

RESPONSE TO THE TREASURY PAPER ENTITLED ‘AN AUSTRALIAN CONSUMER LAW: FAIR MARKETS – CONFIDENT CONSUMERS’ (09)

This response briefly answers four questions from the Treasury paper entitled ‘An Australian consumer law: Fair markets – confident consumers’ (09) and provides supporting discussion and recommendations below and attached.

Yours truly, Carol O’Donnell

Q. Should the scope of the Trade Practices Act (TPA) existing definition of ‘consumer’ be expanded to cover a wider range of circumstances, such as goods used in business contexts? A. Yes.

Many different laws and unhelpful legal practices, as well as differences in their definitions of ‘consumer’, mean there are many inconsistencies as to how consumers and their purchases are treated. This causes lack of clarity, confusion, unfair treatment, lack of transparency and associated cost. It should also be recognised that consumers purchase services, including financial services, as well as products. Laws should have clear objects and definitions of key terms which are as close as is reasonably expected to those found in dictionaries. My dictionary defines a consumer as **a buyer or user**, which seems clear.

Q. Should the TPA be renamed? If so, what name should it have, if not the Competition and Consumer Act? A. We need a Competition Act. Repeal the TPA.

The Trade Practices Act (TPA) should not only be renamed but also repealed along with the Competition Policy Reform Act (1995) and all associated outdated legislation. The competition policy principles which Hilmer and Australian governments envisaged when he wrote his report on national competition policy in 1993 should take the place of the TPA. These modern principles should guide a new Competition Act under which the more sensible elements of the TPA and related outdated legislation are then incorporated in the form of updated regulations, codes of practice or guidance notes as appropriate. This was the approach taken to the plethora of outdated, prescriptive and inconsistent safety legislation when new state occupational health and safety acts were introduced throughout Australia in the 1980s. Supporting argument is provided below and in related attachments.

Q. Should a new definition of ‘consumer’ specifically deal with small businesses and farming undertakings? A. No. Define the consumer consistently everywhere.

Q. Should a new definition of ‘consumer’ cover commercial vehicles or vehicles purchased for a predominantly commercial purpose? A. No.

The further fragmentation of the definition of a consumer would only add to the current lack of clarity, unfair treatment, lack of transparency and related cost involved in the administration of law. All laws ideally conceptualize all those engaged in trade consistently, in related industry and community contexts, unless another course of action appears more appropriate for good reason. The Australian and New Zealand Standard Industry Classification (ANZSIC) and related occupation classifications are based on international classifications and designed to assist the process of more scientific management. ANZSIC classification should be incorporated into all industry management and related scientific practices unless there appears to be good reason to do otherwise.

The attached article entitled, ‘A healthier approach to justice and environment development in Australian communities and beyond’, shows that international and regional health and related environment development agreements introduced a new international governance paradigm which also raises risk management and sustainable development to new importance. Implementation of this new international management paradigm requires broad administrative reform in Australia and beyond to meet the evidentiary requirements of scientific and quality management which current

legal approaches are incapable of meeting because they are essentially feudal in their operations. Some key instances of this are also provided later as well as in attachments.

The TPA concept 'unconscionable conduct' prohibits businesses from engaging in harsh or unreasonable conduct where one party is at a significant disadvantage. The concept ideally enables the related concepts of the 'trader', the 'provider' and the 'consumer' to be more consistently dealt with through also enabling broader recognition of the potential effects of allegedly unfair power in trading (e.g. based on unequal knowledge or money or choice in the trading relationship). The concept of 'unconscionable conduct' may also link the trading relationship to broader concepts of fair and unfair treatment outlined in United Nations (UN) agreements discussed later and in attachments. Whether unequal power in trading and its outcome is 'fair' or 'unconscionable' is ideally addressed historically and broadly in industry and community contexts, in the light of all relevant legislation.

Consistent and logically coordinated development of conceptual relationships is vital for fair treatment but impossible to maintain when lawyers seek to keep all legislation and its related dealings separate and have control of rule bound, adversarial proceedings. Courts are managed according to the specific requirements of particular law, rather than from more broadly knowledgeable and scientific perspectives. Industry and community based management perspectives would be more helpful in resolving disputes because many matters which are linked in normal life could be recognised and dealt with more effectively than by lawyers who think rights are 'inalienable' (i.e. God given) rather than won during economic, political, and related scientific and democratic development.

Conceptual clarity is necessary to achieve national goals but lacking in current law

For every consumer there is a producer and supplier of the product or service consumed. The producer and supplier of the product or service may be the same or different groups or individuals. However, all the aforementioned are part of the broader conceptual class of traders, which also includes borrowers and investors. All traders are part of a great variety of broader communities which are defined internationally by their geographic location and many other varieties of mutual interests and associations, as has been recognised by the UN and its instrumentalities in related conventions which many nations, including Australia, support. All laws ideally conceptualize all those engaged in trade consistently unless another course of action appears better for good reasons. The ANZSIC and related occupation classifications have been designed to assist this. Such classification systems ideally guide trade and industry related data gathering in a manner which embraces systemic questioning and reformulation from scientific perspectives. The administration of law, on the other hand, is pre-scientific in its concepts and practices.

In order to work towards more general consistency in legislation and related treatment it is recommended that the replacement legislation for the TPA suggested earlier is called the Competition Act. In the ideal international, regional and national scientific context and its related markets, to call any new Australian act the Competition and Consumer Act, would be confusing because investors, producers and suppliers are not included in the title even though they are as central to the competitive trading act as the consumer is. To retain the TPA would be to retain legislation with expectations which are flawed in major ways and which addresses consumers improperly and only as an afterthought to the application of an outdated conceptual framework which remains central to the current operations of the act. This is discussed later. General consumer provisions in the TPA are comparatively recent and found in Part V on Consumer Protection, but also in Part IVA which relates to unconscionable conduct. The former provisions do not apply to financial services even though consumers of these may be hugely vulnerable. One also wonders how the Consumer Credit Code is expected to relate to any current or recommended practice.

The word 'consumer' is historically recent. Consumers are traders. Before capitalism the word 'trader' covered all those engaging in exchange. The development of capitalism produced a new distinction between the trading classes representing capital (investment) and labour (workers producing of goods or services). Those working in small business may be members of both groups through saving or borrowing for investment in businesses in which they also work. Historically, the concept of consumers as a subset of traders developed much later. Consumers may often be envisaged as a class of traders who may often need special protection because of their comparative lack of knowledge about the products or services they are purchasing. The regulation of certain crucial services and providers (e.g. in medicine or engineering) was first undertaken by supposedly expert peer service providers, assisted by government regulation. (Lawyers' regulation sprang from earlier, pre-scientific times which linked courts to the monarch.) Legislation designed to protect consumers later enabled dysfunctional protection of many service providers through outdated state professional registration acts which may benefit providers most.

Whilst one may be reasonably happy for engineers and surgeons to be certified to practice by their fellows, on the basis that bridges or bodies might otherwise collapse and we might die, the legal profession has a range of feudal assumptions and related practices, particularly surrounding notions of evidence, which are breathtakingly bizarre from any later, scientific or democratic perspective. For example, they often appear to assume that objectivity may best be gained by ignorance of any related conduct in what they deem as lesser arenas, where knowledge and conclusions may be procedurally suspect from their legal perspective, and hence contaminating. From any scientific perspective, chosen ignorance normally appears ridiculous and yet many economic specialists picked up and retain such legal penchants. For example, Garnaut's interim report on climate change warned:

Care would need to be given to the design of the institutional arrangements for administering the allocation and use of permits. Variation in the number of permits on issue or the price would have huge implications for the distribution of income, and so could be expected to be the subject of pressure on Government. There is a strong case for establishing an independent authority to issue and to monitor the use of permits, with powers to investigate and respond to non-compliance '(2007, p.65).

Such views appear irresponsible because government is elected to govern and by giving away its power to a body established at arm's length from itself, it can only make itself more ignorant and unaccountable than it would otherwise have been. The idea that establishing fund management bodies at arms length from an original body will guarantee objective management is particularly misguided if the appointed trustees have secret relationships and drivers of their own. The scientific approach must be transparent. If lawyers have evolved to regarding themselves as providing a service to communities, they provide little effective management data to show for it.

Consumers are not yet properly recognized in Australian law, including in the TPA, which is discussed later. Workers are now also investors or potential investors, primarily through their membership of superannuation funds or 'ownership' of land, a house or business, on borrowed money. Workers are also consumers of these financial services. All such separate roles need to be clearly and consistently recognized in relevant Australian legislation to avoid increasingly disastrous legal muddle and cost. Related issues are discussed in the attachments entitled:

- A healthier approach to justice and environment development in Australian communities and beyond
- Response to 'A healthier future for all Australians' a report of the National Health and Hospitals Reform Commission (NHHRC)

- We are all capitalists now: A consumer's response to the Treasury Consultation Paper on Australia's future tax system (2008)
- An ideal trust structure for the beneficiaries: An example from an Australian superannuation fund and a bank

All law requires clear objects because prescriptions without aims are feudal practice

'Black letter' law is composed of statements which ideally are followed to the letter. This is in contrast with a later government approach which expects that law will state aims, against which practices are ideally tested logically and scientifically, rather than ruled by some unquestionable authority. The former approach of outlining legal prescriptions devoid of clear aims is authoritarian. It began in a feudal era when the monarch was thought to be appointed by a Christian God and handed down His Word which ruled through judgment on adversarial, rule bound practice. This feudal approach to evidence gathering and treatment is still championed today. The courts and their lawyers also have monopoly control over all historically later, scientific attempts to resolve problems.

In 1992 the Commonwealth Attorney General asked the Australian Law Reform Commission (ALRC), to undertake an inquiry into the TPA. The ALRC recommended 'The TPA should be amended to include a preamble or other provision stating: **'The objective of this Act is to promote a competitive and fair market environment in Australia'**. This early TPA aim that the ALRC recommended does not mention consumers. In 1993, 'consumers' were not directly discussed in the Hilmer Report on national competition policy either, with the exception of the discussion of consumer boycott. Nevertheless, the Hilmer report was followed by the passing of the Competition Policy Reform Act (1995) which also led to attachment to the TPA of the aim (object) **'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'**.

However, the provisions of the TPA and the legal colleagues who deal most commonly with competition and TPA requirements, such as those working in the Australian Competition and Consumer Commission (ACCC), are not adequately equipped to protect consumers, in spite of anything else they might pretend. This is discussed later. The outcome of the Hilmer report was primarily that the TPA became even more of an inconsistent, illogical and extended dogs' breakfast than before. The radically new and sensible approach to competition which Hilmer recommended and which is also addressed below, was ignored thereafter and many new and beneficial opportunities were lost. Some of these opportunities for more sustainable development are addressed in the attachments.

It seems logical that a new Competition Act, as recommended earlier, should have as its object (aim) the slightly amended statement of the Ministerial Council on Consumer Affairs (MCCA) as agreed and proposed to the Council of Australian Governments (COAG) on 15th August 2008. This was:

To improve consumer (sic.) wellbeing through consumer empowerment and protection, fostering effective competition and enabling the confident participation of consumers in markets in which both consumers and suppliers trade fairly (Treasury 2009, p. 10).

The first reference to the 'consumer' is ideally deleted so that the aim of improving wellbeing applies to all Australians, who are also consumers. (We all have to eat but consuming food may not always involve the payment of money. Think of the baby.)

All law requires clear definitions because 'interpretations' are a feudal practice

One assumes the concept of suppliers which is referred to by the MCCA includes producers who must logically be engaged in supply eventually. However, all key words are ideally recognized in definitions which are as close to those in the common dictionary as is reasonable. To do otherwise is merely to create more lawyers picnics.

Hilmer defined competition as, **‘striving or potential striving of two or more persons or organizations against one another for the same or related objects’ (1993, p.2)**. If adopted, this could have led naturally to management partnerships using triple bottom line accounting – economic, social and environmental – which is necessary for sustainable development. The TPA contains no definition of competition, only an ‘interpretation’, in Section 4. This states, ‘competition includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia’.

In general, the TPA does not ‘define’ its key terms, but ‘interprets’ them instead. The result of this is the idiotic practice of simply repeating the words which in a dictionary would be defined. For example, a person wondering what a ‘covenant’ or ‘debenture’ is may find themselves no wiser after reading the TPA ‘interpretation’, than at the start. Dictionaries would be clearer and reduce cost. They were introduced to the West in the European Enlightenment and are necessary for any scientific and data driven practice. However, courts and other financial institutions often follow feudal operations which are often supported by the public purse but which produce no consistent and useful data for effective injury prevention, rehabilitation, premium setting or related cost containment.

For one of many examples, the Senate Economic References Committee's Review of Public Liability and Professional Indemnity (2002) pointed out that in health care, there is no aggregated database of health care litigation claims, which makes it impossible to identify where the risks are, in order to reduce them. Insurers estimated that legal costs in personal injury cases amounted to 40% to 50% of the total costs but nobody had any reliable data. The legal process is crazy from the perspective of the public interest for many reasons, including because the legal occupational monopoly usually refuses to conceptualise itself as a service, like provision of health care or education. Its adversarial practice is opaque and unaccountable, which is unsurprising in a feudal institution. To add more to outdated legislation like the TPA will add to unfairness and legal cost. It is ironic that Australia's most powerful occupational monopoly presides over decisions about fair competition and that feudally driven decision makers freely create ‘junk science’ as well.

Adopt principles of the Hilmer Report in a new Competition Act and repeal the TPA

The Hilmer Report had clearly stated principles which have been lost in translation to the TPA, and in the related actions of the ACCC. Hilmer wrote:

Competition policy is not about the pursuit of competition per se. Rather it seeks to facilitate effective competition to promote efficiency and economic growth while accommodating situations where competition does not achieve efficiency or conflicts with other social objectives. These accommodations are reflected in the content and breadth of application of pro-competitive policies, as well as the sanctioning of anti-competitive arrangements on public benefit grounds
(1993, p. xvi).

The report further points out that the Commonwealth, State and Territory Governments had already agreed on the need to develop a national competition policy which would give effect to the principles set out below:

(a) No participant in the market should be able to engage in anti-competitive conduct against the public interest

(b) As far as possible, universal and uniformly applied rules of market conduct should apply to all market participants regardless of the form of business ownership

© Conduct with anti-competitive potential said to be in the public interest should be assessed by an appropriate transparent assessment process, with provision for review to demonstrate the nature and incidence of the public costs and benefits claimed

(d) Any changes in the coverage or nature of competition policy should be consistent with, and support, the general thrust of reforms.

The above guidelines seem good for direct implementation into relevant legislation and conflict with economic assumptions which are central to the administration of the TPA and which are discussed later. Hilmer wrote after the Heads of Australian Governments committed themselves, in 1990, to development of national standards for the protection of health and the environment, and for related occupations and training. Mutual recognition legislation was then passed by all Australian governments. This aimed at reducing state barriers and related costs, in order to achieve a more competitive nation. These developments need to be understood in their new international post-war context and have been fiercely resisted by those who benefit from the current occupational closed shops which are assisted by state professional registration acts.

Recognize the nature of the international context which produced the Hilmer Report

In 1948 the Universal Declaration of Human Rights provided basic principles for the fair treatment that all human beings should ideally be able to expect. The International Labour Organization had also provided principles for worker protection through the League of Nations, which soldiered on after the League collapsed and after the UN was established. Many of these principles are now included in Australian law, as in the case of anti-discrimination, OHS and workers compensation acts. In 1948 the World Health Organization (WHO) defined health holistically, as a state of complete physical, mental and social wellbeing. Enjoyment of health was recognized as related to the environment which produces any body. In 1978 and 1986, Australia signed WHO agreements which provided a broad framework of principles for the promotion of human health and accordingly also recognized the primary need in any society for peace, shelter, food, income, a stable economic system, sustainable resources, social justice and equity. In 1992, Australia also signed the UN Declaration on Environment and Development. This put human wellbeing as the first of the sustainable development principles on which the later Kyoto Treaty for the reduction of greenhouse gases was also based. This forms an international and loosely related regional planning framework. Think globally act locally.

The development of an international economy and related national approaches to fairness, health and environment protection, have also led, in many quarters, to management aims which are necessarily broader than purely financial goals. An example is acceptance of the need for trading systems which have the goals of reducing the environmental problems which may arise from any production which has traditionally shifted such costs to others. New UN requirements for triple bottom line accounting recognise the existence of social and environmental goals which should be met in partnerships with more traditional business operations driven by shareholder interests, in order to avoid the problem of cost shifting onto more vulnerable communities and environments, and destroying them.

From such theoretical perspectives, the aim of business should increasingly be to reduce the risks of production to communities and to enhance production and the surrounding environments, as well as

profits. Increasing concern of governments and citizens about health and environment protection also means that the beneficial effects of competition are best sought and understood in the context of a holistic regional understanding of industries and communities so as to deal with their related development problems, rather than in the current application of multiple fragmented, outdated, prescriptive, legal provisions. The TPA, the ACCC and the practice of lawyers in general reflect a lack of understanding of the requirements of the new, international approach to competition outlined above. The feudal practice of law is instead based on ancient, adversarial assumptions, which treat the secretive gathering of evidence as if it is primarily related to the conduct of a fair fight, rather than the search for truth about a matter, according to broadly scientific principles.

If governments implement Australian consumer law in the manner outlined on page 10 of the report entitled *An Australian Consumer Law: Fair Markets – Confident Consumers* they are likely to produce neither fair markets, nor confident consumers because the approach will not produce transparency, which is necessary for a perfect market. To enact a version of the Australian Consumer Law as a schedule to the TPA and to enact changes to the investor protection provisions of the ASIC Act and the Corporations Act as recommended on page 10 is wrong because the approach will continue the extension of an outdated legislative muddle inherently based on wrong legal and economic assumptions. Those of us who avoid lawyers and who think the average financial adviser may be a shark playing with other people's money to maximise their own economic interests while ripping off those most likely to be vulnerable whenever this seems a good idea, will have absolutely no reason to change their opinions, as far as I can see. For example, nothing about the title of this paper makes me hate Treasury officials any less for refusing to reply to emails which request a copy of their paper because it is too expensive to download and nobody could comment fully and effectively on something so long without downloading it. One assumes they think they work for rich lawyers and not the Australian community. (Christ Almighty! I do this work for free! I shouldn't have to pay to download as well.)

End all outdated distinctions between economic and social regulation

The regulatory approach found in the TPA is reflected in a recent Productivity Commission (PC) paper which distinguishes between economic and social regulations. According to the PC, economic regulations (like the TPA) 'intervene directly in market decisions such as pricing, competition, market entry or exit'. Social regulations 'protect public interests such as health, safety, the environment and social cohesion.' (PC 2008, p.5). Such a distinction between economic and social regulation is wrong, because economic activity is undertaken ultimately with the social aim of supporting life and its associations. Like the TPA, the distinction reflects the outdated assumption that competition is always for money and that the greatest number of market players provides the ideal conditions for the contest, which can only do everybody good. In this paradigm, the consumer may be conceived as being like any other kind of trader or ignored. In the TPA, the consumer is treated in a comparatively recent addition to the act. This does little or nothing to rectify the wrong and outdated central assumptions on which the TPA rests.

Hilmer recognised the currently ruling distinction between economic and social regulation was conceptually unacceptable when he gave his definition of competition, which does not assume that it can only ever be for money. He also pointed out that the earlier Australian legislation related to competition followed the US Sherman Antitrust Act of 1890 (1993, p.8). This stated that all 'unfair' business 'monopolizations' and 'combinations' are against the consumer and related national interest. In 'American Capitalism, The Concept of Countervailing Power', JK Galbraith pointed out that, 'To suppose that there are grounds for antitrust prosecution whenever three, four or a half a dozen firms dominate a market is to suppose that the very fabric of American capitalism is illegal' (1952, p.68). He also pointed out that this has never discouraged the briefless lawyer.

