

# AUSTRALIAN ETHICS

## PRESIDENT'S REPORT

**W**elcome everyone to the latest edition of *Australian Ethics*!

Whenever I set out to write the President's Report, it always seems like it's an important time to be talking and thinking about professional and applied ethics. Scandals about ethical failures all-too-regularly punctuate the evening news and the morning papers.

This has never been truer than in the last couple of months, in particular with the release of the 'Panama Papers'. At the 2014 Global Integrity Summit, in the lead up to Brisbane hosting the G20, I well remember governance scholars lamenting that tax avoidance never seemed to be 'front page news' – no matter how egregiously multinational corporations and wealthy individuals exploited the international tax system. Even as the G20 placed the issue firmly on its agenda (as Base Erosion and Profit Shifting or 'BEPS' for short), scholars complained that the political will required to push forward with major reforms would not be possible until the public demanded it.

The Panama Papers leak changed all that. The sheer enormity of the amount of money and number of individuals involved – as well as links with serious crimes like money-laundering and with political leaders'

conflicts of interests – seized public attention. Now hardly a day goes by without new headlines revealing further ethical failures and ramifications in the wake of the leak.

In the light of all this, the theme of the AAPAE's upcoming Conference, 'Responsible leadership and ethical decision-making' could hardly be more apt. In the face of such wicked problems – and they are by no means limited to scandals in international finance – changes in law, regulatory oversight, corporate incentive profiles, and institutional design are crucial.

But implementing such initiatives demands strong leadership. So too, developing in personnel and 'gatekeeping' professionals the will and capacity for ethical decision-making can provide an ethical 'pull' to complement the legal 'push'. However, if ethical decision-making and leadership are to constitute a key lever in reform efforts, we need to learn much more about how they work and how they can be empowered and facilitated.

I hope to see you all in beautiful Adelaide next month to help think through these important and intriguing questions.

**Hugh**

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### ETHICS: PROFESSIONAL AND APPLIED

- Business
- Education
- Engineering
- Environment
- Law
- Medical
- Nursing
- Police
- Public Policy
- Public Sector
- Social Work
- Teaching

23rd Annual AAPAE CONFERENCE WEBSITE:

<http://unisabusinessschool.edu.au/connect/events/aapae-2016/>

## 23<sup>RD</sup> ANNUAL AAPAE CONFERENCE

To be hosted by the:

**School of Management**  
**University of South Australia**  
from 15 to 17 June 2016



**University of  
South Australia**

### CONFERENCE THEME

# RESPONSIBLE LEADERSHIP and ETHICAL DECISION-MAKING

The 23<sup>rd</sup> Annual AAPAE Conference in Adelaide, South Australia will be an opportunity to address a range of contemporary issues in applied and professional ethics.

**Conference Convener**  
**Prof Thomas Maak**  
School of Management  
University of South Australia

**Conference Committee**  
**A/Prof Howard Harris**  
**A/Prof Chris Provis**  
**Dr Sunil Savur**

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## Australian Association for Professional and Applied Ethics Incorporated

(incorporated under the *Associations Incorporation Act 2009*)  
ABN 91 541 307 476

### NOTICE OF ANNUAL GENERAL MEETING

Notice is given of the Annual General meeting of the Australian Association for Professional and Applied Ethics Incorporated to be held on **Friday, 17 June 2016** at **12:30pm** in Room BH 4-23 on Level 4, Barbara Hanrahan Building, City West Campus, University of South Australia (Fenn Place, off North Terrace), Adelaide.

The business of the meeting is:

- (a) to confirm the minutes of the last preceding annual general meeting and of any special general meeting held since that meeting;
- (b) to receive from the committee reports on the activities of the Association during the preceding financial year;
- (c) to elect office-bearers of the Association and ordinary committee members;
- (d) to receive and consider any financial statement or report required to be submitted to members under the Act; and
- (e) to deal with any other business as permitted by the Constitution.

**Ian H Gibson**  
Secretary  
17 May 2016

Each financial member is entitled to appoint another member as proxy by notice on the appropriate form given to the secretary no later than 24 hours before the time of the meeting (that is, by 12:30pm on Thursday, 16 June 2016). No member attending the meeting may hold more than four proxies.

Nomination forms for Office Bearers and Proxy Voting forms are available from the secretary, Ian Gibson, at: [gibsonih@aol.com](mailto:gibsonih@aol.com).

An access map of the City West Campus of UniSA can be downloaded from  
<http://w3.unisa.edu.au/facilities/accessmap/citywest/cwaccess.pdf>

## KEY NOTE SPEAKERS

### Mrs Patricia Christie, CEO, ICAC

Patricia is the first Chief Executive Officer of both the Office for Public Integrity (OPI) and the Independent Commissioner Against Corruption (ICAC). Prior to joining ICAC and the OPI, Patricia held various positions within the Federal Court of Australia. During her time at the Court, Patricia undertook several projects in the Pacific Region, including a review of the case management practices of the High Court of Fiji, conducted training for judicial officers and law professionals on Alternative Dispute Resolution in the Kingdom of Tonga and reviewed Registry processes and information needs in the Republic of Kiribati and in Niue.



