence); *Legal Profession Act 2007* (Tas) ss 254 (obligation to report irregularities), 571(2) (person failing to provide information or documents may incur penalty); *Legal Practitioners Act 1981* (SA) sch 2 s 24 (obligation to report irregularities), sch 4 ss 4 (obligation to provide information and documents), 95C (suspending client legal privilege); *Legal Profession Act 2006* (NT) ss 256 (obligation to report irregularities), 620 (obligation to provide information and documents); *Legal Profession Act 2006* (ACT) ss 231 (obligation to report irregularities), 525(2) (failure to provide information or documents is an offence).

<sup>87</sup> *Financial Transaction Reports Act 1988* (Cth) s 15A.

<sup>88</sup> See, eg, *Crimes Act 1900* (NSW) s 316(1).

duct.<sup>89</sup> The gatekeeper role can only be carried out effectively via whistleblowing as the last step in a process of prevention of wrongdoing. Without the whistleblowing possibility, the lawyer gatekeeper is constrained to persuasion or withdrawal of services, neither of which may be effective. In effect, these actions may simply defer the problem and even render it less likely that it be resolved in a satisfactory way. As Waters suggests, '[a]ll a silent withdrawal does is pass the problem along to another securities lawyer, possibly one who is not as concerned with ethics and professional responsibility.'<sup>90</sup> We therefore suggest that, as with Pozen's idea of 'leaky government',<sup>91</sup> the justice system is only just when lawyers can act on their gatekeeper of justice obligations by speaking out as whistleblowers when they see their clients or others abusing justice and they are unable to prevent it by other means. There is certainly a danger that lawyer whistleblowing could be overly encouraged and that clients would lose faith in lawyer confidentiality; undermining frankness between lawyer and client and thus promoting inefficiency and losing opportunities for lawyers to assist clients to act legally and ethically.<sup>92</sup> Accordingly, we argue that it is crucial to the administration of justice that professional conduct regulation set out clear guidance and protection for appropriate whistleblowing by lawyers.

We suggest that there are three elements that must be considered. First, the *relationship* between the lawyer whistleblower and the wrongdoer. Secondly, the *type of wrongdoing* to be disclosed. Finally, the *process* adopted by a lawyer whistleblower faced with misconduct will be a key factor in determining whether the lawyer has acted appropriately, and will be legitimately able to take advantage of any protections for whistleblowing.<sup>93</sup> We summarise our findings and proposed reforms in Table 1.

<sup>89</sup> See, eg, Coffee Jr, 'Can Lawyers Wear Blinders? Gatekeepers and Third-Party Opinions', above n 83, 71–2, who focuses on a duty to inquire and withdrawal of service as the consequence where the law firm identifies wrongdoing.

<sup>90</sup> Waters, above n 85, 421.

<sup>91</sup> Pozen, above n 58, 575.

<sup>92</sup> See Levin, above n 71.

<sup>93</sup> Bok, above n 69, 219–25.

*Table 1: Summary of Ethical Touchstones of Whistleblowing, Limitations of Current Law and Needed Reforms to Allow and Protect Appropriate Whistleblowing*

Ethical touchstones of whistleblowing	Significance	Limitations of current law	Recommended reforms
Relationship	Determines the extent of lawyers' obligation of confidentiality and degree of vulnerability to reprisal	<p>In-house and private lawyers have strong obligations of confidentiality and high vulnerability to reprisal and disciplinary proceedings</p> <p>Only (in-house and external) government lawyers are currently well protected</p> <p>Lawyers contracted to or employed by corporations have limited protection</p>	<p>All lawyers should be protected regardless of whether they have contractual relationship with wrongdoer or not</p> <p>Professional conduct regulation should provide whistleblower protection modelled on the PID Act for gatekeepers of justice whistleblowing</p>
Wrongdoing	Only certain types of wrongdoing are serious enough to be disclosed	<p>Conduct rules exceptions focus only on disclosing information about imminent individual crime and violence, and do not allow disclosure of information about organisational misconduct, financial harm and abuse of justice system</p>	<p>Changing conduct rules to recognise that lawyer's gatekeeper of justice role may justify disclosure of confidential information in circumstances similar to those where the crime–fraud exception to privilege and/or iniquity defence to breach of confidence would apply</p>

Ethical touchstones of whistleblowing	Significance	Limitations of current law	Recommended reforms
Wrongdoing (cont)		Insufficient and unclear case law to define circumstances in which lawyer whistleblowing can be justified by defences in general law of confidentiality including iniquity rule in equity, public policy argument in contract and illegality exception in privilege	Make it clear in conduct rules and education and guidance to lawyers that general law of confidentiality does justify whistleblowing where the iniquity rule applies, and that crime–fraud exception to privilege allows disclosure of administration of justice breaches
Process	Whistleblowing should be the last resort and done fairly and appropriately	No guidance provided about appropriate process except for government lawyers Process provided for protection of corporate whistleblowers is inadequate	Professional conduct regulation and education should set out a process to be followed by lawyer whistleblowers that reflects principles of verification of wrongdoing, whistleblowing as last resort, and fair process

## IV RELATIONSHIP

The very notion of whistleblowing implies a ‘special relationship such as to mean that their disclosure comes “from within”’.<sup>94</sup> As Table 2 indicates, the relationship between the lawyer and the wrongdoer will determine the extent of the lawyer’s obligations of confidentiality, those obligations that support whistleblowing, and the availability of any legislative protections for whistleblowers, as well as any practical encouragements and discouragements to blow the whistle.

<sup>94</sup> A J Brown, ‘Restoring the Sunshine to the Sunshine State: Priorities for Whistleblowing Law Reform in Queensland’ (2009) 18 *Griffith Law Review* 666, 684.

Table 2: Impact of Different Relationships between Lawyer and Wrongdoer on Whistleblowing

Relationship	Opportunity to whistleblow	Duties that might support disclosure	Disciplinary vulnerability: duties that might prevent disclosure	Practical vulnerability	Whistleblower protection available?
In-house lawyer employed by client	High access to information  Strong argument that should act as gatekeeper	Discretion to disclose where serious criminal activity or a threat of physical harm	Duty of confidentiality and loyalty  Breach could be disciplined as unsatisfactory professional conduct or professional misconduct	High risk as the lawyer is vulnerable to sanctions/ loss of employment as employee	Part 9.4AAA of the <i>Corporations Act</i> , but only if relates to breach of <i>Corporations Act</i>  Public sector whistleblowing protection legislation, but only if employed by or contracted to government agency

Relationship	Opportunity to whistleblow	Duties that might support disclosure	Disciplinary vulnerability: duties that might prevent disclosure	Practical vulnerability	Whistleblower protection available?
External lawyer and own client	Fairly high access to information but information may be curated by client to obscure wrongdoing	Discretion to disclose where serious criminal activity or a threat of physical harm	Duty of confidentiality and loyalty  Breach could be disciplined as unsatisfactory professional conduct or professional misconduct	High risk as the lawyer is vulnerable to sanctions from the wrongdoing organisation (loss of work), sanctions from their employing firm	Part 9.4AAA of the <i>Corporations Act</i> , but only if relates to breach of <i>Corporations Act</i>  Public sector whistleblowing protection legislation, but only if employed by or contracted to government agency

Relationship	Opportunity to whistleblow	Duties that might support disclosure	Disciplinary vulnerability: duties that might prevent disclosure	Practical vulnerability	Whistleblower protection available?
Lawyer and own firm and within-firm colleagues and their clients	High access to information  Strong argument that should act as gatekeeper	Discretion to disclose where serious criminal activity or a threat of physical harm  Duty to the administration of justice	Duty of confidentiality and loyalty  Breach could be disciplined as unsatisfactory professional conduct or professional misconduct	High risk as the lawyer is vulnerable to sanctions from the wrongdoing organisation (loss of work), sanctions from their employing firm	Part 9.4AAA of the <i>Corporations Act</i> if employment is via service company and wrongdoing relates to the <i>Corporations Act</i>
		Duty to exercise reasonable supervision of other practitioners and other employees			



Relationship	Opportunity to whistleblow	Duties that might support disclosure	Disciplinary vulnerability: duties that might prevent disclosure	Practical vulnerability	Whistleblower protection available?
Lawyer and other parties (including other side, their lawyers, expert witness etc)	Some access to information  Moderate argument that should act as gatekeepers	Discretion to disclose where serious criminal activity or a threat of physical harm  Duty to the administration of justice	No direct duty to organisation/ other side except for the obligation not to make unfounded allegations  Duty to own client to maintain confidentiality  Could be agreement with organisation to preserve confidentiality eg, in due diligence scenario	Medium risk as the lawyer could potentially be sanctioned by own client as information received in course of brief  Could be subject to equitable breach of confidence action	No protections available
			Breach could be disciplined as unsatisfactory professional conduct or professional misconduct		

Relationship	Opportunity to whistleblow	Duties that might support disclosure	Disciplinary vulnerability: duties that might prevent disclosure	Practical vulnerability	Whistleblower protection available?
Lawyer acting in personal capacity	May garner information through professional networks that is not generally available	Duty to the administration of justice	No obvious duty to inhibit disclosure	Limited risk as not likely the organisation could victimise or sanction	No protections available
	Weak argument that should act as gatekeeper		Arguably may bring profession into disrepute through inappropriate methods of discovery or revelation		
			Disciplinary consequences possible if actions bring profession into disrepute		

### A *In-House and External Lawyers Vis-à-Vis Their Own Client*

It is the lawyer who is in an internal or employment relationship with the wrongdoer who is most likely to hold information ‘worthy of disclosure’,<sup>95</sup> but they are also most vulnerable to reprisals.<sup>96</sup> External lawyers directly briefed by the organisation committing the wrong may also have access to confidential information that allows them to identify wrongdoing, although the client has more opportunity to curate the information they give the external lawyer so as to obscure evidence of wrongdoing.<sup>97</sup> Lawyers in both these situations may have the power to prevent wrongdoing through strong advice and internal influence over the client. They may be motivated to do so in order to protect their own reputation and that of their employer organisation or firm. If they do need to whistleblow, however, the strength of their duty of confidentiality and loyalty to the client and their vulnerability to retaliation through loss of employment or contract, disciplinary complaint or lawsuits is high. Indeed, Clayton Utz and BATAS respectively made a disciplinary complaint against Dale and sued under the general law of confidentiality in response to Dale’s leak.<sup>98</sup>

### B *Lawyers Vis-à-Vis Within-Firm Colleagues and the Clients of Colleagues*

Lawyers may also come across information about wrongdoing due to activities within their firm involving colleagues and the clients of their colleagues. All partners in a firm have an obligation to monitor the ethical behaviour of their colleagues and ensure ethical conduct; again perhaps motivated to do so to protect their own reputation and that of their firm.<sup>99</sup> Where a lawyer has specific supervisory responsibilities, this obligation is heightened.<sup>100</sup> But there are also significant disincentives for whistleblowing. If one lawyer in a firm owes obligations of confidentiality to a client or in relation to information

<sup>95</sup> Paul Latimer and A J Brown, ‘Whistleblower Laws: International Best Practice’ (2008) 31 *University of New South Wales Law Journal* 766, 775.