Drucker later pointed out that the four greatest growth sectors during the 20th century were government, health care, education and leisure. He indicated that none of these sectors operate according to traditional notions of supply and demand, which were established when manufacturing was the main engine of economic growth. During the last two decades in Australia, there has also been spectacular growth in financial services such as banking, insurance and superannuation, which need to be properly managed but cannot be because of all the outdated law which surrounds them and makes transparency impossible.

Economists are apt to forget their normal assumptions if driven by lawyers. For example, the received economic wisdom since Adam Smith is that the perfect market depends on perfect information. Under these ideal circumstances, market trading is a perfect win/win situation. Economic inequality and market fluctuations are mere speed bumps on the road to the perfect information and perfect markets of the longer run. However, the earlier assumptions, language and operations of financial traders and their lawyers is less benign than the later language of economists and is still based primarily on the feudal images of speculative battle or gaming which is legitimated in law by many secrecy requirements. The result of such legal operations is that the US is now a failing economy. Nobody understands the current state of its market operations because so many speculative and complex deals have been undertaken in secret, legitimated by law. The financial crisis is actually the result of market capture by financial service providers who have either provided no information or only incomprehensible, unreliable or misleading information to consumers. This was all considered perfectly legally acceptable until the economy failed. The market situation is now closer to perfect ignorance than perfect knowledge.

The US has a colonial history of perceiving government as a malign interference in the otherwise benign outcomes of market operation, or as a related defender of the faith. Government is allowed to attack supposed monopolies, but not the obvious ones of lawyers and related professionals. One wonders what most Americans now think they have won as a result of this other than obscene income differentials, lower minimum wages, fewer paid holidays, inadequate health care, higher education costs, unstable employment, lost savings, huge debts, by far the highest murder rate in the OECD and family deaths and injuries from constant war.

In Australia, the article entitled 'The case for a new top tax rate' by Richard Denniss on the Australia Institute website, suggests the market is hog heaven for bankers in charge of moving others' money. Of the twelve richest men in Australia five are bankers. Allan Moss leads the pack and earned twice as much during 2006-07 as the next contender, Phil Green, who was also a banker. Sol Trujillo, the only representative in communications, is 5th from bottom of the pack. According to Denniss's computations, if Allan Moss had had to pay extra tax to the tune of a 50% tax rate on income over \$1 million on his yearly income in 2006-07 of \$33.90 million, the extra tax payable would have been \$1,645,000. On the other hand, according to the article, entitled 'Rudd's leadership comes cheap' (Sydney Morning Herald, 30.12.08, p. 4) the Prime Minister's salary of \$330,000 per annum falls \$30,000 short of the salary of the Governor General because her package formula is tied in part to the chief justice's salary. God knows what lawyers normally earn but one can easily see where their interests lie and their occupational monopoly rules over all others through the courts. How is it possible to have a free market when lawyers insinuate the interests of the financier into every secret turn? The market is their bauble.

The assumption that market operation will automatically produce the best social result if only government will stick to war and attempting to break up unfair monopoly is outdated, but still reflected in the division between economic and social regulation. Australian government concern has recently extended to the effects of all production and consumption on the natural environment surrounding individuals and communities. The carbon pollution reduction scheme is an example of this recognition. One now wonders whether government thinks this new scheme should be treated as

economic or social regulation. This stupid but current distinction matters, because courts are rule bound, feudal organizations and the financial and other trade related law they implement, including the TPA, may drag centuries behind the conceptual development of other social and business arenas which nevertheless have less power. (This is discussed again later.)

Australian competition ideally must be understood instead in the universal and related national light of the social aims of broader community, individual and environment protection and enhancement, which also depends upon successful economic pursuit. Consumers are product and service users and are part of many broader communities. In this international, historical context of government agreement and related national and state regulatory reform, the concept of national competition, as defined in the Hilmer report, may primarily be seen as a means of achieving the ultimate social goals of fairness, health and environment protection for all, while ideally affording all those engaged in the market with an even better means of making money. This perspective on competition contrasts with the outdated view reflected in the TPA, which normally sees unfettered competition with the main goal of making money as automatically benefiting all society. In such societies there are ideally only traders.

Follow the regulatory approach taken when state OHS acts were passed

OHS acts, which were introduced in the 1980s, are legislation which aims to protect workers, and also workplace visitors, industry based consumers and some clearly related communities. It appears logical to take a consistent approach to workers, consumers, communities and environments, because they all may be the bearers of risks and injuries which arise through work. As a NSW public servant from 1985-95, I was closely involved in the process which saw all state governments repeal or consolidate their earlier, partial, work safety and related legislation in new, national regulations under new state OHS acts applying to all workplaces. These new OHS acts first outlined clear duties of care, with the goal of achieving safer workplaces. Anybody can remember and use these guiding principles, with the assistance of expertly developed codes of practice which are relevant for controlling the particular risks of operation in various workplaces or communities.

To take the approach of simply adding new bits of legislation to outdated legislation will usually be best at producing only more work for lawyers. This was recognised as inadequate in regard to safety legislation during the 1980s. Few wanted to add on the key duty of care principles now found in OHS acts to the outdated, partial and contradictory prescriptive principles already found in factories, shops and industries acts, construction safety acts and associated safety legislation which had ruled since the late 19th century. It was recognised instead that in a global trading environment new OHS acts with clear guiding objects would have to be established. Old safety legislation with no objects but full of prescriptions would then need to be assessed for their relevance in the modern world and either repealed or updated and incorporated under the new OHS acts.

The new acts had the clear aim of employers and employees cooperating to provide a safe place of work, supported by regulatory guidance on how to do it, unless the specific circumstances in any particular workplace indicated that an alternative course of action would be safer. Such objects and related guidance on managing risk establishes the potential for scientific operation which may change recommended practices outlined earlier and also provide useful management data based on definitions which are clearer and more scientific. Courts, on the other hand, tend naturally to operate according to prescriptions and produce little useful management data because they use few reliable definitions and systems of categorization.

Legislated superannuation requirements may also be primarily regarded as a means to accumulate industry and national funds which ideally pay pensions aimed at effective and efficient attainment of the nationally legislated guarantee of minimum living standards, especially in old age and situations

of disability. These funds are composed of savings gathered over the individual's lifetime. However, such funds are also a potential means of assisting individuals and their related organizations not only to achieve their primary goals but also to make even more money through wise investment of the savings. In this context it is again important to note that the consumer protection provisions (Part V) of the TPA do not apply to financial services. However, the problem cannot be solved by a simple amendment to the TPA, because the legislation already rests on wrong suppositions to which constant additions, many of which are industry based, have rendered increasingly irrational. Don't let the ACCC keep extending its control as it rapaciously seeks to do.

Recognize the ACCC approach to all traders and communities is highly problematic

From any logical, post-Hilmer perspective, the idea that a legal monopoly, including those who work at the ACCC, should ensure Australian competition, appears ridiculous. For example, in 2000, the treasurer called for an inquiry into telecommunications competition regulation. His terms of reference also specified that the review should have regard to the established economic, social and environmental objectives of the Australian government. In its report, the PC (2001) stated that, 'the main way in which pay TV providers compete is via content – in the words of some participants in the inquiry 'content is king' (p. 145). This is, however, one of few references to content in the report and the consumer of TV content is largely absent from the discussion in spite of Treasurer Costello's terms of reference and the new section on consumers in the TPA. Telstra was also named as the biggest consumer of legal services in Australia (PC, 2001, p. xxv).

Nevertheless, the PC view of its own inquiry into allegations of unfair use of market power in telecommunications is summed up in its quote from the Hilmer report (1993, p. 69):

The central conundrum in addressing the problem of misuse of market power is that the problem is not well defined or apparently amenable to clear definition.... Even if particular types of conduct can be named, it does not seem possible to define them, or the circumstances in which they should be treated as objectionable, with any great precision.....Faced with this problem.....the challenge is to provide a system which can distinguish between desirable and undesirable activity while providing an acceptable level of business certainty. (2001, p. 154)

If competition is clearly defined, as Hilmer required, then the above problems may be resolved more easily, in the context of broader, historical and scientific understandings of the industry and its impact upon society, as the terms of reference also appeared to require.

In general, the development of industry and community based management approaches needs to be better understood, because the typically feudal, 'black letter' approach to law and trading appears to drive the TPA, the ACCC and in legal circles generally. Once the lawyers get their hands on things they often screw everything up from any logical or scientific perspective, but nevertheless generate increasing and unknown costs. Alternative dispute resolution processes which are not dominated by traditional legal principles, but which provide for a holistic approach to inquiry and dispute resolution, in order to provide a 'fair go all round' make much more sense. Unfortunately, however, an essentially legal approach is often taken by so-called legal reformers. For example, see the ALRC Review of Privacy Issues Paper (2006). The authors argue in chapter one, on the basis of past legal authority, that privacy cannot be defined and it is difficult to know its purpose. This may seem crazy to anyone with a dictionary and a brain. However, such definitional problems do not prevent the ALRC from presenting a huge issues paper, with hundreds of questions, presumably for other lawyers to answer. (God save us from legal reformers.)

For key examples of the difficulties related to competition, consumer policy and the incapacity of ACCC legal practice, one may also turn to recent development in the health, education and

communications industries and to competing notions of 'access'. The term **access** has a long history of use in studies of health, education and other community services, where it also refers to the patients, students and clients as consumers. However, the ACCC, from its great height, is now dangerously undermining such perspectives.

In its report on telecommunications competition regulation, the PC (2001, p. 40) followed the TPA approach in defining 'access' in relation to services providers in the market, rather than in relation to the ultimate program content consumers in the community. It stated that an **access regime** is:

'a set of regulatory arrangements governing the rules by which one party is obliged to provide its services to other parties, even if it does not wish to do so'.

The report also states access arrangements are governed by Part XIC of the Trade Practices Act (TPA). In its analysis of new television licences, the ACCC (2006) stated that **access** is now defined in a new section 118A of the Radiocommunications Act to mean:

'**Access** to services that enable or facilitate the transmission of one or more content services under the license, where **access** is provided for the purpose of enabling one or more content service providers to provide one or more content services.'

Those of us brought up on dictionaries rather than legal interpretations may find it strange to see a word (**access**) now defined by the repeated use of the word itself. One also wonders what the concept of a 'content service' is expected to mean and how it relates to health, education and other community services. Lawyers appear to make up rubbish as they go along and do not recognize ANZSIC. The latter may be far from perfect but it appears to be a sensible industry classification system which does not deserve to be ignored by those most powerful social forces which mainly represent their own driving feudal interests. The Radiocommunications Act (1992) was also a comparatively useful piece of legislation until the ACCC began to get hold of it. For example, it has aims which should have focused all minds much more effectively than was the case on TV educational and entertainment content, in order to meet the Treasurer's terms of reference in the telecommunications inquiry discussed earlier. The Radiocommunications Act first seeks management of the radiofrequency spectrum to:

- Maximise, by ensuring the efficient allocation and use of the spectrum, the overall public benefit derived from using the radiofrequency spectrum
- make adequate provision of the spectrum for use by agencies involved in the defence or national security of Australia, law enforcement, the provision of emergency services, or for use by other public or community services

In spite of the declarations that the consumer is king in the communications industry, neither the PC, the ACCC nor any others inquiring into new television broadcasting licenses appeared much interested in the nature of the TV content that ordinary people may want to watch. This seems a short sighted and expensive approach to obtaining the national interest or to effective competition, to say the least. It implies, for example, that TV has little potential for assisting skills development for generally greener and more sustainable development. All the concerns outlined above are also addressed in the attached submissions which also provide ways forward.

Thank you for the opportunity to make the current submission. It would be good to see treasury accept the need for more open, joined-up government which adheres to scientific rather than feudal principles. As an institution it currently leaves much to be desired.

Yours truly, Carol O'Donnell

A HEALTHIER APPROACH TO JUSTICE AND ENVIRONMENT DEVELOPMENT IN AUSTRALIAN COMMUNITIES AND BEYOND

Abstract

This article shows that health and related environment development are at the centre of a new international governance paradigm which also raises risk management to new importance. Implementation of this paradigm requires broad administrative reform in Australia and beyond to meet the evidentiary requirements of scientific and quality management. Recommendations for the development of alternative dispute resolution systems (ADR) are made in this context. Supporting education and research into the comparative role and effectiveness of ADR and courts are also required.

Changing international and Australian perspectives on governance

The first principle of the United Nations Rio Declaration on Environment adopted in 1992 is that human beings are at the centre of concern for sustainable development and are entitled to a healthy and productive life in harmony with nature. At the 1994 Asia Pacific Economic Cooperation (APEC) summit, national leaders agreed to create an Asia-Pacific free trade zone by 2020, and supported protection of health and the natural environment. APEC members have diverse political regimes including those of Australia, China, Japan, Indonesia and the US. Governments based on the British model have traditionally separated three principle governance powers, as in the Australian Constitution. Elected politicians, government administrators, and the judiciary are central and independent governance pillars in this model (Commonwealth of Australia 1995). In a more recent governance model, the emphasis is primarily on the necessity for clear separation of policy and administration, with the former driving competitive, transparent, service provision (Rich 1989; Hilmer 1993; Osborne and Gaebler 1993) to achieve health and sustainable development. In this management model, prosecution and dispute resolution are conceptualised as services which should provide data to assist injury prevention, rehabilitation and the future direction of sustainable development. Open, broad accountability is seen as the best guarantee of independent action in the public interest.

This emerging view regarding the appropriate roles of government and the market has developed as governments, including in Australia, have adopted the World Health Organization (WHO) holistic perspective on health as a state of complete physical, mental and social wellbeing, and not merely the absence of disease or infirmity. This requires much broader and better-coordinated management approaches than the earlier, medical model, which focused on treating an ailing body. In 1981, Australia committed to implementation of WHO health promotion goals in which consultation and equitable access to health were also agreed as fundamental community rights. In 1983 the Commonwealth government introduced the Medicare system of nationally guaranteed, taxpayer funded health care. In 1986, national health promotion plans were established on the basis of identification of the major causes of death and hospitalisation and the establishment of strategies for controlling related risks. (Department of Community Services and Health 1994).

Australian state occupational health and safety (OHS) acts were also introduced during the 1980s to replace earlier, prescriptive approaches in which law often had no clear objects, but was supposed to be followed to the letter. Under state OHS acts all employers are now required to provide safe places of work as far as reasonably practicable. Employees must work safely, and sellers to the workplace are expected to provide safe products. Employers are required to undertake risk identification and control in consultation with workers who are provided with information and training (Industry Commission 1995). In NSW, which has a third of the Australian population, the WorkCover Authority administers the OHS act and the workers compensation act. WorkCover inspectors, trade union representatives and others may be approved to undertake workplace investigations and prosecutions. The insurance fund is administered by twelve insurers which collect premium, administer claims and undertake data gathering and fund investment on behalf of government and industry, which owns and therefore underwrites the fund. This structure seeks to meet the need for effective, data driven management in support of injury prevention, rehabilitation and economic stability (Industry Commission 1994).

In 1986, the WHO Ottawa Charter stated that supports for health include peace, shelter, food, income, a sustainable economic system, sustainable resources, social justice and equity. Australian governments and industries are working on this kind of broad and better-coordinated management approach to promoting health and sustainable development. In 1990 the Australian Council of Australian Governments (COAG) began review of legislation to develop national standards for health and environment protection, including related occupations and training, disability services, social security benefits and labour market programs (Premiers and Chief Ministers 1991). In 1995, following the Hilmer Report, the Competition Policy Reform Act was passed. This requires government and private sector service providers to compete on equal terms, unless another course of action appears to be in the public interest (Fels 1996). Professor Hilmer has now become Vice Chancellor at the University of NSW.

In 1994 the UN defined community-based rehabilitation as:

A strategy within community development for the rehabilitation (CBR), equalization of opportunities and social integration of all people with disabilities. CBR is implemented through the combined efforts of disabled people themselves, their families and communities, and the appropriate health, education, vocational and social services (UN Social Development Division 2001: 1).

In 2000, Australia began a coordinated health and disability management process with the development of regional health plans based on population profiles, including socio-economic indicators and a focus on the needs of the aged (NSW Health 2000). This is the national health service context in which all related service provision, including for crime prevention may now be conceptualised. Australian governments recognize that reducing the supply of motivated offenders requires reduction in the general level of community stress. In NSW, coordinated place management, community housing and crime prevention

strategies are being implemented to achieve this (Standing Committee on Law and Justice 1998 2002).

Strang and Braithwaite (2001) have argued that the way the legal system punishes apparent breaches of the law seldom leads to outcomes that aid rehabilitation of offenders and is more likely to result in social exclusion and development of subcultures beyond the reach of moral education. They and others have called for restorative justice approaches to conflict between individuals or within communities. The UN has defined restorative justice as any process in which victims, offenders and other stakeholders participate actively in the resolution of matters arising from crime, often with the help of a fair and impartial third party. The recent NSW Young Offenders Act seeks to facilitate a less adversarial, community based approach to justice by providing for an integrated, hierarchical scheme of police warnings, cautions and youth justice conferences designed to divert offenders from formal court processes for certain offences. Circle sentencing is also being introduced in Aboriginal communities. Suitably coordinated management approaches ought, apparently, to be designed to assist prevention of injury to workers, consumers, community members and their natural environments. However, current cultural assumptions about justice and the related design and practices of courts frustrate the achievement of data driven management to achieve community health and sustainable development.

Central concepts related to the legal idea of justice

A recent federal civil justice system strategy paper (Attorney General's Dept. 2003) stated many people speak of 'justice' as being about what in their view is fair – what is 'right' as distinct from what is 'wrong'. When the public speak of 'access to justice' they usually proceed from the conception of the legal system as a service provider, addressing their particular grievance, vindicating their rights and achieving their desired outcomes. However, access to justice can only ever mean relatively equitable access to the legal process. The concept of the divine authority of the monarch appears to live on in the modern Australian state, in subordination to its Constitution, which all must follow. As Chief Justice Griffith noted:

'judicial power' as used in sec. 71 of the Constitution means the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property.' (Attorney General's Dept. 2003: 150)

This appears to entail a prescientific cultural assumption that the attainment of a social purpose higher than self interest (justice) can be equated with an institution (the court) which supposedly delivers it automatically, by subordinating all scientifically derived evidence to an adversarial process ultimately driven by the word of a supreme authority.

According to Popper (1972), science aims to be objectively grounded in the outcomes of experiment and test. Although honesty is not a scientific concept, all science depends upon it. Honesty is similarly related to the concept of truth. However, recent papers on the

review of the Uniform Evidence Acts (Australian Government/Australian Law Reform Commission (AG/ALRC2004 and AG/ALRC 2005) discuss the unfamiliar concept of 'probative value' instead. This means something akin to 'likelihood of truth'. However the meaning is unclear. This appears to be partly because the pursuit of client interest is defined as the paramount legal aim, which is normally carried out according to the particular letter of the particular law and according to particular rules of evidence. In comparison, any scientific search for truth must take a backseat. Privilege is also a central legal concept used to justify the denial of information, which is considered to outweigh the alternative benefit of having all information available to facilitate the trial process. The central assumption of the legal profession, apparently, is that the lawyer should rightfully conceal or mould what his client knows is true, in order to maximise his interest in revenge or escape from any guilty judgment and its results.