### Dr Jennifer Griffin

Jenn is Professor, Strategic Management and Public Policy at the George Washington University School of Business (Washington, DC) and is also the Director, Global Strategies Program at the George Washington University's Institute for Corporate Responsibility. Jenn's current work focuses on how firms continuously co-create value with their stakeholders, and she teaches corporate strategy, business and public policy, corporate impacts, and corporate social responsibility through various channels with executives from Australia, the US, India, and Chile.

Jenn's most recent publication is *Managing Corporate Impacts, Co-creating Value* (Cambridge Press, ISBN: 9781107058675). In her book, Jenn draws on the insights and experiences of managers from around the world to examine how companies can manage corporate impacts to co-create enduring value for businesses and society. Corporate impacts - the points at which businesses create or destroy value with others - extend well beyond financial impacts to include the workplace, procurement and delivery of goods and services, and shaping perceptions held about corporate behaviour. See <http://www.cambridge.org/us/academic/subjects/management/business-ethics/managing-corporate-impacts-co-creating-value?format=HB#contentsTabAnchor>



### Professor Nicola Pless

Nicola is Professor of Management and holds the Chair of Positive Business at the University of South Australia. Her work on responsible leadership lies at the interface of leadership and corporate responsibility. Nicola's current research focuses on leadership and its development, responsible decision making in multicultural and top management teams, and micro foundations of strategy; specifically the relationship between responsible leadership and social and economic value creation and the roles of values, empathy, and mindfulness within this process.



## CONFERENCE EVENTS

The conference will start with a function in the **Kerry Packer Civic Gallery** at 4.15pm on 15 June 2016. Keynote speakers, presentations, and panel discussions will be on 16 and 17 June. A tour of the Adelaide Oval and a conference dinner, in one of Adelaide's many great restaurants, is scheduled for June 16.



ADELAIDE  
TOWN HALL

Conference Delegates are also invited to attend the **Annual Hawke Lecture** with the **Reverend Mpho A. Tutu** on Wednesday, 15 June at 6pm in the Adelaide Town Hall, followed by a reception with the Hon. Bob Hawke, AC and Reverend Mpho A. Tutu.

If you are interested in attending this event, please select the Annual Hawke Lecture in the "Events" section of the AAPAE online registration website. Alternatively, please email the conference organiser at: [aapae2016@unisa.edu.au](mailto:aapae2016@unisa.edu.au).



## A PERSONAL OBSERVATION AT WESTERN

Theodora Issa

In January, February, also, early and end March 2016, I was obliged to be at hospitals in Western Australia. The different medical conditions of two family members made me a visitor or a boarder of more than one hospital in Western Australia. While there, staying all day in the patient's room, keeping company of the patient, monitoring the actions of the medical staff, or sleeping as a boarder in the patient's room, my mind was given the liberty to travel and think vigorously. This became possible, as I insisted not to take any of my work including research and writing or even my computer with me to the hospital. The only link with the outside world was my mobile phone, bearing in mind that this phone has no access to data and it is merely a phone to receive and send messages or telephone calls, as I wanted to be there as a whole; mind, body, and

