

# SUMISSION TO THE PRODUCTIVITY COMMISSION ON A NATIONAL AND GENERAL INDUSTRY FRAMEWORK FOR CONSUMER PROTECTION

## INTRODUCTION

In January 2007 the Productivity Commission produced an issues paper entitled 'Consumer Framework Policy' to assist its inquiry, which was established by the Treasurer, to make recommendations in relation to Australia's consumer policy framework. This submission also undertakes that task. It particularly addresses the Treasurer's requirement to consider:

*The need to ensure that consumers and businesses, including small businesses, are not burdened by unnecessary regulation or complexity, while recognising the benefits, including the contribution to consumer wellbeing, market efficiency and productivity, of well-targeted consumer policy.*

In doing the required task, this paper also addresses the Treasurer's request to report on:

*Any areas of consumer regulation which are unlikely to provide net benefits to Australia and which could be revised or repealed*

Also at the Treasurer's behest, this paper particularly considers:

- 1. The complementarities between Australia's competition and consumer protection laws, and*
- 2. The shared responsibility of consumers, businesses and governments for responding to consumer issues*

In achieving the above, this paper primarily addresses the Productivity Commission's questions on page 18 of their paper 'Consumer Policy Framework' (2007). These are:

*Is the current consumer framework fundamentally sound? Does it simply require fine-tuning or are more comprehensive changes required? What measures could be used to assess whether it is delivering for consumers?*

The three answering recommendations outlined below are based primarily on a later analysis of the concepts of 'competition' and 'consumer' in the context of recent international and national policy directions, related key legislation and with particular reference to the report on National Competition Policy produced by the Independent Committee of Inquiry (Hilmer Report, 1993). Hilmer's investigation was conducted when the Prime Minister asked the Heads of Australian Governments to undertake an independent inquiry into national competition policy, following agreement by Australian governments on the need for the policy. This is ideally where a new world order begins.

In this context, I assume the most relevant acts for current discussion and for coordinated, consultative government action are now the Trade Practices Act and state Fair Trading

Acts. However, as the Productivity Commission indicated in its issues paper (2007), there is a lot of related legislation and codes of practice, much of which is industry based. This also requires consideration and logical consolidation within the key national contexts. My response to the Hilmer Report and its aftermath can be summarized in the words of Anna, the English governess to the children of the King of Siam, when she sang to him:

Giving credit where it's due, there is much I like in you,  
But it's also very true, THAT YOU'RE SPOILED! (Rodgers and Hammerstein, 1956)

I find the lawyers are to blame, as usual. I hope discussion of credit will occur in a later submission. The current one is mainly based on analysis of competition and consumers. It is also my Valentine's Day gift to you.

### **Recommendation 1:**

**The current consumer framework is unsound and more comprehensive changes are required. It is accordingly recommended that:**

**In the light of a coordinated examination of state Fair Trading Acts and the Trade Practices Act, a new act entitled the National Competition and Consumer Act should be established, and the Trade Practices Act and any related, outdated legislation should accordingly be gutted and repealed.**

**The new Competition and Consumer Act should have sensible objects and key definitions (rather than interpretations), and be in plain English. The object of the Competition Policy Reform Act (1995), as also introduced into the Trade Practices Act, remain appropriate in this context. Both acts state that:**

**The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.**

**The new, principal act should then be supported by suitable regulations and codes of practice. The Trade Practices Act and any related, outdated, legislation should then be repealed. State Fair Trading Acts, which currently appear to have no objects, should be reviewed, in a manner consistent with this approach.**

The precedent for the above approach occurred during the 1980s when all states passed new, comprehensive, plain English, occupational health and safety (OHS) acts which have clear and sensible objects and related duties of care. The states then revised and consolidated all earlier and outdated legislation related to workplace health and safety in supporting, plain English regulations. Then they repealed the earlier, outdated Factories, Shops and Industries acts, Construction Safety Acts and related prescriptive legislation. State governments also encouraged expertly developed codes of practice, to assist employers, workers and suppliers to workplaces to achieve their principle duty of care, which is the provision of a safe place of work. Ideally, all engaged in work should have a

legislated duty of care to protect workers, consumers, communities and the environment. The provision of a duty of care provides a logical, clear and simple legislative framework for the effective management of risk.