The search for truth is therefore not the primary object of legal practice. This is contrary to the expectations of any scientific or problem solving approach, including scientific or quality management approaches to provision of health related care which are discussed later. One issues paper indicates that some judges have supported the privilege against self-incrimination as exercisable on the grounds of 'human rights which protect personal freedom, privacy and human dignity' (AG/ALRC 2004, 174) and the extension of such privileges to defactos, as well as spouses, is now being recommended. From a later, scientific perspective, the concept of human rights must be essentially linked to the concept of the truth about real world conditions, if anyone is to find justice. The representative of the Law Council of Australia stated that:

In considering evidential (sic.) rules a fundamental distinction needs to be drawn between civil and criminal proceedings. Whilst civil process is ultimately concerned to provide a forum for the settlement of disputation between citizens, criminal process involves accusations by the state against citizens for the purpose of punishment (AG/ALRC 2005: 61).

Within democracies, and from a scientific perspective, much statute law is now ideally seen as the required community standard, consultatively made by elected representatives, which all relevant citizens are expected to uphold. For example, state OHS acts are examples of civil laws which describe the generally expected standards and related practices for health and safety at work. In spite of championing legal predictability, Australian lawyers appear unable to accept any scientific approach to evidence which might treat civil and criminal jurisdictions more consistently in order to improve injury prevention and rehabilitation across the board, through more effective risk management and related treatment. How firmly are they bound by their profession or related law?

Some shortcomings of the legal paradigm

Between 1973 and 1989, ten inquiries concluded that the adversarial court system is detrimental to rehabilitation of injured workers (NSW WorkCover Review Committee 1989). There were five insurance company insolvencies in the mid eighties in NSW, when over forty insurance companies were underwriting workers' compensation. Competition on

premium price led to pricing wars and to insurer reserves running low at a time when courts were making increasing lump sum payments (NSW Government 1986). This led NSW and other state governments to introduce the current managed fund structure. Many Australian inquiries have gathered evidence that the traditional court process hinders rehabilitation, injury prevention and supporting service management. This is partly because courts and related institutions do not keep any appropriate data to assist injury prevention, rehabilitation, cost containment or general economic stability. (National Committee of Inquiry 1974; NSW Government 1986; NSW WorkCover Review Committee 1989; House of Representatives Standing Committee on Transport, Communications and Infrastructure 1992; Review of Professional Indemnity Arrangements for Health Care Professionals 1995; Standing Committee on Law and Justice 1997; Heads of Workers Compensation Authorities, 1997; Industry Commission 1997; Grellman 1997; Senate Economic References Committee 2002; The HIH Royal Commission 2003).

For example, the Senate Review of Public Liability and Professional Indemnity Insurance (2002) noted that absence of a national aggregated database of health care litigation claims made it impossible to identify where the real risks are, whether they are changing and which size claims are increasing most. It found litigation may be driven by legal advertising and no win no fee arrangements. Costs were also increased by lack of penalties for pursuing unmeritorious claims and the expectation that the insurer will settle on the assumption that courts will take a sympathetic attitude towards a victim. Insurers estimated that legal costs in personal injury cases amounted to 40% to 50% of the total costs. But nobody had any reliable data. The committee concluded that the court system provides economic incentives to litigate, without providing supports for effective rehabilitation or future management.

The National Expert Advisory Group on Safety and Quality in Australian Health Care (1999) advised health ministers to support national actions for safety and quality related to strengthening the consumer voice and learning from incidents, adverse events and complaints. From this perspective, dispute resolution should logically be managed as a service, like health or education provision, which aims to improve community health and related social or environmental outcomes. Risk management may be defined as a way of achieving continuous improvement in production and its outcomes. It is a logical and systematic method of identifying, analysis, treating, monitoring and communicating risks associated with any activity, function or process in a way which will enable organizations to minimise losses and maximise opportunities. It begins with the establishment of the strategic, organisational and risk management context in which action will occur. The next step is to identify and analyse risks in order to assess, prioritise and treat them. The final step is to monitor and review performance (AS/NZS 4360 – 1999).

Australian standards and codes of practice support state OHS legislation and assist risk management. People are expected to apply relevant codes at work unless the evidence is that another course of action is preferable for health reasons in the specific situation under consideration. This approach provides the legislative context for a generally more independent and informed approach to work, which can be compared with the scientific, evidence based approach, required of health workers. For example, a health worker is ideally expected to identify a client's problem and to apply treatment after consultation and

consideration of the relevant body of scientific evidence or related expert protocols. However, the treatment may vary as far as this appears to be necessary to meet the specific health needs of a specific individual or situation. The reasons for any deviation from the generally expected expert practice should be documented (Johnson 1997). Ideally, all such information can contribute to research aimed at improving the overall outcomes for particular communities and individuals, in the light of the study of a broad range of specifically grouped environments, concerns, treatments and outcomes.

Lawyers usually bill for work on the basis of how many hours it supposedly took to do. However, there is little or no systematic information in the latest Senate report on legal aid, or in earlier major reports on access to justice, about the social problems which are dealt with by the courts. This lack of comparative information about types of dispute, their treatment, and their outcomes is typical of legal practice and can be unfavourably compared with the situation in health care. The health practitioner gathers evidence of apparent problems, records a diagnosis and implements a recommended treatment. Ideally this is applied with variations the practitioner considers necessary in the light of relevant evidence about the particular case or situation. The Legal Fees Review Panel (2004) discussed task-based legal billing favourably. This is defined as reporting the cost of legal services by tasks, using billable codes to describe them. Ideally, the lawyer provides a budget in advance of performing work and may not exceed the budget without prior agreement. This form of billing appears to be more consistent with Medicare expectations and with the Casemix (diagnostically related group) funding model that ideally plays a vital part of the identification of quality and value in health service provision. Duckett (1997) found the Australian Medicare system outperformed U.S. private health care performance on service access, equity and cost, but not quality. He later called for a more effectively integrated and data driven approach to be taken to all community services (Duckett 2004).

Define ADR in context and identify related stakeholder relationships appropriately

The hypothesis is that all communities need non-adversarial dispute resolution methods aimed primarily at harm prevention, with punishment and rehabilitation conceptualised in this context. After consultation, the National Alternative Dispute Resolution Advisory Council (NADRAC 2004) advised the Commonwealth Attorney General to review potential models for a national mediator accreditation system. It defined ADR as a process, other than judicial determination, in which an impartial person (an ADR practitioner) assists those in dispute to resolve the issues between them. It called ADR processes facilitative, advisory, determinative or, in some cases, a combination of all three. Mediation was defined as facilitative, because the practitioner assists the parties to identify the disputed issues, develop options, consider alternatives and try to reach an agreement about some issues or the whole dispute. Conciliation was called an advisory process in which the conciliator is a neutral third party who considers and appraises the dispute. Expert assistance may be sought in regard to apparent facts of the dispute, the law, possible or desirable outcomes and how these may be achieved. Arbitration, expert determination and private judging are provided as examples of determinative ADR processes (NADRAC 2001).

Mediation, conciliation and arbitration may be seen as ascending steps in an approved practitioner's degree of power to judge matters and people, on the basis of all apparently relevant evidence gathered about the major issues of concern to the key stakeholders and others. However, distinctions between mediation, conciliation and arbitration are not consistently made in Australian legislation. In the court, on the other hand, opposing lawyers drive the collection and consideration of all evidence about a matter strictly, according to fixed legal and adversarial principles, presided over by a comparatively passive judge. This is normally expected to occur in isolation from knowledge of earlier or related attempts at conflict resolution, thereby wasting time and money. The court appears to equate such comparative ignorance with lack of bias, which may seem strange to some.

In order to develop effective ADR training or accreditation, the key stakeholders in the most clearly relevant communities must be consulted first. Their members enter into dispute, and therefore are those most likely to be prepared to pay for any supporting process of dispute resolution, related training or accreditation. ADR practitioners may be broadly conceptualised as those who the key stakeholders in a relevant industry or community environment entrust to undertake an informed and effective search for evidence, in order to resolve disputes and record outcomes, so as to prevent environmental problems, of which future disputes may be symptomatic. In ADR, a range of independent advisors or umpires may be approved to assist the parties in dispute. They may gather evidence or advise on expert assistance to determine the answer to a problem from a perspective which is broadly consultative, evidence-based and appropriately balanced, in the light of all relevant legislation and related conditions in a specific situation. Many people, including government health, safety and environmental inspectors may currently act in similar, arbitration-style roles, as well as taking prosecutions. The legitimacy of judgments seems likely to be strengthened when those judging are empowered by more immediate communities, as well as by government, which may be seen by some as remote or threatening to the individual interest.

From the above perspective, the ADR practitioner's qualifications for the role should primarily reflect the knowledge requirements of the general community and the stakeholders in the environment most relevant to resolution of the question in dispute. For example, construction appears likely to be the best training ground for all ADR practitioners working in the construction industry, but good analytical, verbal and written communication ability is a vital part of the role as well as industry and related technical knowledge. If this is so, then industry and community key stakeholders should identify, train and/or approve a range of ADR practitioners who may or may not have other relevant qualifications. Such issues require further consideration and research. Essential differences between the ideal aims and practices of courts and lawyers, in comparison to those of ADR practitioners, should also be conceptualised in this context, before comparing the apparent value of their outcomes.

The Australian Council for Safety and Quality in Health Care (2002) has developed a standard on open disclosure when things go wrong with treatment. This challenges the automatic legal assumption that health workers should keep quiet about mistakes in case they incriminate themselves. The National Health and Medical Research Council will become a statutory authority in 2006. This appears to require cooperative adaptation of

collegiate goals and structures to achieve national health goals through the application of commercial disciplines unless another course of action is clearly and openly dictated. State legal and related professional and academic administrative requirements currently frustrate quality management for care improvements in many health services and related areas. (Review of Professional Indemnity Arrangements for Health Care Professions 1995; Australian Health Ministers' Advisory Council 1996; National Expert Advisory Group on Safety and Quality in Australian Health Care 1999; Review of Higher Education Financing and Policy 1997; Senate Employment, Workplace Relations, Small Business and Education References Committee 2001; Productivity Commission 2005.) The development of effective ADR processes and related education may assist resolution of these problems. However, even though clear separation of policy and administration is increasingly recognized as necessary to judge comparative outcomes of competing service provision effectively, state freedom of information legislation currently relates only to the public sector, and medico-legal information is exempt. This inhibits identification of effective services as well as ADR, and tilts the playing field further towards courts. It appears that a great deal of dysfunctional regulation currently prevents a more consultative, open and scientific approaches to achieving all service improvement.

Identify and justify the appropriate roles of courts and all related ADR

Tribunals and related forms of ADR have been set up since a British colony was established in Australia. Conciliation and arbitration acts and commissions established at the turn of the 20th century have been, perhaps, the most characteristically Australian outcome of a rejection of the traditional British adversarial approach. These presided over development of awards and agreements which outline the expected treatment of groups of people at work, rather than dealing with disputing individuals. The former vice chancellor of the University of NSW recommended appropriate tribunal integration (Niland 1989) but it is not achieved so far. The aim of ADR practitioners, apparently in contrast to that of courts, should be broadly scientific and consistent with quality management. In practice, many existing forms of ADR have their origins in courts. Operations may also be influenced by legal powers.

For example, the NSW workers' compensation commission is an independent tribunal set up in 2002 to resolve workers' compensation disputes. The compensation court closed in 2003. Arbitrators may exercise mediation and conciliation skills to settle disputes. An arbitrator works with the parties in conference-style meetings, by telephone and in person to assist them to resolve issues, or makes a determination where this is not possible. During 2003 the Commission expanded its access to approved medical specialists so that it now has 200, compared with 91 arbitrators (WorkCover 2004). They are approved by relevant government and industry representatives to make independent judgments about disability and related matters, rather than being attached by their remuneration to the expectations of opposing lawyers or the courts. The ADR process ideally enhances the scientific objectivity of all potential judgments and reduces the costs of adversarialism. However, the President of the Workers Compensation Commission pointed out that stakeholders such as lawyers, are used to the traditional courtroom approach, and require education. (WorkCover, 2004).

ADR may also be under the control of courts. For example, the Family Court has recently commenced a new children's cases program which has adopted parenting plans and a more permissive application of the legal rules of evidence (House of Representatives Standing Committee on Family and Community Affairs 2003). The most consistent finding of research into legally driven mediation is high client satisfaction, although general public awareness of mediation appears limited and uptake of voluntary mediation is low (Mack, 2003). The evidence from other jurisdictions suggests the comparatively greater efficacy of ADR processes in comparison with those of courts (Grabosky and Braithwaite 1993; Fisse and Braithwaite 1993; Strang and Braithwaite 2001; Braithwaite 2002).

Better designed, more open administrative systems and related research are necessary in order to identify those treatments and services which are apparently most effective. The relationship between courts and ADR systems should logically relate to this. Human rights may be better conceptualised in a flexible, health related light rather than through the normal court process based on the adversarial tradition. From the health and sustainable development perspective, the information on particular complaints and their resolution should provide data to help solve many related problems. For this to occur, the parties in dispute must have confidence that their concerns will be fully appreciated and treated in an unbiased fashion. Those in dispute should be able to bring someone to speak on their behalf and all people who have something to say about a matter should normally be heard. Representatives of the relevant industry or community key stakeholders may act alone as ADR practitioners, or act on ADR panels, to assist resolution or make determinations.

Education and research the comparative outcomes of all forms of dispute resolution

In Australia most post-secondary education occurs in universities which are self-accrediting institutions, or in technical and further education (TAFE) colleges. Both are public institutions but universities are a Commonwealth funding responsibility and state governments are responsible for TAFE. The National Expert Advisory Group on Safety and Quality in Australian Health Care (1999) called for a national effort to improve education of health care providers and advised that curricula for continuous quality improvement should be included in all undergraduate, postgraduate and continuing education. It is hypothesised that all dispute resolution services, like education or training, should be vocationally based, according to a broad understanding of the requirements of the industrial or other community context for which it is primarily required. This is the assumption, which has traditionally been made, for example, in state government selection of occupational health and safety inspectors. In settling workplace disputes, with or without the aid of independent experts, inspectors may be seen as conciliators or arbitrators, under another name. More flexible and effectively coordinated education provision and related research should now be promoted by key industry and community stakeholders. This may be undertaken through regional networks of inquiry-based learning at work and in communities. This should also facilitate a consultative approach to implementation of relevant health and environmental standards, and to the identification of those practices and programs which appear most necessary to improve quality of life for communities and individuals.

The effectiveness of all relevant scientific, legal and related paradigms for evidence gathering, analysis, judgment and recording require continuing, systematic analysis, in order to determine their comparative power to meet the needs of communities and their key stakeholders. Independence may be conceptualised in this context as the responsibility to make informed decisions, which can withstand public interest based scrutiny from any quarter. This emphasis on transparency is also consistent with existing academic rights to freedom of speech and related academic duties to become increasingly informed from an appropriately scientific perspective. It is hypothesised that key stakeholders in industry and other relevant communities should approve ADR providers. Ideally, this should lead to more sustainable development as a result of more data driven and health social practices and outcomes. Such hypotheses require testing through comparative research. The Health and Medical Research Strategic Review (1997) suggested that Australia should develop a focus on the prioritised creation and assessment of interventions and policy. Adopting WHO definitions it indicated that the national research effort should take three forms. Fundamental research should generate knowledge about problems of scientific significance. Strategic research should generate knowledge about specific health needs and problems. Research for development and evaluation should create and assess products, interventions and instruments of policy which seek to improve upon existing options.

In this context, the establishment of ADR systems and the comparative identification of their outcomes is a type of action research, which is also consistent with the views of Popper (1972) that all administration should be regarded as experiment. Action research is a problem focused activity proceeding in a spiral of steps, composed of planning, action and evaluation of the results of action. Community education, consultation, monitoring and outcome evaluation are also centrally necessary in action research. Ideally, it is seen as a collective, emancipatory practice for the community involved. In order to understand and change social practices, social scientists have to include relevant community based practitioners in all phases of inquiry (Kemmis and McTaggart 1990; Hart and Bond 1995). The need for community involvement in all health policy development and administration has long been acknowledged in national health service goals (Commonwealth Department of Community Services and Health 1994), if not in all professional or bureaucratic practice. The attainment of community wellbeing is also closely related to the achievement of national mental health and Aboriginal health goals. The establishment and trial of ADR models is hypothesised to be a comparatively effective process for assisting achievement of all these related aims.

Conclusion

The appropriate relationships between courts and ADR need to be reconceptualized in the light of new international governance requirements and related developments in Australia. Community demands for health and justice need to be met and delivered through appropriately designed and coordinated services which produce data to promote health and sustainable development. In order to develop effective prosecution or other dispute resolution procedures and supporting training or accreditation systems, the major dispute resolution needs must first be identified by the key stakeholders in Australian industry and community context. This must also be done in the context of knowledge of the laws or

related community standards which relevant groups of dispute resolution practitioners may normally be expected to uphold to achieve health and sustainable development goals. Research into the development of effective dispute resolution systems should be supported by related inquiry into how vocational education systems could be more effectively linked to each other and to the requirements of the relevant industries and communities which should support them.

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RESPONSE TO ‘A HEALTHIER FUTURE FOR ALL AUSTRALIANS’ NATIONAL HEALTH AND HOSPITALS REFORM COMMISSION (NHHRC)

Overview: The NHHRC report is shown to be a recipe for too many chiefs and not enough Indians so an alternative direction for achieving all goals better is suggested.

The key recommendations addressed below from ‘A healthier future for all Australians’, the product of the National Health and Hospitals Reform Commission (NHHRC), are mainly likely to produce new, dysfunctional, professional health service silos, because the report is clearly a product of many collegiate cultures pursuing vested interests which are either unspoken or misspoken (as our US brethren say). The problem is that for various reasons, the richest and the poorest working in health and community services refuse to recognize themselves as industrial, financial or related economic actors. The US health promotion direction that many of those in Australia appear to be following is not designed to face work or children as stressors, to obtain personal choice in death, or to flick the switch to vaudeville when necessary either. The NHHRC report is more like a prescription for professional domination of communities driven by the private sector, than the Alma-Ata direction on health promotion supported by the United Nations (UN) and Australian governments. Perhaps the NHHRC thinks their colleagues are nicer than this, especially the poor old faceless health plans with no right to refuse an individual. (Did you ever see a dream walking?)

Forgive my cynicism, but I recently saw US Treasury Secretary, Timothy Geithner, discuss the government’s pump-priming and better regulation for more profit approach to leading US financial recovery on ‘News Hour’ on SBS. The assumption, shown already to be false in Australian health care and insurance, appears to be that a return to more conservative market approaches will deliver the goal that Americans and individuals everywhere most want to see – profit return. Maybe, but this is unable to achieve the World Health Organization (WHO) or UN goals for health and sustainable development which are most in the interests of current and future generations. To achieve these one needs triple bottom line accounting, designed clearly to achieve social and environmental as well as economic goals, as indicated in previous submissions to the NHHRC. A market driven approach has delivered good health to fewer and fewer in the US, so why should it be able to deliver a better environment for all? Not even the Republicans support the Democrat plan. A better approach is necessary and from his interview on the ‘News Hour’ recently, I bet William Isaac, former Federal Deposit and Insurance Commission (FDIC) official is just the man to help. (We could do with one of those. Why do all the hopeless US economists have Nobel Prizes? Is this an example of irony?)