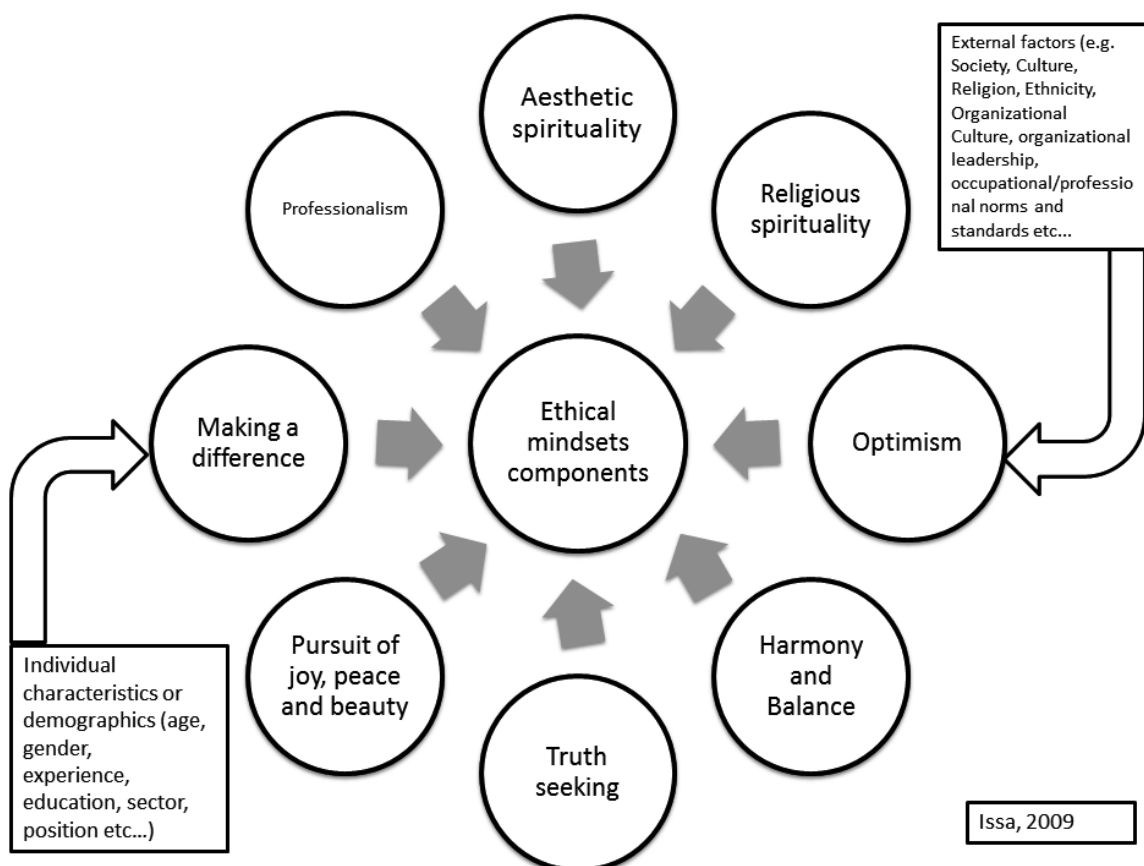
soul with my family member at such a difficult time. Sitting there, talking to my family member, and observing the actions of the medical staff, specifically as I noticed the ongoing words of thanks and appreciation by my sick family members to those individuals, made me think and think seriously of my original research into **Ethical Mindsets** (Issa, 2009).

My original research sought to find out if Ethical Mindsets exist in the Australian services sector, and the research outcome was that Ethical Mindsets do exist and those mindsets have some eight components (1) aesthetic spirituality, (2) religious spirituality, (3) optimism, (4) harmony and balance, (5) contentment, (6) personal truth, (7) making a difference, and (8) interconnectedness.

Indeed, I have witnessed this through my observation where these eight components were apparent in the

day-to-day dealings of those medical staff with my sick family members. It was clear that the first component of aesthetic spirituality was present, as medical staff displayed integrity, honesty, support, and compassion towards my family members. With regards to the second component, they displayed respect for the religious affiliation of my family members. They were also respectful of the religious artefacts displayed in the hospital room or placed under the pillow, and even took the time to listen to the stories being told, which sometimes were drawn from the Holy Bible, without complaining about lack of time or any other matters or showing any sign of disinterest due to difference in belief or culture. The third component was also clear, as those medical staff were acting in an optimistic manner despite the gravity of the situation sometimes, but they continued to say 'here I come to see

ETHICAL MINDSETS DO EXIST



## A PERSONAL OBSERVATION AT WESTERN AUSTRALIAN HOSPITALS (CONT.)

my favourite patient', 'your skin looks beautiful', 'well done' and other statements that encouraged the patient in times of distress. They were truly the source of harmony and balance, which takes us to the fourth component of Ethical Mindsets, for any question that might be posed by the patient or any of the relatives, was responded to with total respect, acting in a very harmonious manner throughout.

Further, and despite the ongoing medications, medical exams, and tests, their way of trying to find peace, joy, and beauty was noticeable even in their simple comments about the nice colour of the nightwear, or the way the item was ironed, or the brand of shampoo that was being used – they tried to find the beauty in everything they saw, which increased the confidence of the sick person in their abilities and established a kind of relationship between the two, and for myself that was nice to have at such a difficult time. Indeed, they knew the truth, and they would hint to it, but in a manner that would allow us all to continue to have confidence that everything would be just fine. They are really individuals who make a difference in the life of the sick people, and I remember my family members describing them as 'angels' as they helped them in and out of the bed, throughout their stay.

Finally, they seem to be comfortable with the way they treat each other and the patients in their care, they

were always acting professionally, and would readily acknowledge the contribution of their co-workers and they seemed to enjoy working in a team, this was very clear when my family member's room was located next to the nurses station, and I would over hear the nice things they told each other and how they would hand over to each other, exemplifying all identified dimensions under the interconnectedness component of Ethical Mindsets from my original research.