In my view, OHS acts provide the most suitable management model for dealing with consumer protection, as discussed again below. It is also argued that the beneficial effects of competition are best sought and understood in the context of a prior understanding of specific industries and their aims and problems, rather than in the current application of the outdated, prescriptive and nevertheless growing provisions of the Trade Practices Act (TPA) by the Australian Competition and Consumer Commission (ACCC).

The New South Wales Premier is an admirer of JK Galbraith (ABC Stateline Program, 9.2.07) and so am I. As an economist, Galbraith was essentially an institutional analyst who pointed out the limitations of economic theories which lacked a historical and political perspective. Galbraith should know. He greatly admired Keynes and interpreted his difficult work for a popular audience like me. He was also at Nuremburg. The rise of German fascism and the Holocaust were the eventual and historically logical outcomes of British and allied financial policies which Keynes fought against until his death because he knew they would lead to German penury and perhaps to war again. He was right. At the crucial end of WW1 the Australian government's understandable desire for revenge did not help the future. Today, thanks mainly to Keynes', other European influences and the Chinese, we now have belief in a democratic welfare state and not just the market, where lawyers traditionally operated, before the ubiquitous development of statute. Their feudal assumptions and practices are the central hinge which must now be smashed to release effective democratic and competitive potential. Lawyers could be easily replaced.

It is consistently argued later that Hilmer's views on competition, which were adopted by Australian governments, must be understood in historical context and that they are very different from their later adoption and interpretation by the legal monopoly culture which presides over the TPA. The ACCC and their brethren lack the holistic understanding of society, industry and environment which is necessary for its effective support. Their bizarre implementation of contested economic theory according to narrowly feudal, legal principles also renders the dismal science more ridiculous than usual. In the process the TPA becomes an increasingly long dogs' breakfast, and not a useful piece of legislation.

The feudal, monopolistic, legal culture is not only anti-competitive, but generally dysfunctional because open, broadly scientific and related evidence based approaches to management are necessary to achieve the consumer and public interest effectively. One cannot help but ask oneself what kind of a dumb or gutless generation of men allowed a feudal, legal monopoly to control a law which assumes competition for money is always the best thing, and you are delinquent if you are not? At least have a fair go all round. To some extent, inquiries like this provide good models. It's a pity I am on the cusp of retirement and my writing will not be supported by anything other than my personal superannuation. That is only one of the crosses that we superwomen have to bear. (Hint.)

**Recommendation 2:**

**According to the Productivity Commission (2007, p.11), at the federal level the Treasurer is responsible for consumer policy advice and development and there is also an advisory body, the Commonwealth Consumer Affairs Advisory Council, which provides independent advice to the Parliamentary Secretary to the Treasurer on consumer issues. There is also a Ministerial Council on Consumer Affairs (MCCA), which consists of all Commonwealth, State, Territory and New Zealand Ministers responsible for fair trading, consumer protection and credit laws. The role of the MCCA is to consider consumer affairs and fair trading matters of national significance, and, where possible, develop a consistent approach to these issues.**

**To me this seems a sensible approach to the need for an overarching authority for the development of recommendation 1 above and any related, industry based, management and arbitration systems. Ideally, the latter should replace courts and their feudal, adversarial, narrow and wrong assumptions and practices, which are so dysfunctional for the development of all scientific and democratic approaches to consumer and environment management and protection.**

The Hilmer Report points out that there is no exemption from the TPA for the professions and that 'work of a professional nature' is specifically included. He also said:

The overwhelming majority of submissions dealing with the professions supported removal of existing exemptions. Proponents of this view included the consumer, business and industry groups, individual businesses and a host of other submitters (1993, p.134) .....