<sup>96</sup> *Ibid.*

<sup>97</sup> Geoffrey C Hazard Jr, ‘Ethical Dilemmas of Corporate Counsel’ (1997) 46 *Emory Law Journal* 1011, 1019.

<sup>98</sup> See William Birnbauer, ‘Thrust, Parry as Law Firm Slams Ex-Partner’, *The Sunday Age* (Melbourne), 4 February 2007, 5, where Clayton Utz reportedly made a complaint about breach of confidence to the professional disciplinary authority, although no outcome has been reported.

<sup>99</sup> This flows from the vicarious liability of partners: see, eg, *Partnership Act 1891* (SA) s 10.

<sup>100</sup> For obligations to supervise, see ASCR r 37.

communicated by a third party, then all lawyers in the firm will be bound. Thus, even though Dale did not himself act for the tobacco company client, as a partner in the firm he owed obligations of confidentiality to all his firm's clients as if he was their own lawyer. He would also have owed obligations of confidentiality in equity and contract to his fellow partners about internal operations of the firm.

### C *Lawyers Vis-à-Vis Third Parties*

Lawyers might also discover the wrongdoing of third parties such as clients, lawyers or expert witnesses on the other side of a transaction or litigation. Lawyers who disclose information in these circumstances can be called 'bellringers' (rather than 'whistleblowers'), as they come across information in the course of a matter where they are not 'insiders' in relation to the wrongdoer.<sup>101</sup> Lawyers are, however, always insiders in relation to the justice system when they are acting professionally. Therefore, even in this situation lawyers still have a paramount duty to the administration of justice, but the motivation to preserve their own and their firm's reputation is arguably less powerful when the wrongdoing is at arm's length. At the same time, confidentiality continues to discourage revelations. Here, the confidentiality is founded in the duty to the client to maintain the confidentiality of any information that flows from the brief, including that provided by the other side. For these lawyers, their duty and vulnerability to retaliation and discipline will depend in part on the attitude of their own client to the exposure of the wrongdoing organisation. A second layer of confidentiality may exist if the lawyer has come across the information in a context where there has been an undertaking to preserve confidence, such as in a due diligence or discovery process. It was this kind of breach of undertakings that led the practitioner to be held in contempt of court and suspended in the New Zealand bridge collapse case referred to earlier.<sup>102</sup>

<sup>101</sup> Marcia P Miceli, Suelette Dreyfus and Janet P Near, 'Outsider "Whistleblowers": Conceptualizing and Distinguishing "Bell-Ringing" Behavior' in A J Brown et al (eds), *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) 71, 71–3. Throughout the rest of the article, we will refer to 'whistleblowing' to cover both situations where the relationship between the lawyer and wrongdoer is contractual and non-contractual.

<sup>102</sup> See above n 68 and accompanying text.

#### D *Lawyers in Personal Capacity*

The final category concerns lawyers who discover wrongdoing in their personal capacity. In such circumstances, the lawyer may come across information about wrongdoing by others through his or her professional or personal networks. Again, the duty to the administration of justice might also suggest a gatekeeping obligation here. The incentives to act as a whistleblower appear low, as it is very unlikely that reputational risk would flow. The lawyer's power to intervene is also less obvious in this context, and the whistleblowing might simply take the form of a disciplinary complaint about the wrongdoer. The disincentives are still present, but arguably weaker than in the situations discussed above, as there does not appear to be a duty of confidentiality. Despite the absence of any duty of confidentiality, there are certainly professional risks in becoming a whistleblower. The obligation placed on lawyers not to bring the profession into disrepute could operate to discourage whistleblowing, at least in public forums.<sup>103</sup>

#### E *Availability of Whistleblower Protections for Lawyers*

This analysis of the various relationships that lawyers may have to the wrongdoer indicates that there are a daunting array of disincentives that discourage whistleblowing. Moreover, legislative interventions that seek to encourage whistleblowing are largely inadequate to protect lawyer whistleblowers<sup>104</sup> as they generally depend on a contractual employment relationship between the lawyer and the wrongdoer. The notion that protection is only necessary where the whistleblower is an insider within an employment or contractual relationship is predicated on the idea that insiders are more vulnerable to reprisals than outsiders.<sup>105</sup> In the case of lawyers, vulnerability arises both through contractual relationships and via the professional disciplinary regime. As a consequence, both insider and outsider lawyers are in need of protection.

The strongest whistleblowing protections are found under the various Acts that apply to the public sector, such as the *PID Act*. This Act protects those who disclose wrongdoing with immunity from any civil, criminal or administrative liability, as well as any other 'adverse action' in their employment

<sup>103</sup> ASCR r 5.1.

<sup>104</sup> For a summary, see above Table 2.

<sup>105</sup> Latimer and Brown, above n 95, 775.

(a term that is defined very broadly).<sup>106</sup> The protections available under these pieces of legislation would not have protected Dale's whistleblowing against a private law firm and private company. However, it would cover lawyers acting for a government client in a similar situation to that of Dale, provided the other requirements for protection are satisfied.<sup>107</sup> Its terms would cover lawyers employed by a private law firm and contracted to provide legal services to a government client. It would also cover lawyers employed by the government with information about wrongdoing by government agencies.<sup>108</sup> These protections would probably not, however, extend to those lawyers acting on the other side of a dispute with a public body who discovered misconduct by the public sector body.<sup>109</sup> Nor would they cover lawyers who discover government wrongdoing in their personal capacity.

A limited and much criticised regime of whistleblower protection was incorporated in pt 9.4AAA of the *Corporations Act* in 2004.<sup>110</sup> The protections are extended to officers, employees, those with contracts for the supply of goods or services to the company, or those employed by a person who has a supply contract.<sup>111</sup> They would, therefore, cover in-house lawyers and external lawyers, whether principals or employed lawyers, advising companies under contracts for service, but only if the relevant wrongdoing amounted to a

<sup>106</sup> *PID Act* s 6. See also A J Brown, 'Towards "Ideal" Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) 2(3) *E-Journal of International and Comparative Labour Studies* 4, 18–20.

<sup>107</sup> We argue that the wrongdoing Dale disclosed would probably have fitted under the Act: see below nn 147–151 and accompanying text. The process followed was problematic, as discussed in below Part IV.

<sup>108</sup> *PID Act* s 69(1) items 15, 16 covers 'public officials' and there is a list of these provided therein. It includes individuals contracted to provide services to the government ('[a]n individual who is a contracted service provider for a Commonwealth contract' and '[a]n individual who: (a) is an officer or employee of a contracted service provider for a Commonwealth contract; and (b) provides services for the purposes (whether direct or indirect) of the Commonwealth contract'); see also at s 30 which provides more information about contracted service providers.

<sup>109</sup> See *PID Act* ss 6, 69.

<sup>110</sup> *Corporations Act* pt 9.4AAA, as inserted by *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* (Cth) sch 4 pt 2 ('CLERP Act'). For a critique of its effectiveness see Janine Pascoe and Michelle Welsh, 'Whistleblowing, Ethics and Corporate Culture: Theory and Practice in Australia' (2011) 40 *Common Law World Review* 144, 151–2. The Senate Economic References Committee also called for a 'comprehensive review' of the *Corporations Act* regime: Senate Economic References Committee, Parliament of Australia, *Performance of the Australian Securities and Investments Commission* (2014) 207 [14.41].

<sup>111</sup> *Corporations Act* s 1317AA(1)(a).

breach of the *Corporations Act*.<sup>112</sup> In serious cases, certain lawyers' own conduct could breach the directors' and officers' duties under the *Corporations Act*; for example if the lawyer held an officer position such as company secretary, or assisted officers and directors, to breach the law.<sup>113</sup> Thus one corporate lawyer could potentially blow the whistle on another lawyer's conduct and be protected.

These provisions may also protect lawyers who blow the whistle on their own law firm colleagues if their firm is itself structured as a company and the wrongdoing concerns a breach of the *Corporations Act*. The Law Council of Australia's *Snapshot of the Legal Profession* revealed that in 2008, 85.2 per cent of lawyers worked in 'other legal services', such as in private legal firms and in-house roles, rather than at the Bar, in government and or in the community legal sector.<sup>114</sup> While the private firms are mostly sole practitioners or partnerships,<sup>115</sup> incorporated firms make up about 20 per cent of existing firms.<sup>116</sup> Moreover, even traditional law firm partnerships may employ solicitors through service companies, the directors of whom are likely to be the equity partners. In such cases, the *Corporations Act* provisions could cover employed lawyers who blow the whistle, with involved equity partners acting as officers.