I have seen all these components present in the medical staff whom I met in different hospitals at different times during the last three months. However, there has been variation, and this was mainly as a result of the experience of the medical staff, their individual cultural and religious backgrounds, and the organisation's culture. While my observation was done in medical hospitals that were private and located in one state (Western Australia), there was a different culture for each of these organisations, which was reflected in some of the actions taken by those medical staff. The conceptual model (previous page) generated following my original research indicates that these components of the Ethical Mindsets are influenced by external factors, such as society, culture, religion, ethnicity, organisational culture, organisational leadership, occupational/professional norms, and standards, added to this are the individual characteristics or demographics (age, gender, experience,

education, sector, position, etc.).

This was merely a personal observation of staff members without them knowing that they were being observed, but it helps to notice that my original research is not only theoretical, but is also evident in the most practical form, seeing and watching those medical staff doing their day-to-day jobs in the most difficult situations and excelling in the way they deal with patients and their relatives.

Indeed, those were extremely difficult days for myself, my family members, and especially for the sick individuals of my family, but the Ethical Mindsets apparent in the medical staff somehow assisted us to deal with, and in a better fashion, such difficult times.

I conclude with a word of thanks to all those who have been responsible for the training and development of those medical staff members, and express my gratitude to those wonderful people who are there to take care of us in times of need.

### Dr Theodora Issa

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### References

Issa, T. (2009). *Ethical mindsets, aesthetics and spirituality: A mixed-methods approach analysis of the Australian services sector*. Available online through URL: [http://espace.library.curtin.edu.au/R/?func=dbin-jump-full&object\\_id=131986&local\\_base=GENO1-ERA02](http://espace.library.curtin.edu.au/R/?func=dbin-jump-full&object_id=131986&local_base=GENO1-ERA02)

## A beacon of love

Theodora is a regular contributor to *Australian Ethics* and, as Editor, I greatly thank her for her continued support of our newsletter. In this issue, Theodora has opened her heart to share her recent experiences within the hospital system in Western Australia – experiences that convey the care, dedication, and professionalism of our medical staff – qualities we can all aspire to. But it is with great sadness that I report the passing of Theodora's mother, Bathqyomo Marine Khoury-Issa. Dear Theodora, may your mother remain a beacon of love to all forever.

## WHISTLEBLOWING:

Peter Bowden

The Winter 2015 edition of *Australian Ethics* carried an article “Blowing the whistle on Bowden”, authored by Stephen Cohen and Damian Grace, responding to my earlier article “The Imperatives of Teaching Whistleblowing” (*Australian Ethics*, Summer 2014). In that article, I had categorised as negative a paragraph in the chapter on whistleblowing in Grace and Cohen’s book, *Business Ethics* (2009, 4<sup>th</sup> edition). On reflection, I did not intend to upset anyone, and would like to apologise for making the statement I did. In fact, I agree that many of the six concerns raised by Grace and Cohen in the paragraph in question are valid. Indeed, they help highlight urgent directions for further whistleblowing research, as I suggest below.

I am currently undertaking the research necessary to update my book, *In the Public Interest* (current edition 2014). The present edition contains many examples of effective whistleblowing that stopped wrongdoing and documents the academic research that verifies that whistleblowing is effective. While the first edition covers only Australia, the UK, and the United States, my research assistant and I are working to allow the new book to cover the world, or at least those 60 – 70 countries (that our research has identified) that have introduced whistleblower protection legislation.

One item our research has already found is that country after country is making internal whistleblowing compulsory. One reason is to make it easier for the organisation to correct the wrongdoing before public exposure. If the company or government department does not correct the problem, the whistleblower should be able to go to an anti-corruption

agency or to the media.

Our research also agrees with Grace and Cohen in their concerns with the inadequacy of Australia’s private sector whistleblowing systems. Rather than stressing inadequacies as a negative aspect of whistleblowing, I prefer to highlight the need to strengthen Australia’s systems. Australia recently has seen several examples of corporate malfeasance, in some of which there has been a whistleblower who has suffered. We need to agitate for strengthening our systems.

Further research is necessary across many facets of whistleblowing. The formalisation of corporate whistleblowing policies with robust protection for the whistleblower is only a relatively new development, and there are many unanswered questions, beyond those mentioned above. I advocate that the academic obligation on ethics lecturers is to contribute to this research.

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Some of the unanswered questions are the rigour of the corruption en-

quiry investigation. The cause is sometimes stated as insufficient numbers or skills in the investigating offices. But I also believe that potential whistleblowers can be taught how to effectively present their case so that it does demonstrate a genuine wrongdoing. I have interviewed dozens of whistleblowers and I am convinced that only a small percentage, maybe 5%, complain about personal issues. Thus the overwhelming majority of whistleblowers acknowledge that their complaint should be about a genuine wrongdoing.