Restrictive practices in the legal profession have also been a matter of increasing concern to the community as evidenced by the level of recent scrutiny at State, Territory and Federal levels (1993, p.134)

For related information and recommendations on risk management and alternative dispute resolution, including mediation, conciliation and arbitration, see my article on the problems of the Australian legal monopoly culture, which is entitled 'A healthier approach to justice and environment development in Australian communities and beyond' and which was published in **Public Administration Today**, Issue 9, Oct.-Dec. 2006. A related article of mine, entitled 'New Australian governance faces old legal impediments', was also published in the British journal, **Health Care Analysis**, Dec. 2006. Perhaps you can access it from the Springer website. (I'll be buggered if I can). A range of related publications and submissions is available on request. See my discussion of the ACCC on new TV licenses announced by Senator Coonan.

### **Recommendation 3:**

**I generally recommend a related industry management and consumer protection structure which is also based on the model operations of the NSW WorkCover Authority. This organization aims to assist injury prevention, rehabilitation, injury compensation provision and effective fund management. This occurs principally through administration of state OHS and workers compensation acts and oversight of premium funds and other management, especially by twelve competing insurance companies. The WorkCover board is guided principally by the objects of the relevant legislation and is managed according to normal commercial principles, (unless there is considered good reason to do otherwise), by representatives of the key stakeholder groups (employers and workers) and other stakeholders who are closely involved in administrative partnerships to achieve the goals of the legislation. These stakeholders are NSW government and insurance company representatives. Insurance companies help administer the scheme competitively, and invest the fund composed of workers' compensation premium under scrutiny of the WorkCover board. Government and industry, not insurers, own the fund. I do not need to spell out the benefits of this approach. One can manage better and make money! Do not give the fund away.**

The management structure adopted by NSW WorkCover contrasted with the earlier, unworkable and slow, 'tripartite' management structures adopted by Worksafe, the National OHS Commission. It also contrasts with all kinds of 'direct democracy' or 'collective' style management structures which are often adopted in academic cultures, by indigenous people, and by many related community groups who may normally expect their funding to come from the taxpayer or who may try to raise it themselves. In this model of decision-making, large meetings of voting members may elect representatives who are then held accountable for their actions by subsequent large meetings of voting members (where equally ignorant but different people may roll up to vote again, especially if they can develop a special interest). The WorkCover, statutory management style, with or without the statute, is more effective, efficient and democratic. This is because management can be made more clearly accountable for its decisions, which are nevertheless clearly defined by a statement related to broader organizational and public interest based aims, not purely profits. Such managers can also operate on a much more expertly informed and broadly consultative basis. One should make sure they do both.

The NSW Labor government introduced the current managed fund structure for workers compensation in 1987, after there were five insurance company insolvencies, when over forty insurance companies were underwriting workers' compensation business. (Some markets appear to be just too crowded?) Competition on premium price had led to pricing wars and to insurers' reserves running low at a time when courts were making increasing lump sum payments (NSW Government, 1986). The WorkCover model was kept by an incoming Liberal government after its inquiry concluded there was a lack of evidence of benefits from private sector underwriting, and that other factors, including quality of scheme administration, provide more important indicators of performance (NSW WorkCover Review Committee, 1989). This was supported in many later inquiries.

Australian experience of insurance fund management suggests that the private sector ownership (underwriting) of funds, plus competition on premium price, generally inhibits effective injury prevention, rehabilitation and containment of scheme cost. This finding was memorably made by the Whitlam government National Committee of Inquiry in 1974, but it has been made since in a wide variety of contexts where harm to workers, clients, consumers, road users, marine and other environments has been analysed. Australian inquiries have found that private sector underwriters who compete on premium price are also driven by the international underwriting cycle, which tends to promote general economic instability, which is bad for business. Private underwriters also require high profit margins to guard against the effects of competitive premium price-cutting, global economic fluctuations, unexpected court awards or long tail claims, poor investment decisions and inefficient administrative practices. When a large premium pool is broken up for ownership by competing insurers, each insurer requires international reinsurance as well as high profit margins to guard against insolvency. This adds to cost for consumers but no incentives exist for injury prevention and related innovation.