The *Corporations Act*'s pt 9.4AAA formula excludes lawyers who have reason to interact with a company without a formal contractual relationship or office with the company. Lawyers acting pro bono would also be likely to fall into this category, as would those lawyers who come into contact with a company as part of a 'due diligence' exercise for a possible contract or takeover. Lawyers who self-protect by moving on to a new position before whistleblowing will lose their protection, as former employees and former officers are omitted from the protection regime. Those who discover wrongdoing while acting for, or employed by, related companies would also potentially become aware of misconduct and vulnerable to sanction if they disclose,

<sup>112</sup> Ibid s 1317AA(1)(d).

<sup>113</sup> Ibid ss 9 (definitions of 'officer', 'director'), 79, 180–4. See generally *Shafron v Australian Securities and Investments Commission* (2012) 247 CLR 465.

<sup>114</sup> Law Council of Australia, 'Snapshot of the Legal Profession' (LCA Brief, Law Council of Australia, September 2009) 1 <[http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Briefs\\_Fact\\_Sheets\\_and\\_Publications/Snapshot\\_of\\_the\\_legal\\_profession\\_reform\\_-\\_Sept\\_2009.pdf](http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Briefs_Fact_Sheets_and_Publications/Snapshot_of_the_legal_profession_reform_-_Sept_2009.pdf)>.

<sup>115</sup> See Sharyn L Roach Anleu, 'The Legal Profession in the United States and Australia: Deprofessionalization or Reorganization?' (1992) 19 *Work and Occupations* 184, 189–90.

<sup>116</sup> Australian Bureau of Statistics, *Legal Services: Australia* (ABS Catalogue No 8667.0, Australian Bureau of Statistics, 24 June 2009) 13.

but may not be covered by whistleblower protections. Thus a group general counsel, for example, might obtain information about wrongdoing by multiple related companies, but the protection extended is restricted.

Professional conduct regulation of lawyers should set out protection for lawyers modelled on those in the *PID Act* to lawyers in any and all of the situations discussed above and summarised in Table 2. The *Corporations Act* whistleblower protections should extend to any adviser who might be in a gatekeeper position in regard to a corporation, regardless of their technical employment status, and it should protect them for whistleblowing in relation to any wrongdoing by the corporation or its officers and employees.

## V WRONGDOING

The nature of the wrongdoing is an important factor in determining whether it is appropriate for people to whistleblow.<sup>117</sup> It has been argued that a broad definition of the type of wrongdoing that justifies whistleblowing as simply any ‘illegal, immoral and illegitimate acts is problematic.’<sup>118</sup> Skivenes and Trygstad posit that the capacity to inflict organisational, individual or community harm should be seen as a key element of the type of wrongdoing that justifies whistleblowing.<sup>119</sup>

### A *What Type of Organisational Wrongdoing Can Be Disclosed by Lawyer Whistleblowers?*

In relation to lawyers and organisational wrongdoing, there are four different categories of wrongdoing causing harm that might justify whistleblowing. First, there are transgressions that promote the organisation’s goals but harm

<sup>117</sup> Richard Wortley, Peter Cassematis and Marika Donkin, ‘Who Blows the Whistle, Who Doesn’t and Why?’ in A J Brown (ed), *Whistleblowing in the Australian Public Sector: Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations* (ANU Press, 2008) 53, 54–67.

<sup>118</sup> Marit Skivenes and Sissel C Trygstad, ‘Wrongdoing: Definitions, Identification and Categorizations’ in A J Brown et al (eds), *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) 95, 99.

<sup>119</sup> Ibid. See also Jos Leys and Wim Vandekerckhove, ‘Whistleblowing Duties’ in A J Brown et al (eds), *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) 115, 119, where three types of organisational wrongdoing that may be encountered by whistleblowers are identified: wrongdoing that contravenes applicable norms, involves neglect of purpose or pursuit of improper purpose, and finally, negligent or intentional causing of harm; P G Cassematis and R Wortley, ‘Prediction of Whistleblowing or Non-Reporting Observation: The Role of Personal and Situational Factors’ (2013) 117 *Journal of Business Ethics* 615, 630.



individuals, the community, and the environment. An example would be the Australian Wheat Board's subversion of the United Nations' 'Oil for Food' programme to illegally channel funds to Saddam Hussein's regime.<sup>120</sup> Second, there are transgressions that are unrelated to organisational goals but cause harm to others, such as sexual harassment by officers and employees.<sup>121</sup> Third, there are transgressions that are unrelated to organisational goals and harm the company itself. This could include embezzlement of company resources by an employee. Finally, there is conduct that appears to promote the organisation's goals in the short term but which may be harmful to the company in the long term. Indeed, the line between conduct that assists the corporation yet harms others (the first category above), and that which harms it, can be difficult to draw when its long term effect is considered. The recent exposure of the Volkswagen 'defeat device' provides an illustration. The conduct of workers and executives in installing this software 'workaround' to circumvent emissions testing may have been initially motivated by a desire to assist the company, but has ultimately proved to be disastrous.<sup>122</sup>

The second and third categories — wrongdoing that is contrary to organisational goals and harms either the company or others — should not raise difficult ethical issues for lawyers. It is the lawyers' duty to report such conduct up the organisational hierarchy to someone who can do something about it — whistleblowing within the organisation only. For example, if a lawyer discovers an employee's illegal activity that harmed the organisation (such as embezzlement), his or her duties would be quite straightforward as the duty to the client (the organisation) would be invoked and the duty of confidentiality would not be challenged. The illegality of the conduct would suggest that it falls appropriately into the category of serious wrongdoing, and could appropriately be reported up the chain of authority in the organisation

<sup>120</sup> See Caroline Overington, *Kickback: Inside the Australian Wheat Board Scandal* (Allen and Unwin, 2007).

<sup>121</sup> For an example of whistleblowing in this category involving a professional, see Quentin McDermott, Karen Michelmore and Hagar Cohen, 'Monash Medical Centre Senior Surgeon Helen Maroulis under Investigation over Claims of Bullying, Intimidating Colleagues', *ABC News* (online), 25 May 2015 <<http://www.abc.net.au/news/2015-05-25/senior-monash-surgeon-under-investigation-over-bullying-claims/6491592>>.

<sup>122</sup> See generally Danny Hakim, Aaron M Kessler and Jack Ewing, 'As Volkswagen Pushed to Be No 1, Ambitions Fueled a Scandal', *The New York Times* (online), 26 September 2015 <<http://www.nytimes.com/2015/09/27/business/as-vw-pushed-to-be-no-1-ambitions-fueled-a-scandal.html>>; Jack Ewing, 'VW's New Chief Says Scandal Will Cost It More Than Expected', *The New York Times* (online), 6 October 2015 <<http://www.nytimes.com/2015/10/07/business/international/vw-diesel-emissions-job-cuts.html>>.

to senior management or the board.<sup>123</sup> Similarly, if the wrongdoing involves conduct that is irrelevant to the organisation's purposes and is harmful and illegal, it may well carry organisational risk for the client. So, an employee who engages in bullying conduct may well embroil the client in workplace disharmony and legal action. A lawyer discovering misconduct of this type should intervene by reporting the conduct to those in a position to address it within the organisation. Only if senior management ignores or inappropriately handles wrongdoing of these kinds, and thus takes on the illegal activity itself (perhaps in some sort of misguided effort to promote organisational goals), does the question of whistleblowing arise. The conduct now fits into the more problematic first or fourth categories above.

It is misconduct that is connected to the organisation's purpose, yet any behaviour that breaches the law or otherwise causes harm presents the more challenging possibility of a need for external whistleblowing by the lawyer. The lawyer would have a clear duty not to counsel or assist in illegal conduct.<sup>124</sup> However, should the client persist with the wrongdoing, the pressure to conceal the wrongdoing is likely to be high. Moreover, the client may embroil the lawyer in its illegal purpose by expecting the lawyer to defend and even further the client's purpose. This is the situation alleged by Dale. Dale stated that he was motivated by the belief that 'there may have been a fraud committed on the Supreme Court of Victoria and that a full investigation was required.'<sup>125</sup> His leaks were aimed at providing further evidence that the client and the law firm acted in violation of the applicable norms by concealing evidence of the intentionally manipulative or negligent marketing of a product known to be harmful, and subverting the judicial process to avoid scrutiny and liability for its own harmful conduct.

<sup>123</sup> See, eg, William H Simon, 'Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict' (2003) 91 *California Law Review* 57.

<sup>124</sup> See, eg, *Law Society of New South Wales v Dennis* (1981) 7 Fam LR 417; *Australian Competition and Consumer Commission v Real Estate Institute of Western Australia Inc* (1999) 161 ALR 79; G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 5<sup>th</sup> ed, 2013) 615 (citations omitted), where it is discussed that '[l]awyers must not engage in conduct that is dishonest, illegal, unprofessional, that may otherwise bring the profession into disrepute or that is prejudicial to the administration of justice. Lawyers must not therefore seek to advance their clients' causes by unfair or dishonest means.'

<sup>125</sup> Birnbauer, 'Lawyer Revealed as Smoking Source', above n 1, quoted in *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [101]. Dale repeated the substance of this account in his evidence to the Court: at [113].