Further research directions can be gleaned from the six concerns (as noted below) Grace and Cohen raised in their book, *Business Ethics*. Rather than being definitive challenges to whistleblowing, their considerations point in the direction future whistleblowing research should go.

The first concern being that *informing was characteristic of the worst excesses of Nazi Germany*. (One of the interesting pieces of information that I have discovered is that Germany has one of the weakest whistleblowing protection systems of the G20 countries (see AWG, 2011)). My initial reading of this point was that Grace and Cohen thought whistleblowing really was comparable to Nazi informing! However, in discussion with others in the AAPAE, it was suggested that this concern was only raised for consideration, and was subsequently rejected or mitigated by their later arguments. Still it would be great if this position was made a little clearer in later editions of their excellent book, to stop readers like myself potentially mistaking their position. It would be a shame if any reader wound up thinking that whistleblowing really was compara-

**WHISTLEBLOWING:**

**Thoughts for new research directions (cont.)**

ble to Nazi informing!.

The second consideration, *it is theft to disclose the information without authorisation*, is true. One of the major writers on whistleblowing, Kohn (2013), advises that a whistleblower should take away no information. I believe that this aspect of whistleblowing requires further research. We, in Australia, had the recent case of the non-competitive award of a scholarship to the daughter of Tony Abbott, who at the time was the Prime Minister of Australia. The whistleblower who exposed it, Freya Newman, was charged with theft.

Imagine, for instance, that you are Jeffrey Wigand, Vice President of Research for Brown and Williamson (a former subsidiary of British American Tobacco, but subsequently merged with Reynolds American Inc.), and you discover that your company is aware of but deliberately hiding the fact that smoking is unhealthy. Is it stealing to release that information? Technically it is, but I believe that the whistleblower has a higher moral obligation (provided they are protected by law). My tentative response is that the whistleblower protection laws should be changed to read that if proven correct, the whis-

tleblower with organisational information has immunity.

The third concern is that whistleblowing *might destroy jobs*. Again, this is true and there have been several instances of this occurring. Further research is required on how this issue can best be handled.

The fourth issue raised is that an individual *cannot judge if the public interest will be served*. I think that we all have the obligation to work in the public interest. What is needed is better education on how to judge the public interest. Whistleblowing legislation is helpful in this regard, as it usually includes a list of specified wrongs that can guide the whistleblower.

The fifth argument is that whistleblowing *breaks an employee's contract*. While certainly true, most current whistleblower protections deal appropriately with this issue by rendering any pre-employment contract null and void if used to silence the whistleblower.

The final concern raised is that the *employee has only a duty to report concerns to superiors*. Research project after research project tells us that this is the whistleblower's preferred option (my own experience

tells me the same). The above-mentioned initiatives to make internal whistleblowing mechanisms compulsory will only enhance the availability and usefulness of this option.

We know that whistleblowing protection systems are far from perfect and, in some instances, non-existent, but improvements can only be made when the implementation of whistleblower protection legislation is supported by awareness raising, communication, on-the-job training, cooperation from academia, ongoing research, and the periodic evaluation of the effectiveness of the framework of protection.

**Dr Peter Bowden**

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**References**

Anti-Corruption Working Group (AWG). (2011, May 12-13). G20 Anti-Corruption Action Plan Protection of Whistleblowers. Cannes, France: Organisation for Economic Co-operation and Development (OECD). Retrieved 1 April 2016 from: <https://www.oecd.org/g20/topics/anti-corruption/48972967.pdf>

Bowden, P. (2014). *In the public interest: Protecting whistleblowers and those who speak out* (1<sup>st</sup> ed.). Prahran, VIC, AU: Tilde University Press.

Grace, D. and Cohen, S. (2009). *Business Ethics* (4<sup>th</sup> ed.). Melbourne, VIC AU: Oxford University Press.

Kohn, S.M. (2013). *The whistleblowers handbook: A step-by-step guide to doing what's right and protecting yourself* (3<sup>rd</sup>

**FIXING GLOBAL GOVERNANCE:**

**T**he failure of global governance, and how to remedy this, is a recurrent theme in political philosophy. Page suggests a number of priorities, including: strengthening and reforming the United Nations system, addressing the pessimism in discourse about global governance, and acknowledging the advances which have been made, and

engaging the cult of nationalism, with a reclaiming of the universalist ideals of renaissance humanism. Part of engaging the cult of nationalism also involves re-thinking the role of religion, especially as a force supporting nationalism and the status quo. Ultimately we do not know what future global governance will look like, but the key is to believe

**James Page**

that transformation is possible.

To read this article in full, visit: <http://www.onlineopinion.com.au/view.asp?article=17785>

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## BEYOND SINGER'S POND:

Gordon Young

The question of where one's ethical responsibilities begin and end has been a long-standing question for professional ethics, particularly within the context of employment. As globalisation extends the influence and potential impact of businesses, the question must be asked whether individual employees can be held accountable for the actions of the businesses they work for and, if so, to what degree?