Insurance systems normally retain strong links with traditional common law, in that a lump sum award is provided only if a long court process finds a plaintiff's adversary is the cause of their injury. Third party motor accident insurance and professional, public or product liability insurance are examples of fault-based schemes which are ill-equipped to address serious harm to injured people who are forced to prosecute a premium holder for solutions to their problems. Neither do such schemes provide the necessary data to assist effective injury prevention or premium setting. Insurance companies may not even distinguish particular premium from their other insurance funds, so there may be no basis on which government can effectively exercise the powers of financial monitoring outlined in its legislation. On the other hand, when funds are owned by government and industry, and when services and premiums are established in this context, the insurers contracted to manage the business ideally compete for market share by providing business with services related to risk management and investment, which ideally also lead to premium price cuts because of more effective injury prevention. The benefits of managed fund investments are also returned to scheme stakeholders when they, rather than insurance companies, underwrite the fund. Do not give this benefit away to the control of lawyers who make their money out of controlling and destroying others through the use of nonsense words they do not understand. Keep this in mind and read on.

## **HILMER ON COMPETITION AND THE TRADE PRACTICES AFTERMATH**

The Hilmer Report led to the passing of the Competition Policy Reform Act (1995) which had the stated object **'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'**. However, the implementation of the Competition Policy Reform Act appears principally to have occurred by making amendments to the existing Trade Practices Act (TPA 1974). Major limitations of this reform approach, especially for consumer protection, are discussed later. It is generally argued that the approach is not conceptually consistent with Hilmer's theoretical framework and serves to render the TPA into even more of an inconsistent, illogical and extended dogs' breakfast than ever before. Will these lawyers go on forever?

The Hilmer Report 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). I cannot find a definition of 'competition' in the TPA, only an 'interpretation', in Section 4. This states that, '**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 apparently 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 better and reduce cost.

Hilmer was writing after the Heads of Australian Governments had committed themselves, in 1990, to the 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. In any international, national or regional context, Australia now ideally operates as a signatory of the United Nations (UN) Universal Declaration of Human Rights. In 1948, this provided basic principles for the fair treatment all human beings should ideally be able to expect. The International Labour Organization provided principles for worker protection under the League of Nations and continued on after it collapsed and the UN was established. Many of these principles are included into Australian law, as is the case in anti-discrimination, OHS and workers compensation acts. Key elements of the TPA which make a trade related contribution to the concept of societal fairness are discussed later.

In 1948 the World Health Organization (WHO) defined health holistically, as a state of complete physical, mental and social wellbeing. Enjoyment of it was recognized as closely related to the environment which produces any body and its symptoms of disease. This holistic, environmental emphasis contrasts with the narrower, medical model of bodily scrutiny, treatment, research and related development. In 1986, Australia signed the WHO Ottawa Charter, 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 signed the United Nations (UN) Declaration on Environment and Development. This put human wellbeing at the centre of principles for sustainable development. In 1997 the WHO also called for development of health promotion through co-operation between governments and the private sector.

The development of an international economy and related national approaches to fairness, health and environment protection, have also led, in some quarters, to management aims which are broader than the norm of 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 traditionally shifts its costs to others. Requirements for triple bottom line accounting also recognise the existence of social and environmental goals which should be met by business 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 environments, as well as profits. The increasing concern of governments and citizens for health and environment protection also means that the beneficial effects of competition are best sought and understood in the context of a prior understanding of specific industries and their development problems, rather than in the current application of 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 which is 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.

Australian competition must now be understood in the universal and related national light of the aims of broad community, individual and environment protection. Consumers are product and service users and are part of a community. 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, primarily through competition. This perspective contrasts with an earlier one, which is currently reflected in the Trade Practices Act (TPA), and 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?)