However, NHHRC recommendation 2.9, which calls for the development of a person-controlled electronic personal health record, is strongly supported as a necessary first step in any national, more openly evidence-based service delivery in future. In recommendation 14.5 the NHHRC also states ‘We support national registration to benefit the delivery of health care across Australia’. Here is the chance to prove it. Rather than setting up a National Clinical Education and Training Agency, as in recommendation

14.4, the NHHRC should first focus on achieving rational and open national health curricula to assist the development of health and sustainable development nationally and internationally. This can best be done through urgent pursuit of a related communication and education revolution in partnerships with industries and communities to serve all sustainable development goals and triple bottom line accounting. Consider the Australian and New Zealand Standard Industry Classification (ANZSIC) and related occupation, treatment classification and funding information in the course of implementing all relevant recommendations. This direction is also discussed in the following attachments:

- Submission to Australian Health Ministers' Advisory Council on a national registration and accreditation scheme for the health professions
- Submission to Productivity Commission inquiry into copyright restrictions on parallel importation of books

It is currently necessary for ministers to treat NHHRC calls for more money with extreme caution because the absence of effectively patient centred management in health care means the recommended expenditures are likely to support vested practitioner interests rather than client or broader community interests. For every new health management body or practice the NHHRC recommends, the ministers should ask that others of equal or more value are suggested and justified for destruction, on the grounds that they maintain comparatively narrow, closed, silo driven and dysfunctional professional or bureaucratic approaches to work, which are not in keeping with more broadly scientific national and international approaches to gaining health and sustainable development. Alternative recommendations, which are based primarily on analysis of particular NHHRC recommendations for more funding are made below and supported in two attachments which are referred to directly below. See others on the right for old people to choose death so we can donate our organs, and on a Saudi Arabian PhD proposal for dental research which also presents opportunities to provide postmenopausal women with oestrogen replacement therapy supposedly as a preventive measure for osteoporosis. Finally, we call on Broadway and claim the musical is back, especially in the army. (Sport can take care of itself. It bores me rigid.)

DISCUSSING THE REPORT AND RECOMMENDING SOMETHING BETTER

Recommendation 1: Support Rec. 2.9 of 'A healthier future for All Australians', which is the development of a person-controlled electronic personal health record

In the article entitled 'Just what the doctor ordered' in the Sydney Morning Herald (SMH, 21-22.2.09, News Review p.7) Dr Christine Bennett, Chairwoman of the NHHRC is quoted as saying that an electronic health record is arguably the single most important enabler of truly person-centred care. I agree completely because most of us are incapable of reporting reliably on what we have previously experienced and the results are multiple repeat prescriptions and tests from various circles of practitioners which is highly undesirable from any individual or community health and related economic perspective. Without the electronic health record, the recommendations of the NHHRC report appear largely to be a call for practitioners to get more money at the expense of the

national community and their clients. Without the electronic health record it will be impossible to take responsibility; connect care; identify and resolve inequities or drive quality performance, as the NHHRC states are its goals. Email provides a potentially related record of what has gone before. I would be lost without it.

The development of the electronic health record ideally enables clients, health practitioners and all related communities to focus comparatively, in more reliable ways, on apparent types and outcomes of treatment, often for the first time ever. Without this development, I predict geriatric psychiatrists and their legal and financial mates will scoop the pools, followed by other medical specialists and some dentists. I predict the others will trail behind according to their associations. (I taught the sociology of health.)

Professional knowledge, remuneration, risk aversion and related research drivers all appear more likely to ensure that the practitioner driven approach to treatment occurs rather than a patient centred approach, at least outside hospital based care. In hospitals, patients are much more likely to be acutely ill and practitioners clearly need to work together as sensibly as possible, to prevent any imminent and upsetting deaths. Their general success in this is perhaps why they are often revered by many people. (I can certainly understand the feeling.) Outside hospitals, clients often rely upon practitioners they have found themselves or have been sent to for advice on future treatment. Once such a client has contacted any health care provider, the latter may drive processes, with the interests of their closest colleagues and other associates also firmly held in view. However, few of us want to have to go to hospital in order to get decent treatment. We prefer to treat ourselves as much as possible by computer or TV. (No kidding.)

Rec. 1.7: calls for the establishment of an independent national health promotion and prevention agency.

In the light of the comparatively clear and helpful direction outlined in the Declaration of Alma-Ata at the World Health Organization (WHO) International Conference on Primary Health Care in 1978, one wonders how many of those currently working in health care understand this direction and can or want to implement it. My educated guess is few, which is supported later and in attachments. One also wonders exactly what role, if any, the ‘citizen juries’ recommended in 13.2 will play in relation to health promotion and injury prevention, and how all are related to the NHHRC discussion of raising and spending money for health services. Who is envisaged as being on juries – captains of industry, some local community voices, or others entirely? What will juries do? They sound like legal rubbish to me, rather than a more openly consultative and data driven approach to service delivery. In the current international context of financial crisis, such questions are vital, because the US, rather than the European or WHO policy direction often drives Australian health care professionals and academics. They may also have vested interests in undermining Australian government policy directions and health service efforts so that they can make more money at the expense of everybody else.

There is much self-interested professional and related academic thinking about ‘health promotion’ and ‘the determinants of health’ to be faced. For example, while the Sydney

University Act seeks free enquiry, the Sydney University website says the university seeks ‘a paramount fiduciary duty of loyalty to the University’ and ‘an atmosphere of mutual trust and respect’. The latter two may not comfortably co-exist with the unhindered search for truth, which is ideally also regarded as being the same as free inquiry. The Sydney University Act and Sydney University website also have opposing views on the importance for decision making and related accountability of the senate and the vice-chancellor (VC). In the legislation, the VC is a powerless figurehead and the senate makes all decisions. One ideally prefers the Sydney University approach, where the VC rather than the university senate appears accountable for decisions. The Senate cannot govern effectively because it represents a large collection of narrowly informed and partial collegiate interests which it is also difficult to hold accountable for decisions and their continuing outcomes. The university rests largely on groups of feudal brotherhoods with mutually supporting, powerful financial interests. (What else is new?)

I am suspicious about how Fig. 1.3, on the social determinants of health (NHHRC, 2009 p. 58) may be interpreted and driven in a narrowly and professionally defined health climate. For example, the Australian text book ‘Understanding Health, A Determinants Approach’ edited by Keleher and Murphy and published by Oxford University Press (OUP 2004) informs one that the WHO, Alma-Ata and Australian government approved definition of health as ‘a state of complete physical, mental and social wellbeing’:

‘confuses the actual state of health with what it is that determines health. It is a definition that masks the determinants by making the state of health itself the object of measurement, rather than focusing on the determinants as an object of measurement. (p, 99.)’

The authors, rather than the WHO, the Declaration of Alma-Ata, or Australian governments, seem most confused, from my perspective. The latter seeks to follow WHO, International Labor Organization (ILO) and related United Nations and Australian policy directions, to promote health and sustainable development more competitively. If academics like Keleher, Murphy and those who wrote with them are encouraging mass student and health professional rejection of the WHO and Australian government definitions of health, this is a key concern in regard to health promotion from any Australian government, industry and related community perspectives which also seek to develop partnership approaches to gaining health and sustainable development. An attack on dysfunctional professional regulation and related administration is necessary in order to gain more open and evidence based approaches to all service delivery in national, regional and international industry and community arenas. Many professionals tend to resist any attack upon their multiple closed shops, which are generated through the universities, state registration and other places. This must be discussed openly but is considered too rude, including by the NHHRC. (Try it in your next mixed tea room.)

Keleher and Murphy informed the reader earlier (p. 10) that:

‘Determinants of health are often divided into distal and proximal determinants. A proximal determinant of health is one that is proximate or near to the change in

health status. By ‘near’ one can mean near in either time or distance, but generally it refers to any determinant of health that is readily and directly associated with the change in health status. Proximal determinants are also referred to as downstream factors. In contrast, a distal determinant of health is one that is distant either in time or place from the change in health status. The association between the change in health status and the determinant may be indirect or hard to see because of other intervening events and locations. Distal determinants of health are also referred to as upstream factors.’

I have no idea what they are talking about and I have read the book. The associated Table 2.1 entitled ‘The (possible) determinants of Ama’s death’ makes little sense to me. The discussion which follows on the upstream, midstream and downstream factors (ie. ‘the determinants of health’) is confused and in my view the concept of a factor is not as strong as a determinant. This may not be trivial to anyone who hates a narrow, ignorant, authoritarian, personality. Keleher and Murphy say: (2004, p. 5)

- Downstream factors are those at micro level including treatment systems, disease management and investment in clinical research
- Midstream factors are those at the intermediate level including lifestyle, behavioural and individual prevention programs
- Upstream factors are at the macro level including government policies, global trade agreements and investment in population health research

I fail to see what makes investment in clinical research a downstream factor and investment in population health research an upstream factor. This is not explained. The patient or client also seems absent from the analysis. Their ‘health status’ appears to stand for them instead. On page 110 one is told that governments are typically more concerned with downstream and midstream approaches than with upstream approaches and that genuinely collaborative, multidisciplinary downstream, midstream and upstream actions are necessary. I have no idea what these are expected to look like, but I bet health professionals ideally see themselves as driving in all directions. (They are far from fit.)

The above is not the ideal regional, holistic, community based and client centred approach to health promotion which was ideally outlined in the Declaration of Alma-Ata and followed by Australian governments. From example, in the Declaration of Alma-Ata, primary health care ‘involves, in addition to the health sector, all related sectors and aspects of community development, in particular agriculture, animal husbandry, food, industry, education, housing, public works, communications and other sectors; and demands the coordinated efforts of all those sectors’. Keleher and Murphy’s discussion of ‘upstream and downstream’ bears no resemblance to the regional approach to health and sustainable development envisaged in the Alma-Ata direction and supported by the UN and Australian governments. The ideal approach sees all work and play as located in communities and environments from which risks and many related challenges arise. The identification and control of the major risks to health are ideally conducted in this context. There will be many environmental challenges along the way. (Baby, believe me.)

Rec. 2.2: calls upon the Commonwealth to foster the widespread establishment of Comprehensive Primary Health Care Centres.

One wonders about the proposed definition and range of primary care services which are to be included under the concept of primary health care discussed by the NHHRC, and guess that more practitioners will increasingly try to find a better way to benefit economically from the term, especially if they can remove themselves from comparative community and government scrutiny, while also driving up their costs to everybody. Services must be clearly and openly defined to prevent this and also to encourage trust. The Commonwealth Medical Benefit Schedule system and a broadly related casemix approach such as that used in hospitals may be usefully adaptable management tools for guaranteed or variable funding in a range of related community service areas.

However, there are many associated problems. For example, a recent newspaper article (SMH 27.2.09, p.5) entitled 'Scan scams: doctors with conflicts of interest reported', claims Medicare is investigating evidence that some doctors are referring patients to diagnostic centres in which they have financial interests and this also raises the risk of overexposure to radiation. US research is cited that doctors with such interests are associated with rates of referral up to seven times higher than usual. The Royal Australian and New Zealand College of Radiologists condemned 'for-profit' (sic.) referrals, saying they pose the risk of inappropriate servicing, overuse of radiology and erosion of patient choice and industry viability. The college president, Mark Khangure, told the Herald that in most states, including NSW there are groups of doctors, often medical specialists, including gastroenterologists, cardiologists and chest physicians, who have shares in diagnosing and imaging centres and refer their patients to the centres. These referrals are on the rise. Liberal senator Gary Humphries expressed concern about general over-servicing and the Minister for Health, Nicola Roxon, said it was 'obviously unacceptable' if anyone was making referrals to drive up their profits. One wonders how to prevent this practitioner behaviour. (Many are blind to their condition as workers.)

The last time I had a pap smear taken by a general practitioner, Symbion pathologists tried to charge me highly because they used a form of technology which was supposedly in advance of the approved Medicare standard to assess the smear. (Surprisingly, this information was written on the bill.) I refused to pay their amount because I was not asked whether I wanted to be treated with technology not approved under Medicare. It was impossible to speak to anybody from Symbion about this and they would not reply to letters. They just set debt collectors onto me until the latter got sick of listening to my views on Symbion undermining Medicare. The general practitioner who took the pap smear has since moved to a new practice which looks very much like the kind of Comprehensive Primary Health Care Centre the NHHRC would like to see. I went there in 2008 when I had sudden vomiting and diarrhoea which seemed like food poisoning. Another general practitioner gave me a script but said old people sometimes get diverticulitis. He gave me a container and suggested I take a stool sample for Davis Campbell de Lambert pathology and bring it to him. I thought this suggestion was utter nonsense and see the current practitioner trend to preventing illness in old people as extremely dangerous, especially in the absence of an electronic patient record.

On the other hand, a couple of years earlier I had gone to see a different general practitioner for a pap smear and she suggested I also have a cholesterol test. I agreed as I had never had one before. I received a pathology report which I hardly glanced at, until she called me back because she said I had high cholesterol and recommended I change my diet and return in six months. Because of my weight, diet and the fact that I walk everywhere and have exercised at the gym for three to four hours per week since the age of thirty, I couldn't believe I had high cholesterol and confirmed this by learning from the appropriate health website how to read the report she had misread. (Basically, there appears to be two kinds of cholesterol and I had more of the good kind, which she misread as bad.) I was very impressed by the power of the website to help consumers.

Practitioners cling to collegiate cultures. However, from a public and individual interest in achieving quality performance, connected care and many related economic and social goals, there are often far too many chiefs and not enough Indians working in health care and its related collegiate systems and silos. In the most prestigious collegiate cultures, where ideally all are equal, it has historically been assumed that each in the medical club has his own area of particular expertise, as accredited by similarly expert colleagues, such that hardly anybody outside his narrow field, except a court, can ever question him about his practice or ever tell him what to do. (This is a laugh, as all courts are feudally driven.)

Such sets of professional assumptions have been undermined on one hand and supported on the other by the 20th century increase in the range of taxpayer funded health care and related forms of education. In the 21st century, such professional assumptions may make the comparatively new concept of multi-disciplinary teams look like a heavenly new status to all those working in health care who have ever wished they were, or at least appeared to be, as important, well remunerated and independent in their actions as a medical specialist, or even a general practitioner. Thus the client may be metaphorically cut up into smaller and smaller bits, which an increasing range of self-defined specialists may focus on to get ahead in increasing intensity and isolation from each other. A person who knows more and more about less and less is one definition of an expert. My dentist and I resist this view and he has promised never to try to send me to his special gum man.

In keeping with their feudal and related collegiate origins, writers of the (NHHRC) report are little different to most of their professional and related academic colleagues in largely refusing to recognize that according to nearly all economists, all people are driven by their search for money. Even if economists are wrong in their assumptions, health care practitioners still remain supported by their work and by related investments in an industry in which the treatments provided are usually paid for by a much broader community than their immediate clients. The wider communities and the sick people in them are also subject to the problems of much dysfunctional industry regulation driven by occupational and related career and employment interests on one hand and by commercial in confidence, market driven investment systems on the other. This is an extremely dangerous combination in terms of its capacity to provide primarily for well-connected practitioners, rather than for their patients or communities. This may increasingly be done from a public purse prized open with very little unseemly effort.

Rec. 2.6: calls for Divisions of Primary Health Care to replace existing Divisions of General Practice.

How could this be successful without bucket loads of money and what exactly would be the point? (I assume the divisions primarily are separate sites for practitioner education leading to higher practitioner payment.)

Rec. 6.12: includes capacity for electronic prescribing by medical practitioners attending aged care homes and provides financial incentives for electronic transfer of clinical data between services and settings such as general practitioners, hospitals and aged care providers, subject to patient consent.

In my view, these transfers of clinical data between services are ideally expected by government as a natural part of all services provided and enabled by the personal electronic record. Other ways of payment seem expensively dysfunctional from a bureaucratic or scientific perspective. The concept of advanced care plans, discussed in Figure 7.4 (p. 188) (which is a discussion and not a figure) perhaps reflects the worst of all worlds to come, in that some old people may fear that their carers can suddenly become their registered killers, while others may not have a clue what is meant by statements they are supposed to have made, such as ‘that all possible measures be taken to exclude any reversible cause of the health crisis..... and that her preference would be to return to the nursing home to be cared for by her ‘second family’. (Search me).

A Catholic medical ethicist alerted me to such fearful problems, which I discuss along with organ donation in the attached. If some of us oldies eventually wish to kill ourselves to donate our bodies, as I do, this may be an exceptionally good thing for society and the environment. The view may not be popular with Christians, but may suit some other tastes which surely deserve recognition, and which may appear even more advanced. (Like soldiers, we are ideally applauded by all for freely choosing our inevitable death.)

Rec. 8.4: proposes the establishment of a National Aboriginal and Torres Strait Islander Health Authority to purchase services specifically for Aboriginal and Torres Strait Islander Australians.

From a scientific perspective a National Aboriginal and Torres Strait Islander Health Authority like the above is a bad idea because there is no reliable definition of belonging to these groups. The NHHRC comparison of indigenous people with veterans is misguided because in the veterans’ case they are known by army records, but indigenous heritage cannot be reliably verified. People should not normally be given special economic incentives to define themselves as indigenous, especially if this gives power to certain of their peers to verify or negate that self definition on grounds which cannot be effectively validated. It may generate resentment and discord wherever benefits are available only to some in any community, because most adults are taxed to pay for it.

Indigenous people are part of broader communities and probably vary a lot in their individual attitudes and behaviour, much like anybody else. However, as Eddie Cantor pointed out a long while ago, the rich get richer while the poor get children. The NHHRC report will not squarely face the problems for many unplanned siblings who cannot be cared for to an expected community standard. The writers point out that:

In many remote areas, high birth rates present the system with an immediate challenge as to how best to support children to be productive and healthy adults, and to give the children soon to be born the best start in life (p. 226).

The most obvious answer to that challenge, from the national public interest based, scientific, and related systemic, community or personal level, is for some women to have fewer children, especially those which have not been previously planned. Perhaps only the Chinese are allowed to point out this bit of the bleeding obvious, because on page 207, a table on ‘the indigenous burden and health gaps’, establishes eleven risk factors for indigenous community health, without mentioning the related number of children a woman and her community are responsible for bringing to adequate adulthood. Women of European and other middle class backgrounds accept that children are a great time and economic burden as well as an emotional comfort and historically have fought for and practiced birth control rigorously. It is paternalistic, career based indifference posing as tolerance, to pretend the necessity for this rigorous practice does not exist for all women and communities who want to be comparatively healthy and wealthy. Peter Costello might want three children but I bet his wife makes the ultimate considered decisions on such issues in the family interest as she sees it. He worked hard as economic provider. Policy concerns about growing populations as a result of migration are a separate issue.

In most cases, once children are born and immunized, the prevention of sickness and tooth loss throughout the life span often lies in implementing relatively straightforward messages which we may all ignore and probably often do at any age. These are:

1. Eat a healthy diet
2. Exercise regularly
3. Don't smoke
4. Don't drink or take other mind altering substances to excess
5. Avoid pregnancies and other high risk situations related to sex
6. Only undertake relatively safe and preferably interesting work (This may be hard)
7. Only undertake relatively safe entertainment (Males may find this particularly boring and one can only learn mastery of an environment through facing its risks)
8. Try to learn to recognize and deal sensibly with personal stressors (This is hard.)
9. Brush teeth properly and much more often than currently

The above list is mainly a more forceful statement of the ten major public health concerns in the US (p. 66). That list, like the eleven risk factors related to indigenous health discussed earlier, is designed to ignore mention of work. I guess this must be the free market approach where we, the approved professionals, will do things for you, the client, preferably using other peoples' money. This ignores the centrality for individual and

community health of industry and its financial operations. In regard to the US list of health concerns one wonders what the 'responsible sexual behaviour' that is requested should look like and how it relates to the risk of 'unsafe sex' in the indigenous list. I expect marriage. (Just kidding, I tired of the institution early and never looked back.)

Health messages can probably be taught most painlessly through appropriate media and supported in child care and schooling. The holistic approach to treating identified risks in an environment so as to promote community or personal health (for example by establishing effective education and related work opportunities) may be more likely to succeed in community partnerships with managers in many industries other than health.