The recent CommInsure scandal, whereby the health insurer sought to deny legitimate claims by redefining what qualified as a claimable health condition, illustrates this problem clearly. These unethical activities were revealed by whistleblower, Dr Benjamin Koh, a highly credentialed physician and CommInsure's appointed chief medical officer. Dr Koh's decision to act has enabled the media, consumers, and the government to begin to correct CommInsure's transgressions. However, the question must be asked why Dr Koh was the only one to speak out. CommInsure is a department of the Commonwealth Bank of Australia Ltd, a modern business employing 52,000 individuals – yet only one of these employees took public action to end this clearly unethical and harmful behaviour.

While Dr Koh's actions have been effective, it cannot be denied that they would have been more so if more employees had objected to these activities, refused to participate in them, or revealed them publicly. This could have prevented considerable harm to CommInsure's clients. But is it reasonable to hold individual employees responsible for the action of such a large organisation which they do not directly control? After all, the decision to take these

unethical actions was not theirs, and refusing to participate in them and/or going to the media could seriously threaten their careers.

This brings us to the ethical question of responsibility; is it reasonable to hold individuals responsible for decisions/actions that they are not directly responsible for? And if not, how can such unethical actions ever be corrected without individuals willing to confront or expose them?

Peter Singer's pond analogy, published as part of his *Famine, Affluence, and Morality* essay in 1972, offers a compelling solution to this problem. The analogy asks whether, on discovering a child drowning in a shallow pond, do we, as individuals, have a responsibility to aid the child, even if doing so ruins our clothes? While Singer acknowledges that this would pose costs to us in dirtying our clothes, the benefits of saving the child's life significantly outweigh those costs – therefore it is clearly our ethical responsibility to save the child.



While this analogy was intended to illustrate the ethics of international aid, it also demonstrates that there is no significant difference in ethical responsibility between an action and an inaction. That we had nothing to do with the child drowning in the first place is irrelevant; the potential harm is clear, inaction will obviously allow that harm to occur, and we know that the cost of preventing that harm is minimal to us. Knowing all this, it could be argued that failure to assist is little different from actively pushing the child into the pond to

prevent them from messing up our outfit – the costs, benefits, and our awareness of both are identical, so what difference does the action/inaction distinction make?

If we extend this argument to the individuals within CommInsure, or any organisation, then the implications are significant. If inaction does not excuse them from responsibility then the scope of their responsibilities becomes effectively unlimited. Furthermore, taking action on every problem within that business becomes an ethical imperative.

This ethical imperative is undoubtedly unreasonable and unsustainable, overloading individuals with responsibility for an overwhelming number of activities, most of which they will have little control over, and interference with could expose them to severe damage to their careers, finances, and mental health.

Singer's pond analogy demonstrates that inaction does not excuse one from responsibility, however practical application of this idea demonstrates it is too simplistic to be effective, simply punishing and exhausting those who try to follow it.

To better respond to this problem, I propose individuals apply the following four tests to assist them to assess where their ethical responsibilities might begin:

**1. Awareness** of the ethical problem  
If an individual is not aware, and cannot realistically be able to be aware of unethical behaviour taking place, it is not reasonable for them to be held responsible for it. The scope of 'reasonable ignorance' is of course greatly limited in this Information Age, but events kept secret from the employee or completely out of their understanding are beyond their abil-



## BEYOND SINGER'S POND:

(CONT.)

ity to reasonably intervene in.

### 2. Proximity to the problem

The closer an individual is to the behaviour and those conducting it, the greater their capacity to be aware of it, understand it, and influence it. The general public has limited proximity to the unethical behaviour in ComInsure, low-level employees are closer, middle managers are closer still, and senior executives are likely intimately involved. Increased proximity enables action to address the problem, and thus increases responsibility.

### 3. Ability to intervene

Specific skills, organisational influence, psychological resilience, and relationships with pertinent people will all determine each individual's ability to affect unethical behaviour occurring nearby. As a highly credentialed physician occupying a senior

role at ComInsure, Dr Koh was in a strong position to influence the unethical decisions within the company, whereas low-level employees outside of the department would be significantly less able to do so.

**4. Consequences** of intervention Inevitably, intervening in unethical behaviour will have consequences for any individual. The more serious the problem, the more widespread it is, and the more senior those causing it, the greater those consequences may be for the intervening individual. These costs of intervention, combined with each individual's ability to withstand or manage those consequences must be considered in deciding whether that individual can be held responsible for intervening.

Collectively, these tests offer individuals an alternative way of assessing their ethical responsibilities, both

acknowledging that inaction does not excuse them while respecting the practical realities that intervention involves. Ultimately, all four of these tests can be summarised in one broader phrase: 'capacity to intervene'. If one's capacity to intervene in unethical behaviour is high, there is a greater imperative for one to intervene, regardless of the behaviours of others, lack of direct involvement, or personal reluctance to do so.