*Table 3: Exceptions to/Defences for Breach of Obligations of Confidentiality that Might Support Lawyer Whistleblowing, Limitations of Exceptions and Summary of Proposed Reforms*

Exceptions to/defences for breach	Limitations	Recommended reforms
Exceptions to confidentiality obligations in professional conduct rules		
To avoid 'the probable commission of a serious criminal offence' ( <i>ASCR</i> r 9.2.4)	Narrow wording means applies mainly to individual conduct	Add an exception to allow lawyers to disclose information that evidences an abuse of justice
To prevent 'imminent serious physical harm' ( <i>ASCR</i> r 9.2.5)	Narrow wording means applies mainly to individual conduct  Does not apply to financial harm	Include imminent serious financial harm in exception
'The solicitor is permitted or is compelled by law to disclose' ( <i>ASCR</i> r 9.2.2)	Not clear whether this incorporates iniquity rule and illegality exception into conduct rules	Make clear in rules and educational material for lawyers that iniquity rule, public policy considerations and illegality exception to privilege all form basis for exceptions to conduct rule obligation of confidentiality
Defences for action for breach of equitable obligations of confidentiality		
Public interest defence and the iniquity rule	Not recognised in Australia	Public interest considerations should be incorporated into legislative protections for lawyer whistleblowers under the <i>Corporations Act</i> and professional conduct rules or other regulation of legal profession

Exceptions to/defences for breach	Limitations	Recommended reforms
'Crimes, frauds and misdeeds' broadly conceived may be disclosed, provided appropriate process followed	Applies in Australia, but not well known and little case law exploring application to lawyers	Incorporate into conduct rules, as it is better to create clear and explicit whistleblower protections for lawyers than rely on unclear case law. Then, provide education and guidance to lawyers about appropriate wrongdoing and process for whistleblowing
Defences for action for breach of contractual obligations of confidentiality		
Can't enforce obligation of confidentiality if it is against public policy	As above	As above
Exception to client legal privilege		
Crime-fraud exception	As above	As above

*B Need to Reform Professional Conduct Rules to Recognise a Gatekeeper of Justice Whistleblowing Exception*

In a number of Australian states, r 9 of the ASCR outlines the principles of confidentiality.<sup>126</sup> It provides exceptions to strong obligations of confidentiality that could support whistleblowing where the solicitor discloses the information for ‘the sole purpose of avoiding the probable commission of a serious criminal offence’ (the ‘avoiding serious criminal offences’ exception);<sup>127</sup> or the solicitor ‘discloses the information for the purpose of preventing imminent serious physical harm to the client or to another person’ (the ‘preventing physical harm’ exception).<sup>128</sup> There is also an exception where ‘the solicitor is permitted or is compelled by law to disclose’.<sup>129</sup> This suggests that the conduct rules may track any exceptions included in the general law of contract, equity and privilege, such as the iniquity rule discussed below (the ‘incorporation of general law exceptions to confidentiality’ exception).

The exceptions for serious criminal offences and physical harm acknowledge the fact that a lawyer owes a strong obligation of confidentiality to an individual client should not always prevent the lawyer speaking where to do so would save another individual from imminent physical harm, or prevent a serious criminal offence. However, the substance of the exceptions is quite narrowly constrained. There must be either a ‘serious criminal offence’ or ‘imminent physical harm’. Lawmakers clearly envisaged the situation where an individual client informs his or her lawyer that he or she intends to commit a crime or injure or kill someone. The narrowness of their wording makes it difficult to apply to the organisational client situation. The attribution of serious criminal activity to a corporation is difficult and, in many cases, relies

<sup>126</sup> ‘[A] solicitor must not disclose any information which is confidential to a client and acquired by the solicitor during the client’s engagement to any person who is not: a solicitor who is a partner, principal, director, or employee of the solicitor’s law practice’: ASCR r 9.1.1; or ‘a barrister or an employee of, or person otherwise engaged by, the solicitor’s law practice or by an associated entity for the purposes of delivering or administering legal services in relation to the client’: at r 9.1.2, except as permitted in r 9.2.

<sup>127</sup> Ibid r 9.2.4.

<sup>128</sup> Ibid r 9.2.5. The ASCR also allows information to be disclosed to support the lawyer’s own ethical decision making by disclosing ‘in a confidential setting, for the sole purpose of obtaining advice in connection with the solicitor’s legal or ethical obligations’: at r 9.2.3; or to be ‘disclosed to the insurer of the solicitor, law practice or associated entity’: at r 9.2.6.

<sup>129</sup> Ibid r 9.2.2.

on a close consideration of the degree of knowledge of the executives.<sup>130</sup> The harm caused by a large corporate client slowly killing a large proportion of its customers via a carcinogenic product would not be considered ‘imminent’ enough, even if it were to be considered criminal.<sup>131</sup> Hence, the uncertainty in relation to the exceptions is likely to mitigate against a lawyer exercising the discretion to disclose in any but the clearest cases involving individuals with clear murderous intent and capability.

Lawyer involvement in client corruption of the administration of justice is not explicitly addressed. Yet many of the most important issues for lawyers’ gatekeeping obligations and potential whistleblowing are emergent issues of grave injustice where lawyers may be involved in hiding evidence and avoiding transparency and justice. For example, the ‘Panama Papers’ leak of 11.5 million documents in April 2016 exposed the way law firm Mossack Fonseca assisted rich clients, including celebrities and government figures all around the world, to avoid paying tax in their home countries by using shell companies in tax havens such as Panama. This leak of confidential lawyer–client documents has thus opened up the issue of injustice and inequality in terms of who pays taxes and who does not.<sup>132</sup> Similarly, reports have emerged of how oil companies followed the example of tobacco companies to hide evidence that they knew of the tremendous damage that carbon emissions from their mining activities and products were causing to the climate and the existential threat climate change poses to human society and civilization as well as ecosystems. There is emerging evidence that some lawyers may have assisted with hiding this knowledge and funding front groups to discredit climate change science, as had occurred with tobacco companies funding scientists to cast doubt on the growing evidence that smoking caused cancer.<sup>133</sup> It was only after the *McCabe* tobacco litigation scandal that legislation

<sup>130</sup> See Karen Wheelwright, ‘Goodbye Directing Mind and Will, Hello Management Failure: A Brief Critique of Some New Models of Corporate Criminal Liability’ (2006) 19 *Australian Journal of Corporate Law* 287.

<sup>131</sup> Some have attempted to characterize this conduct as manslaughter: Jonathan Liberman and Jonathan Clough, ‘Corporations That Kill: The Criminal Liability of Tobacco Manufacturers’ (2002) 26 *Criminal Law Journal* 223. Corporate wrongdoing is often not categorised as crime for a range of reasons well explained in the white-collar crime literature: see generally Steve Tombs and David Whyte, *The Corporate Criminal: Why Corporations Must Be Abolished* (Routledge, 2015).

<sup>132</sup> See Luke Harding, ‘Panama Papers Source Breaks Silence over “Scale of Injustices”’, *The Guardian* (online), 6 May 2016 <<http://www.theguardian.com/news/2016/may/06/panama-papers-source-breaks-silence-over-scale-of-injustices>>.

<sup>133</sup> See, eg, Suzanne Goldenberg, ‘Exxon Knew of Climate Change in 1981, Email Says — But It Funded Deniers for 27 More Years’, *The Guardian* (online), 9 July 2015

was introduced making document destruction a criminal offence, and thus making it clear that *ASCR* r 9.2.4 would apply.<sup>134</sup> How many other concealed wrongs are awaiting transparency so that something can be done?

As argued above, we suggest that lawyers' gatekeeping obligations should ground an exception to confidentiality obligations for whistleblowing. Further research could explore whether the current exception to confidentiality obligations for imminent serious physical harm should be expanded to include imminent serious financial harm.

In *British American Tobacco Australia Ltd v Gordon*, it was also argued that Dale did not breach his obligation of confidentiality under the conduct rules since the information was not privileged (due to the illegality exception to privilege) and there was a 'public interest' in disseminating the information that would justify Dale's leak.<sup>135</sup> Kaye J held, correctly in our view, that no such exception is currently available to breaches of the rules.<sup>136</sup> This is consistent with the Court's finding that Australian confidentiality law does not recognise a public interest defence to breaches of confidentiality (discussed below in Part IV(C)).<sup>137</sup> Australian law does, however, recognise an 'iniquity

<<https://www.theguardian.com/environment/2015/jul/08/exxon-climate-change-1981-climate-denier-funding>>.

<sup>134</sup> See above n 34 and accompanying text.

<sup>135</sup> [2009] VSC 619 (24 December 2009) [139] (Kaye J), where BATAS's defence pleaded that:

Dale's professional duties did not operate to impose on him an obligation to keep confidential information which was not privileged, if there was a just cause or excuse for the use or dissemination of the information, in that the use or dissemination of it was in the public interest, which outweighed the public interest in the maintenance of BATAS's confidence in the instructions given to Dale and to Clayton Utz.

<sup>136</sup> *Ibid* [139]–[141]. See generally Law Institute of Victoria, *Professional Conduct and Practice Rules 2005* (at 30 June 2005) r 3.1.3, which stated at the relevant time that 'the practitioner discloses information in circumstances in which the law would probably compel its disclosure, despite a client's claim of legal professional privilege, and for the sole purpose of avoiding the probable commission or concealment of a serious criminal offence'. Kaye J held that it was 'at the best barely arguable' that a public interest defence might be implicit in r 3.1.3 of these former rules: at [141].

<sup>137</sup> The UK has developed a reasonably broad 'public interest defence' to breach of confidence in equity. This defence covers situations beyond those constituting an iniquity (a crime or fraud), and has been applied in situations where there may be a danger to the public, or where the public is being misled. The courts vigorously protect their role in weighing the dual considerations of the public interest in the maintenance of confidentiality and the public interest in the disclosure of the information in question. Where the balance lies is to be assessed on a case-by-case basis, making it difficult for a person who wishes to disclose confidential information to feel confident that their decision to do so would be covered by the defence: Kaaren Koomen, 'Breach of Confidence and the Public Interest Defence: Is It in the Public Interest? A Review of the English Public Interest Defence and the Options for Austral-

rule' defence to breach of confidentiality and an illegality exception to privilege, as we show below. Both of these would support whistleblowing in certain situations. We suggest that the wording of ASCR r 9.2.2 (which makes an exception to confidentiality where the solicitor is 'permitted' by the law to disclose) should be recognised as incorporating both the iniquity rule defence to breach of confidence and the fraud exception to privilege into the professional conduct rules.