In the related rehabilitation context one needs more explanation of figure 2.2 entitled 'Allied health services funded by MBS under the enhanced primary care program (p.87). The largest number of services provided for 2007-2008, according to this table, is for podiatry (491,257) followed by physiotherapy (463, 695). The smallest number of services provided is for aboriginal health workers (51), followed by audiology (716). One wonders what on earth drove the podiatry extreme. No explanation is provided. One also wonders what kind of health workers the Nganampa Health Council used to achieve results which it and other Aboriginal Community Controlled Health Services considered good (p.204). Why do aboriginal health workers appear hardly ever used?

Rec. 10.2: seeks an Early Psychosis Prevention and Intervention Centre model.

If this model content is not openly available to anybody and on computer or other media, I expect it to be very costly. The word 'psychosis', is apparently used by the NHHRC 'to describe conditions that affect the mind where there has been some loss of contact with reality' (p. 242). This is broad enough to describe all of the people who ever sat in a tea room with one exception. Isn't there also a Brain Institute? Where is it left – ruling? Psychiatrists and psychologists appear to be the most likely people to control the proposed early psychosis prevention and intervention model. They are ubiquitous and often scarily and narrowly focused on their own ends, in my experience. For example, many of these people may be dangerously authoritarian if they think they are scientists, rather than social scientists, as most appear to do at Sydney University. They usually rely for their treatment on what their clients tell them, often as a response to practitioner questions which are formed as a result of particular practitioner interests, with the responses turned into numbers. This may give them a quasi-scientific air, to which they are actually not entitled. The favourite US market driven concept of 'behavioural science' must be debated before the proposed centre. Is behavioural science considered science, social science, or something else, and does it matter? (Freud, the father of psychiatry and psychology, thought he was a scientist but Jung naturally questioned this.)

I get the impression that a lot of psychologists work in health promotion. Are there any others who call themselves behavioural scientists and where are they? When working at Sydney University, I tried to read Nutbeam and Harris's book about health promotion entitled 'Theory in a Nutshell' a number of times but it made little structural or cumulative sense to me, in spite of some headings and linking passages which suggested it should.

I found myself asking why any particular methodology was being described, rather than any other, in any particular section. I also wondered about the difference between a theory and a methodology. To me this book mainly seemed to be describing methodologies, some of which were also related to behaviour prediction. What exactly is the point of these from any broader community health perspectives? I assume a theory may also be defined as a hypothesis, and that one can have a hypothesis about anything and devise a related methodology. Nutbeam and Harris, however, say that a theory is:

'Systematically organized knowledge applicable in a relatively wide variety of circumstances devised to analyze, predict or otherwise explain the nature of behaviour of a specified set of phenomena that could be used as the basis for action'.

I think this primarily defines a methodology which aims to be repeated, not a theory. I think their definition of theory is an example of the ideological reification of various possible approaches to understanding and tackling health or other social issues in order to address them better. This reification often occurs when groups of academics with vested status and economic interests establish empires of influence which information technology systems may then cement and multiply. The power of such people has grown massively, expensively, and often wrongly, from my WHO and national perspective.

While the depressed are always welcomed by health practitioners, the angry are much more likely to be handled by police. (The former are often timid, in my experience.) One wonders why the table entitled 'We need to train more Aboriginal and Torres Strait Islander health professionals' (p. 329) appears to mention all the likely suspects except psychologists. Are they in the 'Aboriginal and Torres Strait Islander Community Controlled Services within defined regions' referred to in recommendation 9.2? Much more clarification is required. Most practitioners below the doctor would naturally love to diagnose, prescribe and see themselves as just as scientific. This is a potential social menace and follows a narrow approach to community health the US often adopts at great social cost because it prefers the lies of every market peddler to any starker reality, so the rich ones win. (How else could the US have ever got to its current economic situation?)

Rec. 11.3: supports an equitable approach to financing a universal dental scheme linked to the Medicare levy.

Unless this is delivered in an unusually sensible fashion, such as through schools and child care centres, and for a clearly defined set of conditions, I think this would lead to an explosion of dental services taken up largely by the people who are already well schooled and acceptant of visiting dentists. I think such people are likely to be young women or their parents who would love them to have a more Hollywood set of teeth and elderly Methodist style women who fear losing teeth. For example, my dentist is now trying to get me to see him every three months, but I have fought him back to six. I have seldom known a man who saw a dentist unless he absolutely had to. Am I wrongly stereotyping men and boys in assuming that most will hardly ever go? See the related research discussion attached which is about tooth loss, osteoporosis and giving women hormone replacement treatment in Bahrein, which somebody in Saudi Arabia unexpectedly sent

me when he was seeking a supervisor. (Truth is stranger than fiction. God knows how most students and supervisors get together. It always seemed to be others' trade secret.)

Rec. 14.4: proposes a National Clinical Education and Training Agency and recommendation 14.5 the NHHRC states 'We support national registration to benefit the delivery of health care across Australia'.

Alternative Recommendation 1: The NHHRC should first focus on achieving rational and open national health curricula to assist the development of health and sustainable development nationally and internationally by urgent pursuit of a related communication and education revolution in partnerships with industry and communities. This direction is also discussed in the attached submissions.

One wonders exactly how the National Clinical Education and Training Agency proposed by the NHHRC would relate to the current myriad of international and Australian educational institutions and their related bodies, and what it would be expected to do, other than make more money for certain practitioners, academics and others assisting some more powerful closed shops. For example, a Martian might assume that the easiest and best way to provide practice for a student wishing to be a dentist or a doctor would be in the treatment rooms of a dentist or a general practitioner, in the manner of apprentices in industries other than health care. In my view, the fact that the apprenticeship model of career development is not broadly and seriously discussed, let alone planned or developed in the upper echelons of health care, is a testament to the historical power of doctors to define their own closed shops, by using education, their state registration acts and others to do it. All allied occupational groups naturally try to follow suit as much as possible. This supports many practitioner club lands which lead others very expensively.

The NHHRC should instead help implement the mass communications and education revolutions necessary for sustainable development, which are addressed in the attached submissions and also in those I sent earlier. These addressed the government inquiries into the impact of the global financial crisis on regional Australia, and the choice of emissions trading as the central policy to reduce Australia's carbon pollution. Tradesmen working in construction, which is the foundation of nearly all other business operation, also have a lot to learn about accountability from practices in health care. (But I digress.)

The Council of Australian Governments (COAG) first called for national standards for health and environment protection, related occupations and supporting education in 1990. In 2008, COAG still seeks a single national registration and accreditation scheme for health professionals. Put the National Clinical Education and Training Agency on the back burner and help achieve the former first. The attached submission to the Australian Health Ministers Advisory Council on a national registration and accreditation scheme for the health professions suggests putting all the key curriculum content taught on a table and coming up with a sensible national curriculum which rationally links curriculum taught in universities and other registered training organizations, so an education revolution to gain more sustainable development can be progressed. This ideally occurs through all natural avenues like open computer sites, TV, videos, radio, books and by any

other means which appear to be broadly consistent with the NHHRC report directions which seek to engender informed responsibility and the related NHHRC goals.

My previous submission to the NHHRC discussed a press report that Aspen Medical won \$37.25 million of medical contracts over the period of Labor government, which was the highest payment made to all consultants, followed by payment of \$18.68 million made to Boston Consulting for management and policy advice. One wonders what such payments were for and whether they should be repeated, from a triple bottom line perspective which involves economic, social and environmental indicators of performance to achieve key project aims. Does the NHHRC know? We all should as we paid for them through tax. All regional health management matters require effectively integrated consideration, which is also why I seek to interest the NHHRC in the general policy direction recommended here and in related attachments. The Australian Financial Review observed (AFR, 20.2.09, p.1) that a consultancy culture curtails policy makers. However, as Humpty Dumpty realized, whether this is so is largely dependant on who is to be master, which is also what the NHHRC never mentions, at least in public. One always worries about silence, confusing messages and closed doors. These are private sector norms. (Who is behind the proposed health plans?)

Alternative Recommendation 2: Treat NHHRC calls for more money with extreme caution because the current absence of effectively patient centred management in health care means the recommended expenditures are likely to support vested practitioner interests rather than client or broader community interests.

Alternative Recommendation 3: For every new health management body or related practice the NHHRC recommends, the ministers should ask that others of equal or more value are suggested and justified for destruction, on the grounds that they maintain comparatively narrow, closed, silo driven and dysfunctional professional or bureaucratic approaches to work, which are not in keeping with more broadly scientific national and international approaches to gaining health and sustainable development cost-effectively. (N.B. This is different to wiping out the smallest provider groups, as the latter popular strategy usually just maintains the self-accrued privileges of the collegiate controllers of the status quo. Brendan Nelson and Peter Shergold wiped me out for psychologists and others at Sydney University)

Health care practitioners and students generally like to avert their eyes from the kind of crude reality above. When they drag their gaze from the various bits of other people's bodies, health care practitioners, including those in the NHHRC, appear to find it hard to define or categorize themselves as workers or investors with any degree of interest or clarity. In their collegiate cultures they appear a little like disciples of religion who are so determined to appear to identify purely with ministering to others that they do not recognise themselves as active industrial, political and economic agents in any broader contexts. These collegiate and related occupational or other investment mate ships, where some are so much more equal than others in regard to their power to command resources, also appear to resist focus on their own work from any scientific management perspective. In this collegiate and investor friendly, industrially and managerially

muddled context, one naturally wonders what attitude the NHHRC has to ANZSIC and related occupational systems. The Chair should ‘sift’ (her word) through the submissions again and find those with scientific responses to this question, wherever they come from.

Industrial blindness on the part of those working in health care is particularly dangerous when so many new health management structures and organizations are also being recommended by the NHHRC. Developing consistent service definitions, which is necessary for gaining the appropriate, reliable and cost-effective treatment which is in turn necessary for improving service quality through related and supporting research depends on this. For example, the NHHRC report provides little clear picture of the core of ‘primary care’ services envisaged for publicly funded provision and I have no idea what ‘scoping’ primary health care means, as contained in the heading on page 81. I heard the normal industrial classification systems or others supported by the Australian Bureau of Statistics mentioned by hardly any of my colleagues when I worked for ten years in the College of Health Sciences at Sydney University. For example, a Review of Basic Sciences in the Faculty of Health Sciences praised the customer service culture. However, it seems that those who wrote that Review report did not recognize health care as being in an industry. Page 16 stated about the Bachelor of Health Sciences (BHS):

‘The BHS is designed to give its graduates the opportunity to become involved in contemporary healthcare by linking the three arms of healthcare – practitioners, the healthcare system and industry – in a unique manner.’

As I wrote to the review - practitioners, the healthcare system and industry are not the three arms of healthcare. This statement is nonsense because practitioners and the healthcare system are ideally part of broader health and community service industry approaches to obtaining health nationally, regionally and internationally. People who do not appear to understand or be willing to accept the concept of health care as an industry cannot talk seriously about implementing a customer service culture.

Alternative Recommendation 4: Consider the Australian and New Zealand Standard Industry Classification (ANZSIC) and related occupation, treatment classification and funding information in the course of implementing the earlier recommendations outlined above and as a means of ‘strengthening the governance of health and health care’ (p. 38), achieving ‘a sustainable health workforce for the future’ (p. 40) and ‘fostering continuous learning in the health care system’ (p. 41).

Alternative Recommendation 5: Flick the switch to vaudeville.

In my experience, those engaged in health promotion need to lighten up, because you can lead a horse to water but you can’t make it drink. Personally, I liked the Colgate lady who used to talk about tough teeth and have also learned a great deal about mental health from pop songs, beginning when Rogers and Hammerstein lyrics and other shows provided a generation of female children with a more real understanding of the meaning of the declaration of human rights and better female role models than lawyers ever could. (To me the all-American singing Jews are tops. Some may also feel like cheaper Freud.)

In relation to the NHHRC report, for example, one remembers Kinky Friedman who sang that you can pick your nose or pick your friends but you can't flick your friends off the saddle. 'They don't make Jews like Jesus any more' is good too. Similarly, in the current international context, one remembers Randy Newman's great prophetic album 'Sail Away' from 1972, in which the song 'Political Science' discusses the American psyche and its relationships with others. It is reproduced below. One wonders, for example, if many already know or would appreciate it in Iran and other parts of the axis of evil or semi-evil outside the US. Ahem. (She sings).

No-one likes us, I don't know why,
We may not be perfect, but heaven knows we try
And all around, even our old friends put us down
Let's drop the big one, and see what happens.
We give them money, but are they grateful?
First they're spiteful; then they're hateful
They don't respect us, so let's surprise them
We'll drop the big one and pulverize them

We'll save Australia; don't wanna hurt the kangaroo
We'll build an all-American amusement park there
They've got surfing too.
Boom goes London! Boom Patee!
More room for you and more room for me
And every city, the whole world round, will just be another American town
Oh how peaceful it will be; we'll set everybody free
You'll have a Japanese kimono, Baby, Italian shoes for me
They all hate us anyhow, so let's drop the big one now!

However, one hopes we will soon be past the old and current unpleasantness, towards healthier communication and development as required in the Alma Ata Declaration which also suggests 'a better use of the world's resources, a considerable part of which is now spent on armaments and military conflicts'. The Declaration further states:

A genuine policy of independence, peace détente and disarmament could and should release additional resources that could well be devoted to peaceful aims and in particular to the acceleration of social and economic development of which primary health care, as an essential part, should be allotted its proper share.

Talk to the animals? I have always found that doing so is always the best way forward, which probably also seems an extremely strange idea to the average man. Please don't ask me to see a psychiatrist again. My colleagues upset me seriously through that.

In this broad health and communication context the NHHRC and universities ideally learn from the Australian Broadcasting Commission (ABC) view of self regulation and from the multicultural approach of the SBS code of conduct. The latter states as its

purpose: ‘SBS leads the exploration of the real, multicultural Australia and our diverse worlds. This means:

- We are a pioneering broadcaster, going places that other broadcasters avoid; and
- We reflect real, multicultural Australia – contemporary Australia is multicultural and multilingual; and
- We explore and connect the diverse cultures and perspectives that make-up the worlds that we live in.’

The SBS code contains many statements like the above. I also answered the ABC’s questions, such as those below, admittedly feeling a bit like Peter Cook:

Will there be a role for extended national broadcasting in education and training and particularly in the vocational education and training environment? Yes! You may start with the development of greenhouse gas audit and related green education and employment development strategies, with health and related environment development strategies – or with different development strategies that you like better, such as language and cultural teaching through entertainment. See attached directions and proceed as you consider best. (I would personally like to see Marx, Freud and Dylan recognized as the great modern Jewish prophets of the world’s historical materialist and related democratic development traditions. Their legacies shine strongly through much high quality US entertainment culture but have been lost from much US professional discourse, which is collegiate, faux-scientific and ultimately feudal, like the US financial system it drives.)

Should consideration be given to expanding or enhancing services with other countries? Yes! Inform the Premiers the Prime Minister and relevant Ministers that you would like to begin developments, if possible, with the Open University at Milton-Keynes in England, with appropriate production sources in China, (which has the second most spoken language of the world), and with those anywhere else deemed relevant. Ask for their advice and assistance. (See attached related policy discussion and direction.)

What are the likely future training needs of the ABC in a converging media environment? There will be a need for:

- better organized educational and related entertainment product planning, production and dissemination systems
- supporting media content retrieval, acquisition and usage systems
- supporting complaints classification and handling systems so better coordinated education and entertainment delivery are possible across Australia.

Learn from those who currently lead the world in this development direction. God knows who that is. I would ask Google, State Libraries or the Australian Bureau of Statistics.

Can archives be more effectively used and accessed? Yes! Decide your education development direction and ask the Prime Minister (PM), other ministers and premiers for help with the related agenda for sustainable and fair development. The direction is developed in the attached discussions of carbon pollution reduction, healthy development and financial management in Australia and beyond.

Are there ways of enhancing the value of the national broadcasters' services to migrant groups? Yes! - by assisting skills development and education for sustainable development strategies to meet identified and prioritized industry and related community need. Mining, construction and agriculture are three of many related areas of concern.

In a Freudian slip above, I forgot about the army. Don't let that happen to you. Please note I invariably prefer a little marihuana joint to the constant legal and medical wine. I am now off to Broadway to collect my free Tropfest disc and the SMH. Thank you for the opportunity to comment on the NHHRC report. I practiced at Sydney University.

Yours truly, Carol O'Donnell.

WE ARE ALL CAPITALISTS NOW: A CONSUMER'S RESPONSE TO THE CONSULTATION PAPER ON AUSTRALIA'S FUTURE TAX SYSTEM (2008)

1. THE CURRENT REVIEW CAN GO NOWHERE: WORK OPENLY IN INDUSTRY GROUPS TO ACHIEVE SUSTAINABLE DEVELOPMENT

This submission later answers the following selected questions from the Consultation Paper on Australia's Future Tax System (2008) for a Review Panel chaired by Ken Henry:

Q. 5.13: The cost of providing health and aged care to older Australians is currently met by government through the health sector. Should retirement incomes policy take into account projected increases in health costs for older Australians? If so, what would be the most effective mechanism and how might the transition to such a system be achieved?

Q6.1 Can the tax system be structured to better attract investment to Australia in a way that increases national income and if so how?

Q 8.4: How could the governance of the tax-transfer system be reformed to reduce complexity, uncertainty and cost, and to improve transparency, understanding and support for the system?

Q. 11.1: Is it appropriate to use taxes on specific goods or services to influence individual consumption choices, and if so, what principles can be applied in designing the structure and rates of such taxes?

Q. 14.3: What is the role of the tax system in ensuring that renewable resources are used both sustainably and efficiently?

The main aim of this response, however, is to argue that tax can only be effectively understood in its relationship to all government assistance provided to industry on one hand and to communities on the other. The consultation paper on Australia's future tax system considers tax and transfers to communities in a very partial way, and has a related and flawed development perspective, which is primarily that of old-fashioned business. Financial services and related law reflect a theoretical paradigm which was dominant long before the United Nations (UN) was established. The consultation paper reflects this.

The best way forward now is to set up industry groups to consider tax in the same context as the range of government assistance to industry. Each group goal is ideally to develop law and related financial management recommendations to support the goals of sustainable development in business, including through taxation. The White Paper Summary Report (2008) which discusses the aims and implementation of Australia's carbon pollution reduction scheme is now ideally treated as law. Other law ideally is subordinate, while awaiting repeal or reform to support sustainable development. This approach was taken when occupational health and safety acts (OHS) with broad aims and duties of care, rather than narrow, contradictory and wrong prescriptions, were introduced in the mid 1980s.

Further justification for this position is below. I cannot think of a more educational exercise for all involved. The categories of capital, labour and land on which the taxation discourse relies are outdated. Prime Ministers Hawke and Keating buried the class struggle when they brought in compulsory superannuation. We are all capitalists now and some of us don't like the language that others of us are using. This must be discussed before we can go on further together. During the current international crisis and before the introduction of the carbon pollution reduction scheme is the perfect time to do it openly, flexibly and fast. These recommendations are also justified in answers to questions later.

WHY INDUSTRY GROUPS TO ACHIEVE SUSTAINABLE DEVELOPMENT?

The Consultation Paper on Australia's Future Tax System, like its predecessor, which supposedly addressed 'the architecture of Australia's tax and transfer system' has no conceptual direction and appears to be a pile of complex rubble which now may be endlessly picked over by so-called experts at great expense. I have seen similar problems in many volumes produced by the Australian Law Reform Commission (ALRC) - on privacy, for example. (No offence to the good ones produced with the National Health and Medical Research Council). The poorer volumes seem the modern, costly versions of presenting medieval debates about how many angels can dance on pinheads. They are far too narrowly theoretical and represent interests historically divorced from most of those in the modern world. Modern interests require widespread open practice justified through more open practice designed to try to tell us clearly where we are going, in case we get confused. Managerial authority is ideally based on science which serves the population. Much law and its closely related theoretical perspectives are not designed to support this. Populations live in an environment which must be understood. (Just ask a doctor.)