Hear more about Gordon's work at the AAPAE 23rd Annual Conference in Adelaide next month.

### Mr Gordon Young

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### References

Singer, P. (1972). *Famine, Affluence, and Morality. Philosophy and Public Affairs*, 1 (3), 229-243

## FEW THINGS IN LIFE ARE MORE CERTAIN THAN DEATH & TAXES

FROM THE EDITOR

As far as the law is concerned, a corporation has a separate legal existence that is distinct from that of its owners, managers, employees, agents, and other stakeholders.

Just like you and me, under the law a corporation has the same powers as we do, including the power to own and dispose of property and other assets, enter into contracts, and to sue and be sued. However, unlike you and me, a corporation can exist in perpetuity – so avoiding death!

Here's one reason to live forever: **If a corporation can exist in perpetuity, does it also hold true that it can avoid taxes too?**

Like all citizens, corporations have the legal right to arrange their finan-

cial affairs to keep the amount of tax payable to a minimum (see <https://www.ato.gov.au/general/tax-planning/>). This is what is referred to as **tax planning**.

However, tax planning is only legitimate when it is done within the letter of the law and the spirit of the legislation.

But if a transaction or a business model has no real commercial purpose (minimising tax does not count!) or if a transaction lacks economic substance, then it is unlikely to qualify as legitimate tax planning, regardless of whether the arrangement is lawful or not. Base Erosion and Profit Shifting (BEPS) is an issue that is a hot topic on the global stage at present. **But what is BEPS?**

BEPS refers to tax planning strategies that deliberately set out to exploit loopholes and differences in tax laws to artificially shift profits to low or no-tax jurisdictions for no real commercial purpose resulting in little or no overall corporate tax being paid.

The BEPS project aims to realign tax legislation across all jurisdictions so that corporate profits are taxed where the economic activities generating those profits are performed and where value is created.

The article by Hugh and Charles on the following pages is a thought-provoking piece that challenges our notion of tax – who should pay it, where should it be paid, and just how much! **No one likes paying tax, but ...**

## PANAMA PAPERS: NO WONDER!

Hugh Breakey & Charles Sampford

In the wake of the Panama Papers leak, hardly a day goes by without new scandals, revelations, inquiries, or reports on the extent of corporate tax avoidance. The public outrage is manifest, and it is clear the G20's efforts over the last three years on *Base Erosion and Profit-Shifting* (BEPS) need to be redoubled if they are to meet with widespread expectations about proper corporate conduct.

As many commentators stress, the problems showcased by the Panama Papers revelations are not confined to clear-cut illegality, including tax evasion (where those involved do not rely on alleged claims to legality but rely on not being found out) and money-laundering for criminal activities like drug running and corruption. The bulk of the tax strategies exposed make claims to be legal, relying on the interaction between the tax laws of different sovereign nations and their bilateral tax treaties. Such arguments rely on exploiting legal loopholes, ambiguities, technicalities, and unintended consequences in tax codes – and the gaps arising in such codes for multinational corporations able to operate flexibly across jurisdictions. This activity is called 'tax planning', 'aggressive tax planning', 'tax minimisation', and sometimes 'tax avoidance'.

While tax avoidance is often contrasted with tax evasion on the basis of legality/illegality, it is important to recognise that many so-called questionable tax planning schemes have not been litigated. A judge might come to a different conclusion to the client's lawyers – especially once the lawyers have been forced to produce all the relevant documents and defend their interpretations. For those subject to Australian tax law, lawyers

must also argue that their 'cunning tax plan' does not constitute avoidance under Part IVA of the *Income Tax Act*, which was introduced to make domestic aggressive tax plans ineffective and expensive.

But this is not principally a legal issue. Even if the legal/illegal, planning/evasion dichotomies were clear-cut, public outrage is applied to both. Indeed, clever planning may make the actions seem even more premeditated, while the complex legal arguments claiming that the assault on the public purse is legal may merely extend the outrage to lawyers rather than excuse the clients. The failure to pay tax is first and foremost a moral complaint about the corporations and their attitudes to the communities in which they operate and which grant them a legal presence. One might therefore suppose a concern for fair tax obligations would be well-represented in the domain of corporate social responsibility (CSR), which speaks directly of moral principles requiring businesses to do more than obey the strict letter of the law.

**EVEN ASPIRATIONAL  
ETHICAL CODES DON'T MAKE  
EXPLICIT THE  
RESPONSIBILITY OF  
CORPORATIONS TO PAY A  
FAIR AMOUNT OF TAX**

Yet if one turns to the major codes, charters, compacts, and guidelines for best business practice and corporate social responsibility, a striking fact presents itself. Most of these important documents say nothing – literally *nothing* – about tax avoidance/minimisation/planning. This is

despite the fact that, as Christensen and Murphy (2004) observe: "Paying taxes is perhaps the most fundamental way in which private and corporate citizens engage with broader society".