For example, Hilmer (1993, p.8) indicated that the early Australian legislation related to competition followed the United States' Sherman Antitrust Act of 1890. This stated that all 'unfair' business 'monopolizations' and 'combinations' are against the consumer and related national interest. However, 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. (He was normally polite). In 'Management Challenges for the 21<sup>st</sup> Century', Drucker further argued that the four greatest growth sectors during the 20<sup>th</sup> 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 to protect against risk, such as insurance and superannuation, which need to be properly protected.

In this conceptual context, and in the absence of much legally privileged information for all engaged in any dispute, it is often difficult to decide what 'unfair competition' between market players may mean, especially if they operate their businesses in an international context. It is also difficult to effectively define the differences between the trading partner and the consumer, let alone decide whether and when the latter may need protection. (The only discussion of the term 'consumer' in the Hilmer Report appears to be in regard to consumer boycott).



In its inquiry into Telecommunications Competition Regulation, the Productivity Commission (2001) concluded there is an inherent difficulty in defining anti-competitive conduct in an objective sense and it is not possible to undertake a full benefit cost analysis of the merits of anti-competitive conduct regulation. It stated that lack of transparency in the Trade Practices Act (Part XIB) also limits the ability of telecommunications providers and the community to analyse and comment. Lack of pricing and related transparency is also problematic for assessing the nature and effects of competition in many other areas, including in insurance and related services. The Productivity Commission's 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)

However, if competition is clearly defined as a means to an end, as Hilmer required, then all the above problems may be resolved more easily, in the context of broader, historical understanding of industry and its impact upon society, including upon consumers.

The historically earlier approach to competition, which sees it as an automatically desirable end in itself, is reflected in some of the key principles of the TPA but not in others. The latter is often the result of the amendment or addition of special industry provisions, or those on consumer protection. This general process of legislative change through amendment or addition has rendered the act conceptually illogical and bizarrely piecemeal. However, it will be championed by all those market players who currently have an interest in doing so, including those with a legal monopoly over its interpretation.

From any logical, post-Hilmer perspective, the idea that a legal monopoly, such as those lawyers who work at the ACCC, should ensure Australian competition, appears ridiculous. From all scientific and related industry perspectives, and particularly in comparison with medical professions, lawyers do not collect their data in a way which allows the identification and control of risk in order to prevent injury in future. This also means legal costs may accumulate to a huge, unknown extent. For example, the Senate Economic References Committee's Review of Public Liability and Professional Indemnity (2002) pointed out in regard to health care, that 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. Yet in its report of inquiry into telecommunications competition regulation, the Productivity Commission (2001) called Telstra the biggest consumer of legal services in Australia (Productivity Commission, 2001, p. xxv). This partly resulted from claims that it operates as an unfair monopoly. This seems a crazy process from the public interest perspective.

The legal approach may undermine democratic operation as well as generate enormous but unknown costs for everybody dragged into the arena, except the lawyers, who it seems can never lose. For example, in its discussion of new TV stations announced by the Minister, the ACCC pointed out that amendments to the Radiocommunications Act include a new S.118L which gives the ACCC *a broad power to make, by legislative instrument, rules about the practice and procedure to be followed by the ACCC when assessing access undertakings (ACCC 2006, p. 25)*. This seems yet another example of how lawyers inexorably and effectively take power away from everybody else – apparently even the elected Ministers and Parliaments who are supposedly their masters in any democracy. Why not smash this prescientific, monopoly and replace it with industry and general planning approaches now, as per my recommendations.

The Hilmer Report 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. It is submitted that the recommendations made at the beginning of this paper are also a better means of implementing the Hilmer Report and supporting requirements of Heads of Government regarding competition than what has occurred already. Consumer protection is discussed below. Hopefully this will also have application in related industry contexts. The original Hilmer was lost in the lawyers' translation to the TPA. Have another go!

## CONSUMER PROTECTION AIMS, DEFINITIONS, TREATMENT AND ACCESS

My pocket dictionary defines a consumer as **a buyer or a user**, which seems fine to me. The different definitions of a consumer in the TPA and in the NSW Fair Trading Act are addressed later. However, the legislative aims of consumer protection are discussed first.