The consultation paper on Australia's future tax system never addresses the aims of taxation directly and deals with 'tax-transfer' impacts on the environment eventually, in chapter thirteen, even though 'environment' was the most common of twelve issues raised for consideration in submissions from organizations and also from individuals. One may disagree with the Productivity Commission (PC), but one has confidence that the organization has an idea about where it is trying to drive Australia and why. The PC appears to try to develop the competitive direction for Australia in the global economy that Labor and Liberal governments have been painfully developing, at least since Whitlam. I wonder if the writers of the current papers on Australia's future tax system have any goal other than producing more work for people like themselves. For this reason I have no confidence that the research commissioned by the Review in 2009 will have any point and wonder why the particular research topics in Appendix D (p.273) were the chosen ones. Why do we need a brief history of how tax and transfer theory have evolved over time? How useful is it going to be to help solve the current international financial crisis? We must stop re-embroidering the past in law that gets more complex. Give up and move on.

Keynes remarked that the difficulty is not so much in developing new ideas as in escaping from the old ones. The Summary of the Consultation Paper on Australia's Future Tax System notes that the Panel views environmental sustainability to be of such importance to

Australia's future that it is ideally a principle against which the current system and potential reforms ought to be tested (p.14). I agree completely. My later response to the Panel is designed to take their concern into account through describing ideal regional and national industry and community approaches for sustainable development, which tax goals ideally support. It also focuses on the first term of reference of the review, which is that 'in order to position Australia to deal with the demographic, social, economic and environmental challenges of the 21st century and to enhance Australia's economic and social outcomes' it will consider:

The appropriate balance between taxation of the returns from work, investment and savings, consumption (excluding the GST) and the role to be played by environmental taxes (p.44).

The review is also expected to 'make coherent recommendations to enhance overall economic, social and environmental wellbeing' (p. 44). One wonders how this can occur because the people who wrote the consultation papers on Australia's future tax system show no historical understanding of the development of industry or government or tax. Can they define 'environment and wellbeing' consistently with relevant UN, World Health Organization, and related national goals? They must, or produce an expensive regulatory mess. These problems are discussed again later and in the attached article on insurance.

I assume the goals of the tax system are ideally to serve current and future generations of Australians through meeting key regional economic, social and environmental goals as effectively as possible. Those who wrote the consultation paper on Australia's tax system only ever refer to the goals of the tax system as being 'simplicity, transparency, equity and efficiency'. Those are not government goals – they are ideal ways of doing business. The statement that they are goals suggests the outdated perspective that individuals can most effectively meet their needs through the market without any government interference and that the ultimate pursuit of self-interest is also in the interests of all. In fact, an elected government's aims are ideally broader than those of its business partners, whose driving goal is to create the appearance of greater business value to encourage further investment. From a government perspective, the business goal of genuine production, as distinct from its appearance, are the means for achieving broader social and environmental aims. The aims of government should not be confused with those of its business partners. The consultation paper is outdated and confused. Land is discussed in this context later.

The consultation paper notes in passing that Cnossen identified five international objectives for product specific taxes in 2005. These goals appear fairly consistent with the social, environmental and economic direction recommended here for industry and related community consideration and development. This is discussed later in response to specific questions raised in the consultation paper. Cnossen found the following tax goals:

- To raise revenue for general purposes (What purposes?)
- To reflect external costs (These are described as being associated with quantifiable social harm, and the example of a tax to reflect the cost of sulphur dioxide pollution on the surrounding environment is offered.)

- To discourage consumption of harmful or addictive products for health reasons
- To charge for government provided services (When is a service considered a tax?)
- Other objectives (The primary example of making the tax system more progressive is offered.) (p.69)

I recommend closer consultation with key industry participants, as defined by the Australian and New Zealand Standard Industry Classification (ANZSIC) System, to achieve key government and regional community goals and in order to educate everybody better, rather than blinding all with an increasing mountain of economic pseudo-science. This direction has a history. When the Hawke government came to power in 1983 it began to address Australia's increasingly unacceptable terms of trade partly through an economic management agreement (an 'accord') with the trade union movement. Eleven industry councils were also set up to cover manufacturing. These conducted industry stock takes and developed strategic plans. This moved industry from an automatic reliance on barrier protection to strategies which included economic incentives for microeconomic reform to make organizations more competitive in the longer term. In 1992, the Commonwealth introduced a superannuation guarantee. Industry managed superannuation funds have now become big players in providing savings and investment services. Call them non-profit?

The current and future directions of Australian primary production, manufacturing and the services sector should now be considered in the light of carbon pollution reduction goals, current PC reports on primary, manufacturing and service industries and other reports. As savers and investors through our superannuation, ordinary Australians are capitalists now. As workers, we also join the capitalists as producers. Besides being savers, investors, and workers, we are also consumers and borrowers who belong to regional and related communities with particular characteristics. All our related individual goals, whatever they are, are now ideally aligned to serve our diverse populations and the wider world. ('We don't need no education, we don't need no thought control?' Far from it! Read on.)

Australian taxation should be conceptualised and constructed to meet key industry and community goals in clear and mutually supporting ways. The Australian carbon pollution reduction scheme ideally embraces this. It will cover around 75% of emissions and involve mandatory obligations for around 1000 businesses (White Paper Summary Report, 2008). The Government is committed to using 'every cent it receives from the sale of pollution permits to help households and businesses adjust and move Australia to the low pollution economy of the future' (p. 4). Major employers and governments are expected to pioneer more sustainable development and environments globally. I get the impression from the White Paper Summary Report and related announcements that we may soon have government money coming out of our ears if we want to pursue it, but the primary difficulty will be in getting it spent sensibly, or even spent. At the same time, the international financial services system and its providers are being shown not only as opaque, complex, unaccountable and unstable but also criminal. Deliberations on taxation to support national goals by those businesses most affected by carbon pollution reduction requirements should be of considerable interest to government and regional communities during this period of change. This is discussed again later in responses to questions.

WHY NOT ASSESS LEGISLATION AND TAX AGAINST INDUSTRY GOALS IN THE LIGHT OF DIRECTIONS FOR SUSTAINABLE DEVELOPMENT?

In the new international context, where a great deal of current Australian regulation, including in taxation, is outdated and dysfunctional, if only because it has no clear aims or definitions of the key terms necessary for scientific practice, the PC issues paper for the Annual Review of Regulatory Burdens on Business – Social and Economic Infrastructure Services (2008) provides a useful checklist for assessing regulatory quality. It states that regulations that conform to best practice design standards are characterised by the following principles and features:

- **The minimum necessary to achieve *objectives* (my emphasis)**
- Not unduly prescriptive
- Accessible, transparent and accountable
- Integrated and consistent with other laws
- Communicated effectively
- Mindful of the compliance burden imposed
- Enforceable (PC 2008, p.14)

The major sources of taxation are ranked below. This information is taken from Chart 2.2 entitled ‘Ranking of Australian Taxes by revenue in 2006-07’ from the earlier consultation paper produced in August. (Treasury, 2008, p.14):

1. Personal tax (\$120 billion)
2. Company tax (\$60 billion)
3. GST (\$40 billion)
4. Fuel excise (\$20 billion)
5. Payroll tax (less than \$20 billion)
6. Conveyance stamp duties (ditto)
7. Local government rates (ditto)
8. Superannuation taxes (ditto)
9. Tobacco excises (ditto)
10. Land taxes (ditto)

Chart 3.1 entitled ‘Contributions to Australia’s tax mix: All Australian governments 2007-2008’ in the recent consultation paper (2008, p. 54) seems somewhat different. I am confused. However, from the history of the introduction of superannuation, I guess the competitive way forward to achieve the goals of sustainable development would be for company and personal tax to be reduced and for savings and investment through superannuation funds to be increased. One must also be assured such investments are managed in a way which is guaranteed to assist sustainable development in a more productive, competitive and stable way than otherwise likely. This is discussed later.

The problems of tariff and related industry assistance appear to be more evident when it is also realized that sustainable production depends on product and service innovation which meets social and environmental goals, as well as short-term economic ones. For example

recommendation 3 in the recent inquiry into the textile, clothing and footwear (TCF) industries states that ‘the scheduled tariff reductions for the TCF industries to 2015 should be allowed to take their course, as it is widely recognized that tariff protection is a blunt instrument for the promotion of innovative and competitive capability at the enterprise level and can in any case have only marginal impact in the context of large exchange rate movements. It is recommended the emphasis of future policy should instead be on well-designed industry assistance measures’. The Australian carbon pollution reduction scheme may be best understood as an opportunity for more open public and private planning partnerships designed to lead to fairer, cleaner, greener and more stable development everywhere. This requires broader, more open, more innovative thinking.

Ideally, all government assistance to industry and communities is considered to achieve related sustainable development goals. This is discussed again later. In this regional development context one wonders if Treasury, financial service providers and other key organizations use the Australian and New Zealand Standard Industry Classification (ANZSIC) or related occupational classification systems which are applied by the Australian Bureau of Statistics and the PC. I guess most financial service providers run more confidential races, supported by their lawyers. This increases the lack of transparency and accountability which led to international financial collapse. Americans call this a free market. (It’s the politics, Stupid.) To create markets in the long-term interests of people outside some charmed financial and political circles, governments and communities they ideally represent must produce in better ways than normal. See below.

Q. 5.13: The cost of providing health and aged care to older Australians is currently met by government through the health sector. Should retirement incomes policy take into account projected increases in health costs for older Australians? If so, what would be the most effective mechanism and how might the transition to such a system be achieved? A: See below and attached article on health and social insurance.

Retirement incomes policy should clearly take account of the projected increases in health care costs for older Australians but ideally so that younger generations are not burdened with the costs or debts of those who went before. This goal of intergenerational equity is a key principle of the new international regulatory model based on the 20th century UN ideal of universally guaranteed standards of living, which also place fair treatment, wellbeing and the guardianship of natural resources for future generations at the centre of all development. A related international regulatory context for protecting health and biodiversity by embracing carbon pollution reduction began in 1990, when the World Commission on Environment and Development defined sustainable development as ‘development that meets the needs of the present without compromising the ability of future generations to meet their own needs’. In 1992 the UN Rio Declaration on Environment committed governments to producing healthier environments. The first principle is that humans are at the centre of concern for sustainable development and entitled to a healthy and productive life in harmony with nature. This is a new way.

The development and management of health care, related services and taxation to assist the achievement of national goals are best understood in the above historical context and

also in the regional and community environments which often determine health, broadly conceptualised as wellbeing. The Council of Australian Governments (COAG) committed itself to this direction in 1990 when it called for development of national standards for health and environment protection, including related occupations and training, disability services, social security benefits and labour market programs (Premiers and Chief Ministers, 1991). Competition is ideally designed to achieve a national platform of guaranteed service standards, with the aim of equal treatment being given by law to the private and the public sector service provider, unless another course of action appears in the public interest. Additional services are ideally available in the market to provide greater flexibility and choice. Perfect information is vital for perfect competition, and for perfect accountability, democracy and risk control. It is resisted in areas like financial services, which may live on lying, control and ignorance. All laws, including on taxation, retirement income and investment, are now ideally constructed in a new international context of regionally planned, competitively delivered programs and projects to meet triple bottom line accounting requirements which are economic, social and environmental.

The Retirement Income Consultation Paper (2008) notes that ‘the age pension and superannuation systems are intended to have complementary roles’ but they were developed and operate largely in isolation from each other’ (p.41). The same is true of state workers compensation systems, the Medicare system, private health care services and insurance, accident insurance, life insurance, the disability support pension, the carer’s pension, and a range of related services. The attached article entitled ‘Recent Australian perspectives on health and social insurance’ describes the background and continuing inquiry into major Australian health and social insurance systems in their primary context of national taxation based welfare provision and private insurance against injury. It may assist all industry discussion of management direction and related taxation issues. Australian policy makers have been particularly interested in the extent to which all health and related funds for services or pensions should be underwritten (owned) and managed by government or in the private sector, in order to gain the best outcomes for individuals, taxpayers, premium holders and the Australian community. Nationally designed, health and related social or environmental service funds owned by government and/or industry, which are transparently, regionally and competitively managed, are likely to provide superior outcomes to market based underwriting of risk and related service provision. It is necessary to construct broader understanding that competitive pursuit of stakeholder interests is more broadly functional than the narrower pursuit of stockholder interests.

The purpose and management of taxation, as well as of retirement saving and investment through superannuation and related funds, are now ideally conceptualized and designed together, to meet the new international goals of health and sustainable development. These goals are ideally implemented more competitively, through open government, industry and community partnerships. This would bring Australia closer to the social insurance model of a government and industry managed retirement income and related investment system recommended by the World Bank. The ideal World Bank multi-pillar retirement income structure is outlined in Appendix C of the Retirement Income Consultation Paper (p. 48). This direction would assist creation of other more broadly stable and competitive forms of industry and community planning, saving, taxing,

borrowing and related investment systems and services. In this process, financial service providers are ideally positioned by legislation to perform more cost-effectively and with greater accountability to consumers of financial services. Tax is addressed again later.

The Retirement Incomes Consultation Paper (2008) states that requiring an amount of superannuation savings to be taken as an income stream would better integrate the age pension and the superannuation system and provide greater protection against longevity and inflation risks (p. 31). I assume so. A frequent message in submissions was also the need to increase compulsory savings through superannuation with targets of 12% to 15% of remuneration commonly being recommended (p. 21). If this money is to be safe rather than lost by those who brought us the latest global financial crisis or others like them, a broader social insurance management perspective which links government, industry and regional community interests more clearly and effectively is necessary. This ideally aims to achieve sustainable development through more information sharing and dialogue designed to achieve regional goals which are social and environmental as well as economic. The carbon pollution reduction scheme provides a related early development opportunity which is discussed later. Health is also produced by the total environment surrounding every body, not simply by the services specifically designed to cure the sick.

Government and major businesses should now define the major goals of key government and industry partnerships for health and sustainable development consultatively in related industry and regional community service contexts. Retirement income funding, taxation and other financial policy and services are ideally designed to support regional goal attainment more competitively. A way forward is addressed below and in the attached submission to the PC Inquiry into Drought Support (labelled Telstra). It suggests the following steps. The land (or seabed) supporting production is discussed later.

1. Plan agriculture, mining and eco-tourism in their regional land matrix contexts nationally and internationally to achieve all the goals of sustainable development.
2. Consider carbon trading and offset development in the context of the land matrix regionally, nationally and internationally to address global warming and loss of biodiversity.
3. Act to reduce carbon pollution and protect biodiversity by weed and pest removal, planting native vegetation and protecting river banks.
4. Seek more innovative, better coordinated management of urban and rural waste, pursued in more open markets
5. Consider the management of life and death to support the aims of the Australian Organ and Tissue Donation and Transplantation Authority Act (2009) and to assist personal choice to be exercised more effectively
6. Intervene in the national broadband communication content planning and service delivery processes to achieve all community goals as scientifically, effectively and competitively as possible (Christians may think of all things bright and beautiful.)

Harnessing the broader goals of sustainable development to carbon pollution reduction offers a new global vision of protection which is ideally embraced by all. Regulations and systems which do not clearly support the new direction should be dispensed with unless

another course of action appears in the public interest. Transition to sustainable development may be led by better coordination of many industry development directions recommended by the PC as well as by those charged with implementation of the Australian carbon pollution reduction scheme, so all Australians and related others may achieve their goals more competitively, in more open and stable markets. This direction also requires open education for sustainable development, which includes education to achieve the directions outlined in UN Conventions which nations have embraced. However, many professions appear to have locked themselves firmly into outdated laws and academic enclaves forged for narrower interests. ABC and SBS ideally help drive the necessary open community education for change. An education revolution is needed.

Q6.1 Can the tax system be structured to better attract investment to Australia in a way that increases national income and if so how?

A. Yes. Do it by defining key regional industry and community goals and also by designing tax, industry support, welfare systems and superannuation management to achieve all goals more effectively, as discussed earlier and in attached articles. Also use the carbon pollution reduction scheme, discussed below, as a vehicle for going forward. However, the ownership and treatment of land must also be discussed. See later below.

Q 8.4: How could the governance of the tax-transfer system be reformed to reduce complexity, uncertainty and cost, and to improve transparency, understanding and support for the system? A: The same answer as above. See related discussion below.

The writers of the consultation papers on Australia's future tax system need to broaden their perspective and put it in a suitably historical and scientific context to be of further use. Conceptually, Australian taxation policy also needs to be clearly situated in the broader context of global and national production, consumption and investment to support sustainable development, with carbon pollution reduction playing a leading role. To reform taxation policy, one also needs to be aware of the full range of Australian government payment systems which provide support to industry on one hand, or to citizens on the other. The Australian Bureau of Statistics (ABS) apparently defines taxes as 'compulsory unrequited transfers to the general government sector' and taxation revenue as 'revenue arising from compulsory levies imposed by government'. In the consultation papers the concept of 'transfers' is used only to mean spending on welfare services and supports. This entails a focus which is different and narrower in scope than the ABS concept of the term 'transfer'. The tax analysis is therefore partial and muddled.

Western governments, laws and taxation systems often have similar origins in European feudalism. Such systems were also exported to colonies centuries later. Under feudalism, peasants paid for the armies and comparatively rich lifestyle of the royal family and their supporting overlords by working the land. The ordinary family and church looked after welfare. As capitalism developed from feudalism, the goals of government and taxation were increasingly to provide the conditions and services necessary for the further development of capitalism, such as roads, railways or bridges. Governments were also called upon to satisfy growing education and welfare demands

made by workers and their families, which they were too poor to satisfy in the market. From this historical perspective, as capitalism became increasingly productive, and the vote was increasingly extended to those who demanded it, the goals of government and taxation increasingly became the redistribution of wealth, so that goods or services, (e.g. for a guaranteed level of income in old age, health care or a flourishing environment), would become increasingly available to all. This is the historical reason that Cnossen identified those particular five international objectives for taxes in 2005.

The development of capitalism also produced a clear conceptual distinction between the trading classes representing capital (investment) and labour (production). Small business was always involved in both classes through saving and/or borrowing for production. The concept of consumers as a class of traders, as distinct from the class who deploy their capital or who sell their capacity to work, developed later still and is not yet properly recognized in Australian law, including in the Trade Practices Act. Workers have now also become investors or potential investors, primarily through their membership of superannuation funds or 'ownership' of land, a house or business, on borrowed money. Finally, government concern has included the effects of production on the natural environment surrounding communities. Enter the carbon pollution reduction scheme.

Financial services and business law may drag centuries behind the above conceptual development. For example, the US has a colonial history of perceiving government as a malign interference in the otherwise benign outcomes of market operation, or as a related defender of the faith. Government is allowed to attack supposed monopolies, but not the obvious ones of lawyers and related professionals. One wonders what most Americans now think they have won as a result of this other than obscene income differentials, lower minimum wages, fewer paid holidays, inadequate health care, higher education costs, unstable employment, lost savings, huge debts, by far the highest murder rate in the OECD and family deaths and injuries from constant war. Sant and Kinsley point out that energy independence has been the policy goal of US government for 35 years (Australian Financial Review, AFR 16.12.08, p.54) and this is a dramatic exception to the broader policy of free trade. The theory of free trade holds a nation is better off when its citizens are permitted to buy goods from foreigners at any price they wish to pay and worse off if government interferes. The quest for energy independence is now ideally a new form of national protectionism. Ideally it strongly assists the creation of a new world order where the major goals of government are for health and sustainable development for all people.