The codes of conduct that fail to mention fair tax obligations include pre-eminent and otherwise-demanding charters like the *Caux Round Table Principles*, the *UN Global Compact* (as well as its *Principles for Responsible Investment*), the *Earth Charter*, the *Guiding Principles of the World Forum for Ethics in Business*, the UN OHCHR's *Guiding Principles on Business and Human Rights*, Amnesty International's *Human Rights Principles for Companies*, and the *Equator Principles*. To be sure, some of these codes have particular agendas (such as an environmental focus) that might serve to push fair tax obligations onto the back-burner. Even so, the fact remains that explicit fair tax obligations are so rare in the Corporate Social Responsibility space that the *International Standards Organization's* (ISO, 2010) analyses of both sectoral and cross-sectoral initiatives fail to even list such obligations as a potential CSR element in their taxonomies.

If we want corporations to start living up to fair tax obligations, then this widespread silence needs to change. Almost all the above-mentioned codes contain principles that are relevant to the issue of fair tax obligations. For example, the *Caux Roundtable Principles* include the broader community in a business' list of stakeholders, and stress that responsible businesses must live up to the spirit and intent behind the law (CRT, 2009). Equally, the *International Bar Association* showed how strong tax obligations follow from

## PANAMA PAPERS: NO WONDER! (CONT.)

the OHCHR's *Guiding Principles*, at least in the context of multinational's tax obligations to developing countries (IBAHRI, 2013).

That said, these principles' implicit applications to fair tax obligations – and even the glancing treatment such obligations are given in other codes (such as in the ISO's *Guidance on Social Responsibility* and in the *Triple Bottom Line Approach*) – are not enough. In an area that involves a corporation directly shouldering significant costs impacting on its bottom line, society needs to lay down clear and unequivocal commitments. The tax-related responsibilities following from general principles needs to be explicitly highlighted to any corporation who aims to comply with them. All of these codes provide aspirations to good corporate citizenship: but few make a point of saying that good corporate citizens pay their share of tax as part of their 'corporate social responsibility' or 'social license to operate'.

As well as explicit principles declaring fair tax obligations, corporations need concrete guidance so they can gauge what compliance would require of them. What exactly is a fair tax obligation, and who gets to decide? After all, there can be good reasons for enterprises to have low tax contributions in a given financial year. So too, working out what counts as a 'tax haven' is not always straightforward. There is a vast gap, for example, in the corporate tax rates in Australia as opposed to the UK. Are Australian corporations morally required to eschew availing themselves of the UK's much-lower rate, or not?

Two good starting points for discussion are the principles offered by the Tax Justice Network's *Code of Con-*

*duct for Taxation* (Murphy, 2007) and the OECD's *Guidelines for Multinational Enterprises* (OECD, 2011). Both codes set down the fundamental responsibility of living up to the spirit and intentions of tax codes. They also take care to explicitly prohibit some of the more egregious tax-minimisation strategies, such as those surrounding transfer pricing and beneficial ownership.

We submit that civil society groups and business ethicists interested in tax justice would do well to consider the legitimacy and viability of such obligations, and to help draw them into the general CSR and ethical investment conversation.

Of course, we cannot pretend the problems raised by the Panama Papers reside purely with corporations. Tax havens, for example, do not stem from unintended consequences. These countries tempt companies to create a formal legal presence and to claim that income from intellectual property, loans and/or marketing margins are earned in their jurisdiction. Sometimes a country will offer tempting tax packages to secure genuine activity, which is taxed at lower rates than in other countries (while this may be seen as legitimate competition, it loses that legitimacy if countries use this as a means of pocketing a tax that ordinarily would go to another country's government for economic activity occurring within its borders.)

However, the creation of a temptation does not legitimise being tempted. Corporations still make a conscious decision to avail themselves of tax havens. If corporations want to be seen as good global citizens, then they need to ask themselves hard questions about these issues, give honest and public answers, and

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seek community endorsement for those answers. One of the sensible places these expectations could be made explicit is in business codes of best practice and corporate social responsibility. Companies should recognise that this is not just a matter of their long-term best interests. It involves their social license to operate, their ability to attract ethical and trustworthy staff, and their sense that they are contributors to rather than free riders on the communities in which they operate.

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'Making the right moves ....'

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The AAPAE fosters and publishes research in professional and applied ethics, as well as attempting to create connections with special interest groups.

However, the AAPAE does not endorse any particular viewpoint, but rather it aims to promote a climate in which different and differing views, concerns, and approaches can be expressed and discussed.

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