I guess that the early TPA (1974) was without aims, like most other prescriptive legislation. This lays down requirements which must be followed to the letter, in contrast with later legislation, such as State OHS Acts, which commence with general aims, (objects), which are established to guide work related activity, so that the outcomes of activity to achieve the aim of a safely productive workplace ideally can be measured, with a view to improving future production. My google search indicates that in 1992 the Commonwealth Attorney General asked the Australian Law Reform Commission (ALRC), to undertake an inquiry into the TPA. The ALRC recommended that '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'**.

It is noteworthy that protecting consumers was not mentioned by the ALRC above, and that consumers were not discussed in the Hilmer Report either. The lack of specific discussion could be because consumers were traditionally seen merely as traders, like all others. Some in the market sell and others buy. Later, the latter were also called consumers. Power did not centrally enter into the conceptual framework of trading until a class of 'consumers' were defined as in need of protection, largely because of their comparative ignorance. This language change is the development of democracy in the community, the value of which the lawyers always manage to appropriate. Consumers might therefore be ignored in trade practices writings of the ALRC and Hilmer because:

(a) It is assumed that competitive markets automatically meet traders' interests, and that societies are composed of traders (which includes buyers/consumers) (Legal view from the early US approach in anti-trust legislation and also in TPA)

OR

(b) Consumers are seen as part of a broader range of groups who make up communities and the natural and trading environments which support them (Hilmer Report and Heads of Government perspective)

However, with the Hilmer Report and the related passing of the Competition Policy Reform Act (1995) the stated TPA aim (object) **'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'** was provided in an amendment to the legislation. This seems sensible to me because it provides a clear legal recognition that a 'consumer' is conceptually different from a 'trading partner' and there are a lot of them who vote, rather than go on strike. Because of their comparative ignorance of the product or service they are purchasing, consumers (buyers) need protection. A consumer often has little power to pursue their

interests effectively, especially when acting alone. (The consumer of medical services or pharmaceuticals springs to mind immediately.) As a retiring person, who is constantly urged to find a financial adviser I can trust, I am acutely aware of the problem. I have no good reason to trust any except those at Unisuper. However, I have also read what ‘the smartest guys in the room’ did to the California Public Employees Retirement Systems (CalPERS) fund. To me Enron seemed not so much a bad apple, as part of the system. (McLean and Elkind, 2004).

The Productivity Commission issues paper (2007) points out that general consumer provisions in the TPA are found in Part IVA which relates to unconscionable conduct but are mainly Part V on Consumer Protection. However, the latter provisions apparently do not apply to financial services. Why is this so? Such consumers may be hugely vulnerable. I sometimes wake in fright. Yet I have a PhD in industrial matters and have worked in industrial or workers’ compensation areas or in universities all my adult life.

The TPA concept ‘unconscionable conduct’ prohibits businesses from engaging in harsh or unreasonable conduct where one party is at a significant disadvantage. This provides an important concept which properly links the ‘trader’ and ‘consumer’ through a recognition of the potential effects of dominating power of any kind (e.g. unequal knowledge or money or choice) in any market relationship. It may also link the trading relationship to the broader concepts of fair treatment found in UN agreements, which were discussed earlier. Whether the outcome of unequal power in trading is ‘fair’ or ‘unconscionable’ is better discussed on an industry basis, in the light of a range of relevant legislation if necessary, in my opinion. The logically coordinated development of conceptual relationships are important but impossible to maintain when lawyers have control of legislative proceedings and seek to keep all legislation and related dealings separate. Courts are usually managed according to the specific requirements of particular legislation, rather than from broadly knowledgeable and scientific perspectives. Industry based management perspectives would be more helpful because matters which are actually linked in normal life could be recognised and dealt with better when in dispute.