*C Availability of the Iniquity Rule Exception to Equitable Obligations of Confidentiality Already Supports Gatekeeper of Justice Whistleblowing*

The Court in *British American Tobacco Australia Ltd v Gordon* accepted the existence of an iniquity rule defence to breach of confidence.<sup>138</sup> Cowell pleaded an iniquity in the form of a tortious conspiracy to pervert the course of justice. She argued that the information Dale leaked:

was not privileged, the information disclosed the existence, or real likelihood of the existence of, a crime, fraud or civil offence, and the duties of confidence attaching to the information do not operate to preclude the use or dissemination of the information to a third party with a real and distinct interest in redressing the crime, fraud or civil offence ....<sup>139</sup>

The 'iniquity rule' was first articulated by Wood V-C in the 1857 case of *Gartside v Outram*.<sup>140</sup> The rule was originally quite narrow, stating that where iniquitous information (at that stage confined to crimes and frauds) was disclosed, confidentiality could not attach to this information.<sup>141</sup> By 1967, due to the decision in *Initial Services Ltd v Putterill*,<sup>142</sup> a defence had broadened to

ia' (1994) 10 *Queensland University of Technology Law Journal* 56. See also Tanya Aplin et al, *Gurry on Breach of Confidence: The Protection of Confidential Information* (Oxford University Press, 2<sup>nd</sup> ed, 2012) 684–7 [16.05]–[16.15]; *Fraser v Evans* [1969] 1 QB 349; *A-G (UK) v Guardian Newspapers [No 2]* [1990] 1 AC 109, 197–8 (Sir John Donaldson MR); *Distillers Co (Biochemicals) Ltd v Times Newspapers Ltd* [1975] 1 QB 613; *Malone v Metropolitan Police Commissioner* [1979] 1 Ch 344.

<sup>138</sup> [2009] VSC 619 (24 December 2009) [20]–[66] (Kaye J). However, note that his Honour did identify various issues with the way Cowell had pleaded the iniquity rule in this case: at [120]–[124].

<sup>139</sup> *Ibid* [7].

<sup>140</sup> (1857) 26 LJ Ch 113.

<sup>141</sup> *Koomen*, above n 137, 57.

<sup>142</sup> [1968] 1 QB 396.



extend to ‘crimes, frauds and misdeeds.’<sup>143</sup> Aplin et al note that the iniquity could either be something that has already occurred, or one that may occur in the future;<sup>144</sup> and that ‘[t]he courts adopted a flexible approach to the nature of “frauds and misdeeds”, being prepared to consider almost any civil wrong as falling within the category’.<sup>145</sup> Koomen labels this the ‘broad’ iniquity rule, which she defines as applying:

to cases where an iniquity is involved, but the existence of an iniquity will not *automatically* justify disclosure. If an iniquity is involved the court must then balance the competing interests to determine whether disclosure is justified.<sup>146</sup>

Kaye J in *British American Tobacco Australia Ltd v Gordon* appeared to accept this broad formulation of the iniquity rule, stating that there is ‘a public interest in the disclosure of the relevant wrongdoing to a person who has a relevant interest in redressing that wrongdoing’<sup>147</sup> and that a leak such as Dale’s concerning possible abuse of justice could be shown to fall within its terms. This raises the role of appropriate process which we discuss in detail below.

D *Availability of Public Policy Defence to Breach of Contractual Obligation of Confidence Already Supports Gatekeeper of Justice Whistleblowing*

In *British American Tobacco Australia Ltd v Gordon*, the defence also made an argument on the basis of the ‘public policy defence’ to the contractual claim for confidentiality that it would offend against public policy to enforce BATAS’ claim of confidentiality in relation to information about an attempt to pervert the course of justice by BATAS and their lawyers. Kaye J accepted that if enforcing the obligation of confidentiality would adversely affect the administration of justice, such a claim could be made out.<sup>148</sup> This suggests that the position in contract would mirror the position in equity under the iniquity rule.

<sup>143</sup> Ibid 405 (Lord Denning MR) quoted in Koomen, above n 137, 58. See also Aplin et al, above n 137, 685 [16.09].

<sup>144</sup> Aplin et al, above n 137, 687 [16.14].

<sup>145</sup> Ibid 686 [16.12].

<sup>146</sup> Koomen, above n 137, 76 (emphasis in original).

<sup>147</sup> [2009] VSC 619 (24 December 2009) [118]. See also Dal Pont, *Law of Confidentiality*, above n 78, 224 [11.26], where it is discussed that ‘the “iniquity rule” is hardly devoid of public interest considerations’ (following which Kaye J’s comments are cited).

<sup>148</sup> Ibid [135].

E *Crime–Fraud Exception to Privilege Already Supports  
Gatekeeper of Justice Whistleblowing*

Dale reportedly ‘did not regard the documents which he handed over to contain privileged information, because of the crime-fraud exception to the doctrine of legal professional privilege.’<sup>149</sup> The third defendant, Cowell (the executrix of McCabe’s estate), pleaded this as a defence. Kaye J held that Cowell’s pleading was not clear enough about which specific communications were covered and which crime or fraud they were connected to.<sup>150</sup> One problem often faced by defendants seeking to plead the crime–fraud exception to privilege is a lack of access to the internal documents that would prove the exact communication and its purpose. Cowell only had access to the memo leaked by Dale, not the internal files and communication on which it was based. Prima facie evidence of a fraud on justice may have been enough for litigation over the privilege itself. Normally, the party seeking removal of the privilege can then gain access to the privileged documents and the matter of whether there is a wrong can then be determined. But how much evidence of a fraud on justice is enough for an individual lawyer to appropriately decide to leak otherwise confidential and privileged documents?

F *Need to Extend Legislative Whistleblowing Protections to Cover  
Lawyer Gatekeeper of Justice Whistleblowing*

If Dale’s whistleblowing had occurred in a government agency situation, the type of wrongdoing disclosed would likely have been protected by the *PID Act* as ‘disclosable conduct’ under the categories of perverting the course of justice, exposing people to health risks or deception relating to scientific evidence.<sup>151</sup> One commentator describes the definition of ‘disclosable con-

<sup>149</sup> *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [96]. See also *Baker v Campbell* (1983) 153 CLR 5, where it was discussed that unless legislated otherwise, the privilege may apply in all settings in which some authority purports to have power to require the disclosure of information (orally or in writing).

<sup>150</sup> *British American Tobacco Australia Ltd v Gordon* [2009] VSC 619 (24 December 2009) [160]–[165].

<sup>151</sup> *PID Act* s 29. ‘[D]isclosable conduct’ is defined broadly, and the categories that would be of relevance to the disclosure made by Dale are ‘[c]onduct that: (a) perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice’ at item 3; ‘[c]onduct that is: (a) fabrication, falsification, plagiarism, or deception, in relation to: (i) proposing scientific research; or (ii) carrying out scientific research; or (iii) reporting the results of scientific research; or (b) misconduct relating to scientific analysis, scientific evaluation or the giving of scientific advice’: at item 6; ‘[c]onduct that: (a) unreasonably results in a danger to

duct' as 'broad to the point of all-encompassing'.<sup>152</sup> Disclosures about destruction of documentary evidence would appear to be covered by s 29 of the *PID Act* as conduct that 'perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice'. The disclosures about the handling of scientific evidence about the health risks associated with smoking would also appear to be covered.<sup>153</sup> The *Banking Act 1959* (Cth) similarly provides a more inclusive regime, stating that disclosure of possible misconduct or an improper state of affairs and a belief that the information could assist the recipient in the performance of their duties is enough.<sup>154</sup> Similar protections should be afforded to private lawyers who disclose such wrongdoing.

The *Corporations Act* and the *Australian Securities and Investments Commission Act 2001* (Cth) (together the '*Corporations Legislation*') whistleblower protection can apply to whistleblowers in relation to companies but only applies where the whistleblower has reasonable grounds to suspect a breach of the *Corporations Legislation*,<sup>155</sup> or an attempt, incitement or conspiracy to breach the law. This formula is more restrictive than that afforded under a number of other whistleblowing regimes, and should be extended.

## VI THE PROCESS

The final element is the process by which the whistleblower responds to the misconduct. Whistleblowing is ethically problematic because it breaches shared understandings of loyalty and confidentiality within a relationship.<sup>156</sup> This is especially true for lawyers who blow the whistle on their clients and colleagues. It is, therefore, important that lawyer whistleblowers follow a process that ensures they only leak confidential information where it is ethically justified to do so and do not unnecessarily breach other ethical obligations in the process.<sup>157</sup> We suggest the following process.

the health or safety of one or more persons; or (b) unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons': at item 8.

<sup>152</sup> A J Brown, 'Towards "Ideal" Whistleblowing Legislation? Some Lessons from Recent Australian Experience' (2013) 2(3) *E-Journal of International and Comparative Labour Studies* 4, 13 <[http://www.adapt.it/EJCLS/index.php/ejcls\\_adapt/article/view/134](http://www.adapt.it/EJCLS/index.php/ejcls_adapt/article/view/134)>.

<sup>153</sup> *PID Act* s 29 items 3, 6, 8.

<sup>154</sup> *Banking Act 1959* (Cth) s 52A(2)(c).

<sup>155</sup> See above n 112 and accompanying text.

<sup>156</sup> Bok, above n 69, 120.

<sup>157</sup> *Ibid* 219–25.

- First, potential whistleblowers should minimize the public expression of internal dissent, by ensuring they use judgement and are accurate in their assessment of any wrongdoing. That is, they should make sure they have sufficient evidence.
- Secondly, they should minimise breach of loyalty by exploring whether there are appropriate alternative options for preventing wrongdoing before sounding the alarm.<sup>158</sup> This also means that the disclosure should be as narrow as possible and directed to the appropriate party who can rectify or prevent the wrong with public disclosure (eg via the media) as a last resort.
- Thirdly, they should address the element of accusation from within by ensuring a fair process of accusation, before whistleblowing.