The opportunities now presented by the pollution reduction scheme, outlined in the Australian Government White Paper Summary Report (December 2008) require consideration in this context. There are around 7.6 million registered businesses in Australia. The overwhelming majority will not face any direct obligations under the scheme. However, approximately 1000 of the nation's largest employers and polluters will be centrally involved. The White Paper Summary Report supplies a text for all which is addressed later below. Under the National Greenhouse and Energy Reporting System (NGERS) the key polluters will first have to measure and report the level of greenhouse gases they produce before they receive carbon permits from government.

Emissions intensity 'will be measured on the basis of the emissions-to-revenue or emission-to-value-added of activities being above nominated thresholds' (p.20). Will these measures clarify the relationships between trading and financial operations and how measurement of real world productivity is related to this? Such a lack of value clarity appeared to help Fannie Mae, Enron and other US Ponzi or similar schemes to flourish.

The White Paper Summary Report (2008) on Australia's carbon pollution reduction scheme states that we can wait and leave our children and grandchildren to face the full impact of climate change or take responsible action now by investing in the industries and jobs of the future. It states the world is confronting the worst financial crisis in three quarters of a century, which makes it more important we secure the long-term prosperity that comes from building the low pollution economy of the future. It establishes a package of financial assistance for Australian households worth about \$6 billion per year ongoing from the commencement of the scheme in 2010. A further \$2.15 billion over five years will be invested to help business, community sector organizations, workers, regions and communities adjust to a low pollution future through the New Climate Change Action Fund. There is \$12.9 billion available to fund a new 10-year plan called Water for the Future. Australia is also involved in the \$200 million International Forest Carbon initiative, which supports efforts to reduce emissions from deforestation and forest degradation in developing countries. The Global Carbon Capture and Storage Initiative (p. 11) and many other government funding initiatives have been announced.

I guess the capacity to achieve openly shared and sensible direction, rather than the actual amounts of money involved in real production, is the vital driver necessary for future economic stability and for achieving all Australian sustainable development goals. For example, according to Winestock (AFR, 23-29.12. 08, p. 30) Japan had net financial liabilities equal to 88% of gross domestic product (GDP) in 2007; the US had 52% and Britain 35%. On the other hand, Australia has net financial assets of 7.7% of GDP. Winestock states that in September 2008 US Congress produced a massive bail-out package called the Troubled Asset Relief Program to invest in the assets of troubled banks. He claims Warren Buffet said, 'If I could buy a hundred billion of these kinds of instruments at today's prices, and borrow a non-recourse \$US90 billion, which I can't, but if I could do that, I would do that with the expectation of significant profit'. Trust is all you need to make some rich and achieve production? I have no idea but I bet you do.

Q. 11.1: Is it appropriate to use taxes on specific goods or services to influence individual consumption choices, and if so, what principles can be applied in designing the structure and rates of such taxes?

A: Tax to promote health and environment protection. Decide rates on the basis of estimating the cost of injury prevention and rehabilitation when the product causes harm which has to be addressed (e.g. cigarettes, alcohol). Keep lawyers out of the system and keep broad ownership of the relevant premium or related tax/levy funds, in order to control how fund managers use and invest them competitively on your behalf. Never give away the premium/levy/tax fund and lose control over its deployment, because the shareholders of the private fund exert downward pressure which undermines all injury prevention and

rehabilitation services the fund is set up to support. Own the funds and reap benefits of their competitive investment yourselves. You will then also have much greater control over the competing fund managers. You can ensure they provide adequate prevention and rehabilitation services. You can also have more money from owning the fund and its investment income, which you also direct. Lawyers have traditional relationships with private fund underwriters and together with courts their battles drive up ruinous costs without producing data or incentives to assist injury prevention or rehabilitation services or to establish premium setting properly. The monetary cost of calamity is passed to better managers instead, and massively increases all business instability. Then we all pay for the crash which the lawyers also feed on. See attached on health insurance; see Michael Moore's film 'Sicko', and ponder the international financial crisis for further information.

Q. 14.3: What is the role of the tax system in ensuring that renewable resources are used both sustainably and efficiently?

Come to terms with the land by first dealing with it clearly and openly on a national basis. From the earlier paper on Australia's future tax system one learns that there are many taxes in Australia, all of which are ultimately paid from the earnings from only three factors of production: labour, capital and land (including natural resources) (p. 167). I assume land is overwhelmingly a non-renewable resource upon which most production involving renewable resources must be conducted. However, the appropriate treatment of land is a mystery to me. I am unclear about its essential rules of ownership and the ideal relationship of these to indigenous land rights, property or human rights of any kind. (This is yet another picnic exclusively for lawyers?)

I regard the absence of the theoretical and regulatory discussion of land in the consultation papers on Australia's future tax system as another major inadequacy. One cannot discuss renewable resources, housing and much other policy sensibly without first discussing land. I guess that most state land taxes eventually get passed on in extra costs to the people who buy houses or businesses. Land taxes must also be infuriating for other small borrowers such as me, because they appear primarily and unfairly designed to provide revenue for unnecessary lawyers and financial service providers in badly designed systems, as well as for state governments. (See attached discussion of the irrational relationships between a superannuation fund, Perpetual Ltd and a bank called 'Trust'. (The management seems like expensive self-blinding. Who needs Perpetual and why?)

I have recently read the NSW Environmental Planning and Assessment Amendment Bill (2008), the Building Professional Amendment Bill (2008) and the Explanatory Notes for these. They are perhaps the worst examples of incomprehensible, expensive and time wasting legal and related government product that I have seen for years. As a person who worked in policy and advisory positions in the WorkCover Authority for ten years, I have seen a lot of outdated, determinedly unclear, uninformative, repetitive, voluminous, legislative rubbish in my time. However, the Environmental Planning and Assessment Bill and the Building Professional Amendment Bill took the cake. No wonder NSW Councils have recently been sacked for corruption. If this is the standard of legislation in planning it is a wonder that anybody involved in the process has any idea of what they are

supposed to be doing. The proposed legislation is so incomprehensible that it is hard to believe that this is not what state government wants. One wonders why.

For example, under Division 4 88 (1) Definitions, one is told that a Crown development application means a development application made by or on behalf of the Crown. Why call government the Crown and why use a definition which simply repeats the most confusing or contentious word? (I hate lawyers.) Section 88 (2) states:

A reference in this Division to the Crown:

(a) includes a reference to a person who is prescribed by the regulations to be the Crown for the purposes of the Divisions, and:

(b) does not include a reference to:

- (i) a capacity of the Crown that is prescribed by the regulations not to be the Crown for the purposes for the purposes of this Division, or
- (ii) a person who is prescribed by the regulation not to be the Crown for the purposes of this Division.

The above merely states the obvious, extremely confusingly, without providing any necessary information. It is vital to know whether any person involved in the planning process is expected to be acting on behalf of government, in a regulatory capacity, or on behalf of a member of the private sector, in a market capacity. In spite of its wordily incomprehensible statements of the bleeding obvious, I have absolutely no idea what the discussion of Crown developments means or requires. This problem is typical of the rest of this outrageously worded legislation. This is lawyers' talk, whose ultimate purpose is to convince ordinary people that they are stupid and must give control of their affairs to the legally trained at great expense. A government which stands behind such abuse of the public trust and purse is criminal in my view. Why does there appear to be no government desire to support plain English in legislation? A clear national approach is necessary. Much of the current academic discussion of land and housing is useless in my opinion. I guess they do not want to know much about the real world because knowing is frightening.

The concerns of 85 Councils from across NSW whose members rallied to oppose the proposed changes to the NSW Planning System are logically treated in a coordinated, national context. Councils call for an efficient development and approvals process, which is not undertaken at the expense of heritage, sustainability and the democratic right for input into the future of the neighbourhood. These claims must be implemented from more broadly open and scientific regional perspectives to be effectively met and corruption free. The alternative is more confusion, division, cost and conflict, driven largely by the twin desires for market and political advancement. Councils are concerned that any NSW plans to limit monetary contributions to councils from developers will prevent the latter from providing local facilities and services. They also say these development contributions provide only a fraction of the cost of infrastructure needs. However, future funding or in-kind contributions for land purchase, housing and infrastructure development need to be more clearly and broadly justified. One needs to clarify land management to address tax.

The PC report of the review of the regulatory burden on upstream petroleum (oil and gas) states in chapter 5 that under Australian law, petroleum resources are owned by the

Crown (i.e. by government (p. 69). I assume, therefore, that government, not the private sector oil company, ideally manages all operations conducted upon the resources it owns. Government ideally also manages such operations competitively, in the public interest, by contracting mining companies to extract and market oil and gas to government specifications. In this ownership context, PC discussion of the rationales for government regulation, which briefly addresses 'public goods' is unacceptable. Box 3.1 states:

Public goods exist where provision for one person means the product is available to others at no additional cost. Public goods are characterised by being non-rivalrous in consumption (that is, consumption by one person will not diminish consumption by others) and non-excludable (that is, it is difficult to exclude people from benefiting from the good). Given that exclusion would be physically impossible or economically infeasible, the private market is unlikely to provide these goods to a sufficient extent. The nature of public goods makes it difficult to assess the extent of demand for them. Common examples include flood-control dams, national defence and street lights (p. 30).

The above perspective is what one might expect from Daniel Plainview, the oil man in the recent movie, 'There Will Be Blood', rather than from Australian government in 2008. Government is established to seek the public good for current and future generations – which is economic, social and environmental. Government does not envisage the public good as 'similar analytically' to 'externalities or spillovers'. The PC appears to be the subject of the regulatory capture it deplors on page 33. The report seems like the tool of oil company shareholders thinking of their short term profits and very little else. This is likely to mean potentially competing renewable resources are not used or are destroyed. The PC appears uninterested in innovations to make production more sustainable, but sees regulation more as a hindrance it wants to be rid of, rather than as any potential incentive for more innovative and cleaner production. For example, on page 29 the PC discusses crude oil and condensate, natural gas, LNG, LPG and the countries to which these products are sent without providing any idea about what these products are used for, their cost, their impact on the environment, their substitutability and their general level of sustainability. This disinterest in the relative merits of oil and gas products from any social or environmental perspective appears typical of the report. Yet such information may be vital for carbon pollution reduction and renewable resource development.

In the current context, where even the PC appears to be confused about who it is supposed to be serving, it is not surprising that industry participants find 'a lack of clarity of policy intent and definition of good oilfield practice' (p.79). I assume that good oilfield practice is ideally that which meets the stated aims of oilfield legislation. I also assume that these aims are ideally to meet the interests in sustainable development of current and future generations of communities, workers and customers in environments which are involved in or affected by production and consumption of oil and gas. The PC proposals for change in the industry are ideally reconstructed in this wider context of national and international legislative aims, including carbon trading and renewable resource development.

I have no idea why the WA Government states ‘The concept of ‘good oilfield practice’ balances the competing objectives of maximising both net present value and ultimate recovery’ in cases where ‘the interests of operators may diverge from those of regulators’ (p. 83). I assume regulators ideally expect the operators to serve regulatory goals, in the same way that I expect a building contractor to build the house I want, not something else it prefers. It is important to understand such issues if governments are being requested to introduce ‘lighter handed regulation of retention leases by increasing the period of the initial lease from five years to 15 years, with renewals for a period of ten years’.

In the current context, oil and gas extraction and petroleum production appear ideally linked to major sources of automotive and related transport and energy innovation. I assume oil, gas, petroleum, auto and related transport sectors should all seek a consistent safer, greener, planned transport innovation and energy funding approach in which all production and consumption are driven by incentives for more sustainable development. A regional industry and community stakeholder management framework, rather than a petroleum production chain management approach is necessary for consolidating current regulation to achieve sustainable development across all national industry and community boards. One assumes the ideal role of partnerships, unincorporated associations and sole traders must be considered in a related context by Australian and other governments. The COAG ideally assumes that competition between business entities should take place on a level playing field of national minimum standards related to health (welfare) and environment protection, unless another course of action appears to be in the public interest. Management structures are ideally designed to serve all relevant goals competitively.

Funding projects for more sustainable development in areas of primary production, such as mining and energy, forestry, fishing and farming require early consideration in related global, regional and local communities. Many projects should be partially guaranteed by government credit on the basis of their apparent ability, if handled properly, to reduce major problems related primarily to dealing with financial crisis on one hand and global warming or related problems of environment degradation on the other. In general, projects are ideally ranked and chosen for funding on the basis of their potential for controlling all related current risks to populations which are economic, social and environmental, as fast as possible. This is also the basis for triple bottom line accounting. This recommended funding approach delivers biggest bang for buck in part because the general direction of holistic regional and local development and related risk reduction may become gradually clearer to all the stakeholders. This also helps them to identify and deal with problems by teaching themselves. The direction also provides a more stable future by producing better coordinated understanding and control of all development related risks.

Thank you for the opportunity to make this submission.
Yours truly, Carol O’Donnell.

AN IDEAL TRUST STRUCTURE FOR THE BENEFICIARIES: AN EXAMPLE FROM AN AUSTRALIAN SUPERANNUATION FUND AND A BANK

Introduction

From a historical and related scientific management perspective, industry superannuation funds, to which workers, employers and government contribute primarily to provide the workers with an income in their old age, may be conceived as new and better coordinated forms of insurance, taxation and banking. In the traditional insurance company, the fund owners and beneficiaries of the business are the stockholders, not the premium purchasers who are seeking to protect themselves against some kind of risk. Elected governments collect and direct taxes separately, on behalf of taxpayers. Banks take deposits from citizens and companies and lend money to their customers for home or business purchase and all related development. Industry superannuation service management is ideally now designed so fund managers can achieve not only contributor savings, adequate pension provision and housing loan assistance but also regional investment for sustainable development more scientifically and cost-effectively. Many regional planning and management processes are ideally conducted by government in cooperation with relevant communities, industries and related fund managers. An ideal trust structure is considered later in this context. It is structured to enhance competition through better service coordination, related cost cutting and more openness. Openness is vital for all scientific work, including management. Perfect information is necessary for a perfect market. The ideal trust promotes this development.

The main reason current financial institutions do not work as effectively as they should in the interests of the financial service customers, is that financial service providers and governments remain adherents of management expectations belonging to a feudal management era, which existed prior to the more scientific assumption that perfect information is necessary for a perfect market. The scientific management expectations of welfare state capitalism are even newer still. In the early insurance model there are few injury prevention or rehabilitation structures or services to reduce the risk of injury or its consequences for the client or the surrounding environment. The cost of the risk of injury occurrence, on the other hand, may be offloaded to innocent premium holders or taxpayers, or sold to other market participants. This adds to the eventual risk of market collapse rather than providing a mechanism for risk prevention. UniSuper indicates that for the financial year ending in June 08, cash investments performed best with returns of 5.89% and 'socially responsible high growth assets' performed worst at -17.49%. In 2006-2007 the latter assets returned 19.60%, while cash returned 6.68. This comparatively unstable investment performance is a major concern in relation to the introduction of carbon trading in 2010, to achieve pollution reduction.

Australian national sustainable development goals must be achieved primarily through seeking the prevention of injury in the environment and rehabilitation after injury occurs. Industry cannot drive sustainable development effectively alone, because its primary

goals are making money for stockholders or accessing support or other compensation when this fails. More broadly scientific approaches to management are necessary to achieve more sustainable development. More broadly linked management partnerships between industries, governments and other communities, driven by social and environment goals, which include commercial goals, are necessary. Recommendations of recent Treasury and other government reports are considered in this context.

More Scientific Financial Management is Necessary but Treasury Cannot Lead

This discussion first provides a short historical and theoretical background for Australian superannuation fund management. It also focuses on the evidence to support a central example of ideal managed trust relationships between Australian superannuation fund members, bank customers, and related broader communities with similar interests. These collective and individual interests principally lie in better and cheaper fund management for superannuation members and bank customers, in order to achieve related and more broadly identified community goals or directions more effectively. The evidence supporting the discussion of the ideal trust structure is also provided with the aim of maximising the interests of the beneficiaries most concerned with the example provided. They are contributing members of UniSuper and loan customers of MembersEquityBank.

However, the current financial crisis is also a good time to explore potentially matching trust relationships between many industry superannuation funds and bank managers, or with other institutions. Such institutions may have assisted saving, lending, taxing, pension provision or related financial service and investment functions. Such services may be better defined, designed and coordinated to serve the interests of industry superannuation fund members, bank customers, taxpayers and other customer or related community groups more effectively than at present. Supporting discussions of Australian constitutional problems, education for sustainable development, and the management structures to achieve the government Green Paper on Carbon Pollution Reduction (2008) objectives are provided in attachments. Tax needs to be conceptualised in this context.

Later discussion of ideal trust structures and relationships additionally aims to promote effective financial service provider competition through describing a more consistent and scientific approach to financial services structure, management and delivery to achieve more clearly identified social goals. This process ideally begins with clarification of financial definitions, more consistent use of financial terms, clearer financial, social and environmental aims, and the improved design of related service management structures and administrative procedures. This is necessary to promote the financial service managers' capacity to compare service outcomes and to continually improve them through competition. I assume the Australian and New Zealand Standard Industrial Classification (ANZSIC) should provide useful guidance in this context and that the following Services Industry categories should be of primary interest:

- Finance and Insurance
- Property and business services
- Construction

The above industries ideally serve many related industries as scientifically as possible. Yet Treasury does not refer to any ANZSIC categories in its publications discussed later.

According to Popper (1972), science aims to be objectively grounded in the outcomes of experiment and test. Although honesty is not a scientific concept, all science depends upon it. Scientific, democratic and customer service management processes also depend on communication. Effective communication, rather than tests, grades or related numbers, are the essential measure of much scientific discourse. Written communication requires a level of logical thought development which cannot be matched in cultures which are primarily oral or numerical and so less open to organized development or criticism. Naïve academic or professional ‘experts’ may also be taught to equate numbers with science and the written word with law or imagination. This is not the case. Ideally, scientific managers know and encompass the value of all through good communication. Science ideally emulates a more careful, carefree God than the deity of feudal cultures.

The Australian government must understand the necessary conditions for effective comparative administration before it can create them. I have little confidence that many so-called legal or financial experts understand them well because they are largely uninterested in historical and related structural development. They hide behind laws and numbers. When legal or financial experts write they often omit definitions of terms, because they are not in legislation. The courts rule but seldom define. Theirs is prescientific treatment. I used Rubin’s Dictionary of Insurance Terms, published by Louisiana State University (1991), to define key terms used later. The Financial Services and Credit Reform Green Paper (2008) produced by the Australian Treasury and entitled ‘Improving, Simplifying and Standardising Financial Services and Credit Regulation’ does not even define a trustee. However, it defines TRUSTEE CORPORATIONS as:

Corporations licensed under State and Territory Government Trustee Companies Acts for the purposes of providing personal trustee and estate administration services.

One wonders what other functions such trustee corporations normally have. The Treasury report on the architecture of Australia’s Future Tax System (2008) has no glossary. In Table 2.9, entitled Australian government taxes as at 1 July 2008, the heading ‘Trusts’ refers to ‘*Trustee of trust (other than public trading trusts, corporate unit trusts and FHSA trusts)*’ (p. 59). FHSA is not even in the listed acronyms. All the above management concepts and structures, whatever they are, require consideration in the light of current Treasury and related government reports’ shortcomings and the argument made later. This indicates that poor service administration is related to bad choice of a trustee in the case of the MembersEquityBank choice of Perpetual Ltd. All trust related concepts should now be defined and treated appropriately. Treasury seems unwilling to do the job of analysis properly. Why not give the Productivity Commission and the Australian Tax Office a go, on behalf of Australian consumers and taxpayers? Law which operates without aims, key definitions or related classifications, makes scientific management impossible and the latter is not valued at all in such authoritarian,

feudal and unstable environments. Courts collect little or no management data which can be used for better injury prevention. They are the root of an evil far from public service.