We apply these three elements to test the Dale situation and explore the difficulties of justifying lawyer whistleblowing.

#### *A Evidence: Judgement and Accuracy in Dissent*

Potential whistleblowers should first verify that the misconduct they propose to disclose actually occurred, and judge how imminent and serious the threat is.<sup>159</sup> As a member of the internal review of the conduct criticised in the original *McCabe* decision, Dale presumably had access to sufficient relevant information to form an accurate judgement about whether there was an impropriety. But Dale's case illustrates the difficulty of making a judgement as to how imminent and serious the threat is. On the one hand, the *McCabe* litigation had concluded some years previously, and Rolah McCabe herself had passed away even before the appeal. In the meantime, the various practices of tobacco companies and their lawyers that Dale argued amount to an abuse of justice in *McCabe* had already now been exposed in other cases, so Dale's revelations were not urgent in that sense.<sup>160</sup> On the other hand, Dale believed there was still a possibility that *McCabe* could be re-opened, and perhaps that his revelations might have helped established precedents that could prevent harm to others through lawyer and client collusion in abuses of justice.

<sup>158</sup> Ibid 221.

<sup>159</sup> Ibid 220.

<sup>160</sup> See below n 182 and accompanying text.

B *Last Resort: Exploration of Alternative Possibilities for Prevention*

Bok suggests that potential whistleblowers should seek, wherever possible, to fulfil their loyalties to both their clients or colleagues and to the public interest by first using existing avenues of change within the organisation.<sup>161</sup> It is only where internal efforts to resolve wrongdoing have failed that external whistleblowing or leaks should be considered.

Case law on both the iniquity rule and, in the United Kingdom, public interest defence, recognise that whistleblowing to the public via the media should be a last resort.<sup>162</sup> The *PID Act* has similar provisions regarding any such disclosure to the media.<sup>163</sup> Under the *PID Act*, the information cannot simply be leaked to the media or the public at large. The whistleblower must first disclose the information internally<sup>164</sup> or where appropriate to the Ombudsman or another investigative agency specified under the Act.<sup>165</sup> Only when the person reasonably believes that this internal review process has been inadequate can the information be released externally, and only if it is in the public interest to do so. There is, however, the possibility of bypassing this process in the case of a ‘substantial and imminent danger to the health and safety of one or more persons or to the environment.’<sup>166</sup> The process embraced by the *Corporations Act* is narrower. It requires that the disclosure be made to the Australian Securities and Investments Commission (‘ASIC’), directors or senior officers within the corporation, the auditor or a member of

<sup>161</sup> Bok, above n 69, 221. See also Marit Skivenes and Sissel C Trygstad ‘When Whistle-Blowing Works: The Norwegian Case’ (2010) 63 *Human Relations* 1071.

<sup>162</sup> See, eg, *A-G (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 8 NSWLR 341, 382 (Powell J), quoted in Koomen, above n 137, 78 (citations omitted), in which Powell J noted that ‘the court’s task is to evaluate ... the public interest in the exposure of “iniquity”, and, having done so, to determine whether, on balance, the public interest is better served by permitting disclosure of the subject information, and, if so, to what extent disclosure ought to be permitted’; *Re B and Brisbane North Regional Health Authority* (1994) 1 QAR 279 (31 January 1994) [126] quoted in Koomen, above n 137, 80, where the Queensland Information Commissioner found ‘it will not be a defence to a claim that disclosure of confidential information to the public is in the public interest, where the public interest could have been served by disclosure in confidence to a proper authority’.

<sup>163</sup> See especially Keiran Hardy and George Williams, ‘Terrorist, Traitor, or Whistleblower? Offences and Protections in Australia for Disclosing National Security Information’ (2014) 37 *University of New South Wales Law Journal* 784, 811–12.

<sup>164</sup> *PID Act* s 25.

<sup>165</sup> *Ibid* s 34.

<sup>166</sup> *Ibid* s 26(3)(a).

the  
audit team.<sup>167</sup>

Even should external reporting be appropriate, reporting to a regulator or to the police would be more likely to be seen as a measured response to the misconduct. Indeed, Bok suggests that:

It is disloyal to colleagues and employers, as well as a waste of time for the public, to sound the loudest alarm first. Whistleblowing has to remain a last alternative because of its destructive side effects. It must be chosen only when other alternatives have been considered and rejected. They may be rejected if they simply do not apply to the problem at hand, or when there is not time to go through routine channels, or when the institution is so corrupt or coercive that steps will be taken to silence the whistleblower should he try the regular channels first.<sup>168</sup>

The 2009 decision of the Western Australian State Administrative Tribunal in *Legal Practitioners Complaints Committee v Trowell*<sup>169</sup> considered these matters in relation to a disciplinary action against a lawyer for disclosure of confidential information to the media. The Australian government requested that Trowell represent Shapelle Corby while incarcerated in Bali, Indonesia in relation to drug offences. Trowell later made allegations to the media that a member of the Bali legal team suggested that the government should provide funds to bribe the appeal judges.<sup>170</sup> The Tribunal rejected the possibility that a broad public interest defence could excuse the breaches of confidence by a practitioner via disclosure to the media in Australia (in contrast to the United Kingdom).<sup>171</sup> It did accept the iniquity rule and held that the disclosure of:

a serious proposal to bribe the judiciary ... would likely avoid any finding of unprofessional conduct. However, in our opinion, disclosure by a lawyer of such confidential information could only be justified if made to the appropriate

<sup>167</sup> *Corporations Act* s 1317AA(1)(b).

<sup>168</sup> Bok, above n 69, 221 (emphasis altered).

<sup>169</sup> (2009) 62 SR (WA) 1.

<sup>170</sup> *Ibid* 13 [44], 81 [378], 81 [381]. The Tribunal cited a passage from the decision in *Gartside v Outram* (1856) 26 LJ Ch 113 before stating that '[t]his passage has been developed in England as an independent "public interest" defence to justify publication of an otherwise confidential publication: at 81 [379]. Moreover, the English doctrine has in certain circumstances allowed for the possibility of disclosure to the media.' Cf at 81 [381], where the Tribunal went on to state that 'the doctrine has received limited theoretical recognition in Australia' and cited Gummow J's decision in *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 74 FCR 434.

<sup>171</sup> *Ibid* 82-3 [384]-[388].

authority .... It is difficult to see how it could ever justify publication to the press.<sup>172</sup>

Professional conduct regulation should ensure that whistleblowers have institutionalised avenues available for reporting misconduct within the organisation and/or to an external body, similar to the *PID Act*. Dal Pont argues that it is unlikely that there will be a need to disclose information to the media in most instances, suggesting instead that information about criminal activity is most appropriately disclosed to the police; information about 'breach of duty imposed by statute' is most appropriately disclosed to the 'relevant regulatory body'; and information about dangers to public health are most appropriately brought to the attention of the health authorities.<sup>173</sup> One of the advantages of institutionalised avenues for reporting is that, as Dal Pont points out, this means that an appropriate authority will determine whether wrongdoing has occurred before it goes to the public and that, therefore, the prima facie threshold can be lower than if the information were to be disclosed more publicly:

After all, the discloser is not required to investigate the substance of the complaint, but only to bring the matter to the attention of the relevant body, to which confidentiality obligations may apply pending a finding substantiating the complaint (and sometimes even if the complaint is made out).<sup>174</sup>

Dale's case as a whistleblower in the *McCabe* litigation is illustrative in the sense that, according to Dale, it was his dissatisfaction with Clayton Utz's response to the internal review (and with those steps that were taken externally) that ultimately led to him taking the unusual step of disclosing information to the other side and the media.<sup>175</sup> As the description of *McCabe* and its aftermath in the Part II of this article (and below in the Appendix) show, although the conduct in the *McCabe* litigation had been referred to and considered by a number of public authorities, there appears to have been no definitive investigation of the conduct of the lawyers by an external authority

<sup>172</sup> Ibid 82 [384] (citations omitted).

<sup>173</sup> Dal Pont, *Law of Confidentiality*, above n 78, 229 [11.37] (citations omitted).

<sup>174</sup> Ibid 227–8 [11.32].

<sup>175</sup> William Birnbauer, 'The Insider', *The Sunday Age* (Melbourne), 28 January 2007, 15. In particular, Dale was concerned that one of the two senior partners whose conduct he believed to be inappropriate in the *McCabe* litigation as a result of the internal review had not been dismissed by the firm or otherwise disciplined. The other had resigned soon after the review.

reported to the public.<sup>176</sup> Yet serious questions had been raised about the conduct of the lawyers in tobacco litigation generally all around the world via the leak of documents and information such as the ‘cigarette papers’.<sup>177</sup> Moreover, the conduct of Australian lawyers had been implicated in *Brambles Australia Ltd v British American Tobacco Australia Services Ltd*.<sup>178</sup> Dale may have reasonably believed that he had access to extra information and evidence that had been overlooked in these investigations and could make a difference in bringing justice and truth to a situation that sorely needed it.<sup>179</sup>

### C Fairness of Accusation

Thirdly is the question of fairness of accusation. Bok suggests that ‘[i]n fairness to those criticized, openly accepted responsibility for blowing the whistle’ should be preferred, and ‘the more so, the more derogatory and accusatory the information.’<sup>180</sup> She explains that, ‘[w]hat is openly stated can be more easily checked, its source’s motives challenged, and the underlying information examined.’<sup>181</sup> This is reflected in the *Corporations Act* require-

<sup>176</sup> Only a few weeks after the original *McCabe* decision in April 2002, the Australian Competition and Consumer Commission (‘ACCC’) had announced an inquiry into whether Clayton Utz and BATAS had breached the *Trade Practices Act 1974* (Cth), but no action was ever forthcoming: Australian Competition and Consumer Commission, ‘Tobacco Decision: ACCC Investigates’ (Media Release, MR 076/02, 12 April 2002) 1. According to a Clayton Utz media release after Dale’s leak, there had already been ‘investigations conducted by the Victorian Legal Ombudsman and the NSW Legal Services Commissioner which were resolved favourably to Clayton Utz and the partners involved. The regulators had full access to all relevant material’: Clayton Utz, ‘Clayton Utz Statement: BATAS — McCabe *The Sunday Age*’ (Media Release, 20 December 2006) [3].

<sup>177</sup> See Stanton A Glantz et al, *The Cigarette Papers* (University of California Press, 1998).

<sup>178</sup> (2006) 3 DDCR 580, 586 [19] (Curtis J).

<sup>179</sup> In fact, Dale’s leak had some impact. After the newspaper reports of the leak, the Victorian Attorney-General Rob Hulls issued a media release indicating he had referred the conduct of Clayton Utz to the Director of Public Prosecutions (‘DPP’) and Legal Service Commissioners of Victoria and New South Wales for investigation: Rob Hulls, ‘Statement from Attorney-General Rob Hulls’ (Media Release, 20 December 2006). In August 2007, the DPP (Vic) asked the Australian Crime Commission to join its investigation of the *McCabe* matter: William Birnbauer, ‘Top Lawyers Face Scrutiny’, *The Age* (online), 19 August 2007 <<http://www.theage.com.au/news/national/top-lawyers-face-scrutiny/2007/08/18/1186857841884.html>>. Yet no charges have ever been forthcoming from any of these investigations, meaning it is still unclear whether Dale’s leak in fact contributed to preventing or rectifying any wrongdoing.

<sup>180</sup> Bok, above n 69, 223.

<sup>181</sup> *Ibid.*



ment that the whistleblower act in good faith.<sup>182</sup> Accordingly, a disgruntled lawyer disclosing because of some impure motive is excluded from protection. The aim of this limitation appears to be to discourage false or misleading disclosures. However, such disclosures would already be discouraged by the provisions that require the whistleblower to have ‘reasonable grounds to suspect’<sup>183</sup> and the criminal offence that might be committed if a person knowingly provided false or misleading information to ASIC.<sup>184</sup> A further hurdle is provided by the requirement in the *Corporations Act* that whistleblowers provide their name in advance of the information.<sup>185</sup>

At first, as we have seen, Dale blew the whistle without revealing his identity in the public arena. On 3 November 2006, Dale implicitly denied he was the source of the leak through his lawyer, but in January 2007, Dale revealed himself to be the whistleblower in a follow up article by Birnbauer. In litigation concerning his later expulsion from the partnership (which occurred in August 2006), Clayton Utz argued that ‘Mr Dale’s “sole motivation” for leaking the documents was to damage the firm.’<sup>186</sup> According to Dale, however, his sense that a miscarriage of justice had occurred in the *McCabe* litigation was a gradual realisation. He gave evidence that although ‘he had not always believed that Mrs McCabe had suffered an injustice ... he started to become concerned and changed his mind around mid 2005, as a result of several developments.’<sup>187</sup> These developments included an SBS documentary, ‘The Big Lie’, which ‘caused him to be concerned about the truth of what one of his partners, Brian Wilson, had said’ about whether or not Wilson had advised BATAS about document destruction.<sup>188</sup> This was contradicted by former BATAS employee, Fred Gulson, in the documentary and in depositions to a USA court. When the USA court published its decision on that case, it was very critical of BATAS’s document destruction practices,

<sup>182</sup> *Corporations Act* s 1317AA(1)(e).

<sup>183</sup> *Ibid* s 1317AA(1)(d).

<sup>184</sup> *Criminal Code Act 1995* (Cth) sch s 137.1.

<sup>185</sup> *Corporations Act* s 1317AA(1)(c). Cf *PID Act* s 28(2).

<sup>186</sup> *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [114] (Hollingworth J); cf at [101]–[102], where Dale stated that the reason he leaked the documents was his concern about a miscarriage of justice. See also Birnbauer, ‘Lawyer Revealed as Smoking Source’, above n 1.

<sup>187</sup> *Dale v Clayton Utz [No 2]* [2013] VSC 54 (26 March 2013) [115] (citations omitted).

<sup>188</sup> *Ibid* [116].

and this caused greater concern.<sup>189</sup> Hollingworth J accepted his account in interlocutory proceedings:

by the time he leaked the documents to the media in late 2006, Mr Dale's conscience was genuinely troubled by what had happened in relation to the McCabe proceeding, and he went to the media because he thought it was the morally right thing to do. No doubt Mr Dale was not having favourable feelings about Clayton Utz by this stage, given the circumstances of his dismissal the previous year. But I am not persuaded that his sole motive for leaking the documents was to damage the firm.<sup>190</sup>

Even before Dale's leak, the conduct of the lawyers in *McCabe* was already a topic of public debate in which multiple parties had been able to put their point of view — the *McCabe* lawyers and clients, Clayton Utz, the tobacco client and various stakeholders such as public health advocates. The material disclosed potentially gave a more accurate picture of the systemic practices of commercial lawyers and clients that were already at issue in public debate, rather than shining a spotlight on hitherto private and unknown matters. Arguably, precisely what was missing was access in the public debate to a better understanding of the internal workings of commercial law firms and their relationships with their corporate clients and their in-house lawyers, a matter of great public interest in how the justice system operates. On the best interpretation then, Dale's leak potentially created a more open, fairer, democratic discussion about what behaviour in litigation was and was not appropriate.

## VII CONCLUSION

The disclosure of wrongdoing is controversial since the lawyers' obligation to keep secret confidences is so intertwined with the lawyer's identity as to be its 'defining, paradigmatic feature'.<sup>191</sup> This article has argued by contrast that lawyers are justified, and indeed obligated, to whistleblow where they have information about clients or other lawyers using legal services to subvert the administration of justice. This is an essential element of the lawyer's duty to the administration of justice and role as a gatekeeper of justice. It also accords with current approaches to regulatory policy and democratic control in which

<sup>189</sup> Ibid [116]–[117].

<sup>190</sup> Ibid [118].

<sup>191</sup> Rebecca Aviel, 'The Boundary Claim's Caveat: Lawyers and Confidentiality Exceptionalism' (2012) 86 *Tulane Law Review* 1055, 1064.

the possibility of leaks and whistleblowing is an essential aspect of the way in which both public and private institutions are subject to democratic control and accountability. Yet, as we have shown, lawyers are largely unprotected by the legislation introduced to encourage appropriate whistleblowing and are thus vulnerable to reprisal including professional discipline if they do whistleblow. Moreover, lawyers lack guidance from professional conduct regulation and education as to when it is and isn't appropriate to whistleblow.

The case of Dale's leak of internal law firm information regarding whether his own law firm colleagues had assisted their tobacco company lawyer to conceal documents and mislead the court about the extent of their concealment illustrates the difficulties faced by potential gatekeeper of justice whistleblowers, and the complexity of navigating the legal rules around confidentiality and privilege when whistleblowing.

Generally, where officers and employees of organisational clients engage in wrongful and harmful conduct, lawyers should have little ethical difficulty in fulfilling their obligations to justice and to the client by internal whistleblowing; reporting up the organisational hierarchy until something is done to correct the situation. The challenge comes when lawyers are asked to assist their organisational clients to avoid the scrutiny of the justice system or where they discover that their colleagues, clients or lawyers on the other side, or other lawyers that they come into contact with, have breached their duty to the administration of justice.

We have argued that the position in general law under the iniquity rule exception to breach of confidentiality actions, the public policy exception to breach of contract, and the crime-fraud exception to privilege generally allows whistleblowing in such situations, provided an appropriate process is followed. It is, however, difficult, uncertain and probably unreasonable to expect potential lawyer whistleblowers to navigate and rely on the complex and sparse case law in the area. Professional conduct rules recognise no exception for gatekeeper of justice whistleblowing (except for a vague reference to the general law of confidentiality) and provide no guidance as to an appropriate process to follow for any would be whistleblower. Existing legislative whistleblower protections for public servants and corporate employees provide only partial protection and guidance for lawyers. The *PID Act* does not protect lawyers not contracted to a government agency and the *Corporations Act* whistleblower protections apply only to corporate employees and in relation to wrongdoing that breaches the *Corporations Legislation*.

We have, therefore, argued that the professional conduct rules should be changed to provide for a gatekeeper of justice whistleblowing exception. This might be most simply done by explicitly introducing an exception to confi-

dentiality in the conduct rules where the crime–fraud exception to privilege or the iniquity rule exception to breach of confidence would apply. We also suggest that professional conduct rules and regulation should provide protection to lawyer whistleblowers that mirrors the type of protection offered by the *PID Act*, along with guidance as to the appropriate process for whistleblowing that also mirrors the *PID Act* and observations in the case law concerning the iniquity rule. Finally, we suggest that legal services regulators and/or legal professional bodies should introduce mechanisms by which whistleblower reports concerning breaches to the duty to the administration of justice can be received and investigated in a confidential and effective way so that lawyers do not have to resort to the media.

Furthermore, detailed work to define precisely how our proposed reforms to conduct rules and regulation to allow and protect whistleblowing will work may be necessary. But this should not detract from the urgency of introducing whistleblower exceptions to confidentiality and protections to enable lawyers to act as gatekeepers of justice in relation to their colleagues and organisational clients. In this time of constantly threatening financial, environmental and social crisis, it is absolutely urgent that we do everything we can to enhance the democratic control and just accountability of large and powerful organisations in our society.