The Treasury report on the architecture of Australia's Future Tax System appears to take little interest in issues concerning the potential broadening of the income tax base. (What planet do they live on?) In a brief discussion entitled 'How taxes affect savings and investment decisions (2008, p. 248) the report provides a misleading chart, entitled 'Savings and Investments in an Open Economy. In it, 'resident savers' and 'non-resident savers' face 'holding entities' which surround 'financial structures', which surround 'assets'. The 'holding entities' are 'banks, companies, superannuation funds or trusts'. None of these vital entities are defined in the Treasury report on Australia's Future Tax System or in the Treasury Green Paper (2008) on Financial Services and Credit Reform. Treasury overlooks such 'holding entities'. However, banks, companies, superannuation funds and trusts do much more than holding. They are trading entities, which may trade increasingly opaquely valued financial products with unexpected outcomes, as the current US and related global financial crisis is currently showing. I assume that 'foundations' were missed out by Treasury because their doings are ideally considered philanthropic. Charitable activities may be unclear but may also escape tax implications. Financial services need greater scrutiny. Treasury appears not to have the stomach for it.

The Consumer Friendly Nature of the Modern Superannuation Magic Pudding:

In feudal times, the trader's family, banker and insurance premiums were his main financial protections. In the case of catastrophe, a man might call his lawyer and attempt to get lost money back from another supposedly guilty party or an insurance company, via the courts. In a later historical period, the flowering of science and technology was strongly driven by the development of capitalist organization and related competition. Even later, the development of capitalism drove welfare state growth and all its related public service provision, such as pensions, funded through taxation. However, the earlier feudal management structures continued to dominate later bureaucratic management expectations, through the continuing and dominating power of feudally structured courts, lawyers and all related commercial in confidence expectations. The current result of this is dysfunctional overregulation which only works to profit lawyers and their acolytes by driving everybody else increasingly into professional and related darkness. The current US crisis shows the cumulative effect of financial secrecy and consequent ignorance. This is the opposite of increasingly open markets. Americans are kidding themselves.

The desire for financial compensation or revenge, rather than for injury prevention or rehabilitation drives the feudal approach to management. Risk may be parcelled up and sold to others as a financial investment service, and as if this process were also related to stopping a ship from sinking, or a sea wall from breaking and flooding houses, in the real world. It is not. Lawyers and their acolytes are used to following many ancient rules, in which self-blinding ignorance may be equated with more effective management. For example, under the heading, 'Robust institutional arrangements are needed' Garnaut provided the following warning in his Interim Report on Climate Change:

‘Care would need to be given to the design of the institutional arrangements for administering the allocation and use of permits. Variation in the number of permits on issue or the price would have huge implications for the distribution of income, and so could be expected to be the subject of pressure on Government. There is a strong case for establishing an independent authority to issue and to monitor the use of permits, with powers to investigate and respond to non-compliance ‘(Garnaut, 2008, p.65).

The Australian government is elected to govern and by giving away a major governing power to any body established at arm’s length from itself, government only makes itself more ignorant and unaccountable than it would otherwise have been. This is a common kind of problem. Everybody needs to know more about what is going on, not less.

In the case of industry superannuation, as in the case of NSW workers compensation insurance, the managed funds are owned by the contributors to the funding pool, who are also the fund customers. This fund management model ideally services its stakeholders – the ideal beneficiaries of the fund - rather than a completely different group of stockholders, as is usually the case with management of insurance companies and banks. Like premiums paid to an insurer, deposits placed in a bank or taxes paid to government, superannuation funds are ideally invested by the fund managers to achieve adequate returns to the fund owners. In superannuation the latter are also the main contributors to the fund, its customers and related beneficiaries. This stakeholder management model is the most recent, scientific and democratic form of capitalist development, which can ideally be effectively coordinated with the broader management aims of governments and with the related interests of industry and communities in sustainable development. Older ways of operating now merely add layers of foolish regulatory costs to all transactions. British government purchase of interests in banks may assist better Australian direction.

Consider the recommendations of the Select Committee of Senate on State Government Financial Management (2008) in this context. Recommendation 1 is for a Charter of Budget Honesty. In the current US financial meltdown, all those who have always striven to be honest, may now be forgiven for wondering what they are expected to be doing differently. This is now the major financial puzzle conceptually - a little like the Chinese, cultural, revolution. Recommendation 2 suggests the Charter should include requirements that financial reporting ‘be fully consistent with all relevant financial reporting standards’, (etc. etc. etc.). The necessary trick, however, is deciding which financial reporting standards continue to be relevant if one properly understands the nature and requirements of ideally related national and international capitalist, democratic and sustainable development enterprises (to say nothing of the ideas of Marx, the champion of scientific materialism.) Recommendation 3 of the Select Committee of the Senate refers to the necessity to maintain the integrity of the tax system, among many other fine things. Having read ‘Australia’s Future Tax System’ (2008) I think Treasury is probably unwilling or unable to explore what integrity might mean, let alone act on it.

The recent article on Frank Lowy entitled ‘The quiet benefactor: Lowy’s dedication to Israel’ in the Sydney Morning Herald (SMH 29.9.08, p.1) states that a foundation is not a

company or a trust. In regard to the integrity of the tax system, the same article notes that the Australian Tax Office has trouble applying Australian taxation laws to non-common law entities, such as the Lichtenstein foundation operated on Mr Lowy's behalf. It seems that more effective bank regulation is necessary in many tax havens to ensure that Australian and other governments can tell the difference between illegal and legal activities when Australian money goes to banks offshore. This may also be part of the route to coordinating sustainable development more effectively through triple bottom line accounting. The latter is primarily concerned with establishing the bank project aims from commercial, social and environmental perspectives and documenting their progress.

One wonders in this international context how the leaders of failed or failing states other than the US, such as Burma and Nepal, think their countries' situation is ideally managed in the light of the impact of the global financial crisis and all related requirements for sustainable development, which are partly driven by ideal systems for carbon pollution reduction. One also wonders how the governments of failed states ideally perceive their populations and any related foreign workers to be protected when natural or man made emergencies arise. The secondary trading markets appear largely to have toxic purposes in this global context in that they offload the cost of financial risk to other market players, rather than reduce all risk through risk prevention, rehabilitation and related development programs funded effectively from common pools. US attempts to provide good health services via market mechanisms failed, why should carbon trading be any different?

From the international sustainable development perspective, which governments, industry superannuation funds and related managers ideally now support, good governance normally requires clear separation of government policy from its administration, with the former driving competitive, transparent, service provision (Rich, 1989; Hilmer, 1993) so all may identify a range of economic, social and environment related outcomes. Program budgeting, as partially implemented in the public service by Wilenski (1982; 1986), is central to this approach. Managers start with program and related project aims which have been consultatively developed and prioritized in the light of national and regional community goals. They establish strategies to meet them and prepare related budgets. The direction is important to establish early and openly, rather than fighting about the supporting amounts of money and their sources over the long term. Arguments about the latter go on forever. If there is a clear policy direction and worries are about the real world consequences of action, its potential problems can be more easily seen and reduced. Key fund management activities are monitored and their outcomes are measured in the light of the overall identified aims of the related projects and institutions.

Australia has been blinded by an outdated Constitution and financial administration which reflects a British governance model in which elected politicians, administrators, and the judiciary are seen as separate, independent governance pillars, which try to keep each other and those lower, ignorant. The Senate Committee report of inquiry into transparency and accountability of Commonwealth public funding and expenditure (2007) ignored program budgeting. It recommended complex additions to the existing Australian budget process which add to current budget opacity and all related cost. The committee concluded its recommendations were designed to restore the Parliament's

historical and constitutional prerogatives. This is undesirable in an era where open partnerships with industry and communities are required to achieve national and regional health and sustainable development effectively, through fair and efficient competition.

In Recommendation 8 of the Senate committee on State Government Financial Management (2008), the committee suggests the Council of Australian Governments (COAG) consider the costs and benefits of input controls compared to output controls in the development of Special Purpose Payments (SPPs). Input controls and output controls are not defined. The recommendation followed discussion of Commonwealth-state and territory fiscal relations in Chapter 2. The committee notes the major overhaul of the SPP framework currently being undertaken by the COAG. It also notes the National Audit Office (NAO) has identified this topic as possibly warranting a future performance audit, which the committee supports. One assumes the NAO will naturally operate secretly. Government needs to understand and implement open program budgeting, not forget it.

Prioritization of projects for the \$20 billion Building Australia Fund, the National Rental Affordability Scheme and related project coordination is now being undertaken and management partnerships must be considered in this context. An openly planned approach to investment should allay opposition concern that these funds 'will just be used as a slush fund to bail out failing state Labor governments, who have got infrastructure problems that they have all allowed to accumulate' (Sydney Morning Herald (SMH) 4-5.10.08, News 4). I assume current NSW Government policy in regard to the procurement of **infrastructure, information technology, property and goods and services** requires consideration in the same context. For example, the NSW Treasury Gateway Review Workbooks comprise:

- Strategic Review Workbook
- Business Case Review Workbook
- Pre-Tender Review Workbook
- Tender Evaluation Review Workbook
- Pre-Commissioning Review Workbook
- Post Implementation Review Workbook

I believe that few could go through the current voluminous Treasury processes outlined in the above workbooks without being driven to drink. I do not know how these Treasury expectations relate to anything expected by the NSW Department of Planning, councils, recommendations of the Senate Report on State Government Financial Management (2008), or construction to be undertaken under the National Rental Affordability Scheme draft guidelines (2008). The latter superficially seem reasonable to me. (This is rare.)

Rationale for Construction of an Ideal Trust Structure and Relationships

In the Dictionary of Insurance Terms, Rubin (1991) states:

A TRUST is a legal entity that provides for ownership of property by one person for the benefit of another. The trustee receives title to the property, but does not have the right to benefit personally from the property. The trustee has a legal obligation to manage the property and invest its assets solely for the BENEFICIARY OF TRUST (sic).

There are basically two types of trusts: LIVING TRUST (established during the life of the GRANTOR) and TESTAMENTARY TRUST. For example, a trust may be established by a parent to hold assets for the benefit of a child.

Logically, under Rubin's definition of TRUST, my claim relates primarily to a living trust which exists between me and UniSuper. I am one of many UniSuper members. Under the above definition of TRUST, I am the beneficiary of a trust in which UniSuper (the trustee) undertakes to manage my superannuation savings and related investment account. If I seek a loan, MembersEquityBank may be my loan service provider and mortgage related trustee. Members Equity advertises itself as 'The Super Funds Bank'. I took out a loan and have now paid it off. My Super Funds, my Bank! I had naively thought. However, I had to undertake transactions which should have been simple and largely free of cost, but which were made extremely complex and costly. The aim appeared to be to extract money by forcing me to use lawyers, have property valued, have mortgages and certificates of title dealt with, and related state taxes paid, in order to have some of the latter reimbursed. At the time, many organizations were on TV nightly seeking to lend money to people with much less credit worthiness. I recommend that the Treasurer invite Australia's leading industry superannuation funds and Members Equity Bank to design a better system from the perspective of the superannuation fund contributor, loan consumer and the national interest. Related suggestions appear below.

According to Rubin:

FIDUCIARY - holding of property or otherwise acting on behalf of another in trust. The fiduciary must exercise due care in safeguarding property left under personal care, custody and control. Insurance coverage is available for this exposure. (One wonders why the insurance should be necessary).

MembersEquityBank is the ideal fiduciary of UniSuper. UniSuper is also the ideal trustee for MembersEquityBank. The interests of the beneficiaries of UniSuper savings and investment account management and the customers for MembersEquityBank loans and related property services appear best served if MembersEquityBank becomes the housing loan manager for UniSuper funds. However, Perpetual Ltd. currently interferes in this ideal trust relationship. Perpetual Ltd should not be considered as the trustee of MembersEquityBank, 'The Super Funds Bank' as is currently the case. Perpetual Ltd must operate in the interests of shareholders in Perpetual Ltd, who are neither UniSuper members nor MembersEquityBank customers. Perpetual Ltd shareholders represent a third set of interests which milk the other two sets irrationally, opaquely and very annoyingly. Perpetual Ltd has something worse than a conflict of interest. It should never have been the trustee of MembersEquityBank. UniSuper fund managers are the ideal MembersEquityBank housing loan underwriters. Who chose Perpetual and why?

The manner of treatment of any mortgage and certificate of title on any loan related property being considered in the above context should be clear and exclude as many costs as possible. The current MembersEquityBank loan management and related service

system is unnecessarily complex, adversarial and expensive. If MembersEquityBank managers could know how much superannuation a consenting member had in a UniSuper account, one wonders how the circumstances of the attachment of any MembersEquityBank loan, however small, to property and its related mortgage or certificate of title, should be carried out. This now requires consideration.

According to Rubin:

Since the trustee is required to manage the property and its assets in a prudent manner, if he or she fails to perform in accordance with the PRUDENT MAN RULE the trustee becomes personally responsible for any lost funds or profits incurred by the trust

From the above perspective, I believe that whoever made Perpetual Ltd. the trustee of MembersEquityBank or UniSuper failed to perform in accordance with the PRUDENT MAN RULE. From my perspective, what they did was more like the application of the STUPID, HORRIBLE OR EXPEDIENT MAN RULES. In my experience this often involves the continuing application of feudal legal principles, while mixing them up even more irrationally than was probably the case in the 14th century. In Australia, the more scientific concept of duty of care, which is found in state Occupational Health and Safety Acts, may be usefully extended by consistent regional management with coordinated duties of care to customers, communities, the land, water, air, and related biodiversity. Market operations which are driven by money managers will not produce effective competition to solve real world problems, as indicated by the current US financial crisis. A more scientific management approach is suggested in the attached article entitled 'Health and education for sustainable development and the Australian carbon pollution reduction scheme'. Taxation matters also require consideration in coordinated regional industry and community contexts, where the common aims are increasingly related to sustainable development – to achieving economic, social and environmental goals.

According to Rubin:

A trust agreement is: A legal document setting out the roles to be followed by a TRUSTEE in administering assets of a TRUST. The trust agreement may limit investment of trust assets to specified types of securities, for example, or provide for distribution of the trust principal or earnings to a BENEFICIARY OF TRUST only under certain circumstances

Rubin does not include a definition of SECURITIES in his dictionary. He includes dictionary definitions of a number of different bodies with the word 'security' in the title, but never explains the word itself. (I assume this Freudian slip follows the common feudal courtesy of lawyers to their judges. Increasing confusion over terms costs money.)

The concepts of UniSuper 'rebalancing and strategic tilting' which were discussed in recent member training, should logically be undertaken in the above context, in cooperation with those charged with achievement of government and industry regional planning objectives related to sustainable development and carbon pollution reduction, as

discussed in articles attached. If UniSuper is convinced of the material value of the housing or related portfolio held (for example, by going out and patting the housing stock) fund managers should not switch financial holdings from moment to moment to achieve some concept of numerical, market and risk related equilibrium as markets move, especially if this concept of value is fictitious, as appears to be the case. Related standards appear false and a means for traders to make more money for themselves.

In Recommendation 2 of the Parliamentary Joint Committee on Corporations and Financial Services Report (2007) entitled 'The structure and operation of the superannuation industry', the writers suggest that treasury should conduct a review of laws and regulations governing superannuation to identify how they may be rationalised and simplified. Key assumptions, definitions and industry descriptions and relationships still need to be logically addressed before effective discussion of the simplification of superannuation law is possible. For example, any future inquiry should address the aim and related rationale of requirements that a superannuation fund or any other financial institution should be managed by a trustee, 'at arm's length'. When is the separate trustee necessary and why? What exactly should the trustee role entail? The report constantly refers to 'the industry'. This and other key terms and relationships need clearer definition. I do not recommend treasury for the task. However, consistent with the recommendation of the above report, it would be good if UniSuper publicly tenders its key service provision agreements for consideration. It would educate the market.

The above issues require further consideration in the light of national competition policy which was supposedly implemented after Hilmer's report to Australian Heads of Government in 1993, following an independent committee of inquiry. Hilmer defined competition as, 'striving or potential striving of two or more persons or organizations against one another for the same or related objects' (1993, p.2). This definition would have led to triple bottom line accounting (financial, social and environmental), which is necessary for sustainable development, if it had ever been implemented properly. It was not. The earlier Trade Practices Act (TPA) 'interpretation' of competition was retained in spite of Hilmer, which states that, 'competition includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia'. The TPA does not define key terms, but 'interprets' them instead.

In spite of Hilmer, Australian competition legislation still follow the US Sherman Antitrust Act of 1890 which stated that all 'unfair' business 'monopolizations' and 'combinations' are against the national interest. As JK Galbraith pointed out, 'To suppose that there are grounds for antitrust prosecution whenever three, four or half a dozen firms dominate a market is to suppose that the very fabric of American capitalism is illegal' (1952, p.68). He also pointed out that this has never discouraged the briefless lawyer. The Australian TPA has developed on a similar basis of early legal assumptions about the market being composed of traders whose interactions, when ideally free from government interference or other monopoly influence, naturally benefit the whole society. This is a highly questionable economic proposition, unsuitable for legal reification. The consumers (customers) are not recognized as a sub-set of traders in this theoretical framework. The comparatively recent concept of the 'consumer', suggests that many such traders may need

special protection because of their comparative lack of information about their purchase, or for other reasons such as their comparative lack of money, opportunity or related bargaining power. After the Hilmer report, consumers were specifically addressed in a new section of the TPA. This and state fair trading acts now have long, inconsistent and narrow definitions of a consumer. Lawyers' logic is awful because their views are feudal.

UniSuper Fund Management Ramifications

Recently in the Australian Financial Review (AFR 30.9.08, p.69) Lohr discussed the current US financial legislation which will allow the Secretary of the US Treasury to make decisions regarding the purchase of mortgage-related assets up to the value of \$700 billion. In the legislation, the term mortgage-related assets apparently means residential or commercial mortgages and any securities, obligations or other instruments that are based on or related to such mortgages, that in each case was originated or issued on or before September 17th, 2008. Lohr quotes a former senior researcher at the International Monetary Fund (IMF) saying:

Key tasks are overseeing the workings of the rescue plan, helping to guide the contraction and recapitalisation of the banking industry, assisting home owners who face mortgage defaults and in general shaping policy for a nation that will be less accustomed to easy credit and overspending. (AFR 30.9.08, p.69)

Australian development is ideally coordinated effectively in a global context. However, on the basis of current reading I do not trust Treasury officials in the US, Australia or the state of NSW to resolve key problems rather than increase them as a result of following their past rules and more recent ones which they make up as they go along in conditions which have become increasingly opaque. This has now caused many disasters in financial services provision and results. The past Australian treasurer's concern about whether government buying securities is supposed to raise or lower the cash rate also requires consideration in this context. His confusion and that of treasury about this is recounted in his Memoirs (Costello, 2008 p. 114).

In the current, extremely unclear financial situation, it seems a good idea to start any accounting processes with current material realities, such as housing stock, on which loans are often based. In this context I cannot understand how it is possible to have a non-financial dependant, which was referred to in recent UniSuper training. The Treasury reports are very scrappy but neither they nor Rubin's Dictionary of Insurance Terms, which looks a more scholarly account, allude to any such category of being. Are we about to revive the concept of 'emotional dependence', as in my youth? How delightful. I'd be grateful for any further information you provide on any of these issues.

Thank you for the opportunity to make this submission.

Yours truly
Carol O'Donnell