## VIII APPENDIX: TIMELINE

22 March 2002	BATAS defence struck out. Jury awards McCabe \$687 560 in damages.	<i>McCabe v British American Tobacco Australia Services Ltd</i> [2002] VSC 73 (22 March 2002)
April 2002	Clayton Utz convenes a committee of partners to make an internal review in response to the <i>McCabe</i> decision. An oral report is made to the board.	Bill Pheasant, 'Clayton Utz to Run Ethics Audit', <i>The Australian Financial Review</i> (Sydney), 24 April 2002, 3; William Birnbauer, 'Justice Denied: How Lawyers Set Out to Defeat a Dying Woman', <i>The Sunday Age</i> (Melbourne), 29 October 2006, 16.
12 April 2002	The ACCC announces an inquiry into whether Clayton Utz and BATAS have breached the then <i>Trade Practices Act 1974</i> (Cth).	ACCC, 'Tobacco Decision: ACCC Investi- gates' (Media Release, MR 076/02, 12 April 2002) 1.
3 May 2002	Clayton Utz issues a statement indicating that they will not represent BATAS in the appeal of the <i>McCabe</i> decision.	Clayton Utz, 'Clayton Utz to Close Tobacco Claims Litigation Practice' (Media Release, 18 July 2002) < <a href="https://www.claytonutz.com/knowledge/2002/july/clayton-utz-to-close-tobacco-claims-litigation-practice">https://www.claytonutz.com/knowledge/ 2002/july/clayton-utz-to-close-tobacco- claims-litigation-practice</a> >.
June 2002	Memos are reportedly provided to the Clayton Utz board about the conduct of the two senior lawyers (Travers and Eggleton) involved with representing BATAS in the original <i>McCabe</i> case.	William Birnbauer, 'Exposed: Dirty Tricks behind Top Lawyers' Plot to Deny Justice to Cancer Victims' <i>The Sunday Age</i> (Mel- bourne), 29 October 2006, 1
18 July 2002	Clayton Utz announces the closure of its tobacco litigation practice.	Clayton Utz, 'Clayton Utz to Close Tobacco Claims Litigation Practice' (Media Release, 18 July 2002) < <a href="https://www.claytonutz.com/knowledge/2002/july/clayton-utz-to-close-tobacco-claims-litigation-practice">https://www.claytonutz.com/knowledge/ 2002/july/clayton-utz-to-close-tobacco- claims-litigation-practice</a> >.

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31 August 2002	Travers reportedly retires from Clayton Utz 'to pursue other interests following the decision of the Clayton Utz board to close its tobacco claims practice'.	William Birnbauer, 'Justice Denied: How Lawyers Set Out to Defeat a Dying Woman', <i>The Sunday Age</i> (Melbourne), 29 October 2006, 16.
28 October 2002	Rolah McCabe dies from lung cancer.	
6 December 2002	The Court of Appeal overturns Eames J's decision.	<i>British American Tobacco Australia Services Ltd v Cowell</i> [2002] VSCA 197 (6 December 2002).
3 October 2003	<i>McCabe's</i> High Court special leave application denied.	Transcript of Proceedings, <i>Cowell v British American Tobacco</i> [2003] HCATrans 384 (3 October 2003).
1 May 2004	Crown Counsel for Victoria, Professor Peter Sallman recommends legislation prohibiting the destruction of evidence.	Peter A Sallman, <i>Document Destruction and Civil Litigation in Victoria</i> (Crown Counsel Victoria, 2004).
June 2004	Victorian Parliament Law Reform Committee recommended an offence relating to evidence destruction (recommendation 5).	Law Reform Committee, Parliament of Victoria, <i>Administration of Justice Offences: Final Report</i> (2004).
Mid-2005	Eggleton reportedly leaves Clayton Utz.	William Birnbauer, 'Exposed: Dirty Tricks behind Top Lawyers' Plot to Deny Justice to Cancer Victims' <i>The Sunday Age</i> (Melbourne), 29 October 2006, 1.

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May 2006	Former BATAS Company Secretary and in-house solicitor Frederick Gulson gives evidence about the BATAS document retention policy, in the NSW Dust Diseases Tribunal. The Tribunal finds that BATAS's document retention policy met the meaning of fraud in the <i>Evidence Act 1995</i> (NSW), therefore legal professional privilege does not apply.	<i>Brambles Australia Ltd v British American Tobacco Australia Services Ltd; Re Mowbray</i> (2006) 3 DDCR 580.
15 August 2006	Victorian <i>Evidence (Document Unavailability) Act 2006</i> (Vic) comes into effect making destruction of potential litigation material a criminal offence.	<i>Evidence (Document Unavailability) Act 2006</i> (Vic) s 2.
July 2006	Judge of the US District of Columbia District Court finds that tobacco companies were attempting to 'defraud the public' by concealing the dangers of cigarette smoking.	<i>United States v Philip Morris USA Inc</i> , 449 F Supp 2d 1 (DC Cir, 2006).
27 September 2006	Christopher Dale leaks the Clayton Utz internal review to the media (anonymously).	<i>Dale v Clayton Utz [No 2]</i> [2013] VSC 54 (26 March 2013) [93]–[95], [113]–[119].
29 October 2006	William Birnbauer publishes two articles in <i>The Sunday Age</i> based on Dale's revelations.	William Birnbauer, 'Cheated by the Law: Exclusive — Exposed: Dirty Tricks behind Top Lawyers' Plot to Deny Justice to Cancer Victims' <i>The Sunday Age</i> (Melbourne), 29 October 2006, 1; William Birnbauer, 'Justice Denied: How Lawyers Set Out to Defeat a Dying Woman', <i>The Sunday Age</i> (Melbourne), 29 October 2006, 16.

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November 2006	<p>BATAS and BATAL seek orders restraining further use of leaked information by Fairfax Publications, Slater &amp; Gordon (McCabe's lawyers), Gordon, and Cowell (McCabe's executrix).</p> <p>Injunctions issued against Fairfax and Slater &amp; Gordon.</p>	<p><i>British American Tobacco Australia Ltd v Gordon</i> [2007] NSWSC 109 (22 February 2007); <i>British American Tobacco Australia Limited v Gordon</i> [2009] VSC 619 (24 December 2009); <i>British American Tobacco Australia Services Ltd v John Fairfax Publications Pty Ltd</i> [2006] NSWSC 1197 (2 November 2006); <i>British American Tobacco Australia Services Ltd v John Fairfax Publications</i> [2006] NSWSC 1175 (7 November 2006); <i>British American Tobacco Australia Services v Fairfax</i> [2006] NSWSC 1328 (9 November 2006); <i>British American Tobacco Australia Ltd v Gordon</i> [2006] NSWSC 1473 (1 December 2006); <i>British American Tobacco Australia Ltd v Gordon</i> [2007] NSWSC 109 (22 February 2007); <i>British American Tobacco Australia Ltd v Gordon</i> [2007] NSWSC 230 (16 March 2007); <i>British American Tobacco Australia Ltd v Gordon</i> [2007] NSWSC 292 (22 March 2007); <i>McCabe v British American Tobacco Australia Services Ltd</i> [2007] VSC 216 (6 July 2007); <i>Cowell v British American Tobacco Australia Services Ltd</i> [2007] VSCA 301 (14 December 2007); <i>British American Tobacco Australia v Gordon</i> [2009] VSC 77 (27 March 2009).</p>
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<p>20 December 2006</p>	<p>Victorian Attorney-General Rob Hulls refers the conduct of Clayton Utz to the DPP and Legal Service Commissioners of Victoria and NSW for investigation.</p> <p>Clayton Utz issues a statement noting they will cooperate with enquiries, but indicating that in their view the contents of the internal review were superseded by the Court of Appeal decision and previous investigations conducted by the Victorian Legal Ombudsman and the NSW Legal Services Commissioner which were resolved favourably to Clayton Utz and the partners involved.</p>	<p>Rob Hulls, 'Statement from Attorney-General Rob Hulls' (Media Release, 20 December 2006).</p> <p>Clayton Utz, 'Clayton Utz Statement: BATAS — McCabe The Sunday Age' (Media Release, 20 December 2006).</p>
<p>28 January 2007</p>	<p>Birnbauer publishes an article in <i>The Sunday Age</i> identifying Dale as the source of the leaked documents.</p>	<p>William Birnbauer, 'Lawyer Revealed as Smoking Source', <i>The Sunday Age</i> (Melbourne), 28 January 2007, 15.</p>
<p>16 March 2007</p>	<p>A restraining order made against Cowell (executrix of McCabe's will) preventing her from disseminating Dale's leaked documents.</p>	<p><i>British American Tobacco Australia Ltd v Gordon</i> [2007] NSWSC 230 (16 March 2007).</p>
<p>22 March 2007</p>	<p>Restraining order against Dale.</p>	<p><i>British American Tobacco Australia Ltd v Gordon</i> [2007] NSWSC 292 (22 March 2007).</p>

August 2007	The DPP asks the Australian Crime Commission to join its investigation of the <i>McCabe</i> matter.	William Birnbauer, 'Top Lawyers Face Scrutiny', <i>The Age</i> (online), 19 August 2007 < <a href="http://www.theage.com.au/news/national/top-lawyers-face-scruti-ny/2007/08/18/1186857841884.html">http://www.theage.com.au/news/national/top-lawyers-face-scruti-ny/2007/08/18/1186857841884.html</a> >.
24 December 2009	Kaye J of the Supreme Court considers the defences put forward by Cowell and notes those which cannot be relied upon and which need further detail in support of them.  Cases against Gordon and Slater & Gordon have settled.	<i>British American Tobacco Australia Ltd v Gordon</i> [2009] VSC 619 (24 December 2009).
31 March 2011	Case against Cowell settled on a confidential basis on Thursday 31 March 2011.	Richard Ackland, 'End to a 10-Year Wrestle with Smoke', <i>The Sydney Morning Herald</i> (Sydney), 2 April 2011, 8.
26 March 2013	Hollingworth J of the Supreme Court issues an injunction restraining Clayton Utz from retaining barrister Mr Myers as their representative in the case brought by Dale challenging his termination as a partner of Clayton Utz.	<i>Dale v Clayton Utz [No 2]</i> [2013] VSC 54 (26 March 2013).