OHS acts are legislation which aims to protect workers, and also workplace visitors, industry based consumers and some other communities. It seems initially logical to take a consistent approach to all 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 safe 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.

OHS Acts and the Commonwealth Radiocommunications Act are examples of an initial approach to law which ideally focuses attention on the achievement of aims and matching outcomes. This ideally also allows the aims of legislation to be more scientifically

pursued than was possible with the earlier, prescriptive approach to legislation, which seeks to apply feudal, adversarial, authoritarian and narrow logic rather than more scientific management.

In general, the development of industry based management approaches need to be much better developed, because the typically feudal, 'black letter' approach to law and trading appears to dominate in 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, a prescriptive legal approach is currently taken by so-called legal reformers. For example, see the Australian Law Reform Commission (ALRC) Review of Privacy Issues Paper (2006). The authors argue in chapter one, on the basis of 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 lawyers from presenting a huge issues paper, with hundreds of questions, presumably for other busy lawyers to answer. (God save us from the legal reformers.)

In spite of its new object to protect them, I could not easily find a current definition or even an interpretation of the word 'consumer' in the TPA. I gave up and rang the ACCC. I was directed to a plain English publication entitled 'Warranties and Refunds'. Surely these are related to financial services, which are not included in the TPA consumer provisions? – But I fear I have outstayed my welcome at the ACCC, so did not ask.

Anyway, the Trade Practices Act says that a 'consumer' is a person (including a corporation) who acquires:

- Goods or services of a type normally bought for personal or household use, whatever the cost, or
- Any other type of goods or services costing \$40 000 or less, or
- A commercial road vehicle or trailer of any cost that is used mainly to transport goods on public roads

Provided that the goods are not acquired solely for reselling or for using up or transforming commercially to produce, repair or treat other goods (s.4B).

On the other hand, the NSW Fair Trading Act (Section 5) states that:

- (1) In this Act, a reference to a consumer is a reference to a person who:
  - (a) acquires goods or services from a supplier, or
  - (b) acquires an interest in land, other than land used, or intended to be used or apparently intended for use, for industrial or commercial purposes

(2) Goods or services referred to in subsection (1) do not (except for the purposes of section 43) include goods or services acquired or held out as being acquired for re-supply or, in the case of goods in the course of a business other than a farming undertaking for the purpose of:

- (a) consuming or transforming them by a process of manufacture or production, or
- (b) using them for the repair or treatment of other goods or of fixtures on land

(3) In this section:

“farming undertaking” includes:

- (a) the raising of stock to provide meat or other food for human consumption, and
- (b) any agricultural, pastoral, horticultural, orcharding or viticultural undertaking

Neither of the above acts seems to have a good definition because they are very different from each other and neither is as simple or as normally accepted as the idea that **a consumer is a purchaser or user**. Instead, these legal definitions of consumer appear to reflect the pre-scientific, illogical and partial way in which lawyers normally proceed. I think the TPA has principally been developed on the basis of older assumptions about the automatic benefits to the whole society of competition and that consumers have been addressed in a separate section purely as an afterthought, following many others, which occurred as society changed and became more demanding.

That lawyers should debate about the merits of competition for vast amounts of public money must be a delicious irony for them, because the legal brethren have a monopoly over the courts and their related practices, however dysfunctional. Whilst one may generally be 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 have 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 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, and hence contaminating. From any scientific perspective, this chose ignorance appears ridiculous.

The current object of the TPA (Section 2), as indicated earlier, is **‘to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection.’** However, the TPA and those who deal most commonly with competition and TPA requirements, such as the lawyers in the ACCC are not adequately equipped to protect consumers, in spite of anything else they might pretend. At the most basic level, the ACCC does not have the TPA on its website but refers the interested person to other sites where the legislation may be obtained. Because the Austlii site has the legislation printed out in a way where every third word is in blue, disappearing ink, it cannot be downloaded for close understanding and future reference. The ACCC advertises a plain English pamphlet on the TPA on its website which is unavailable in practice. (I rang them for it on 7.2.02. I was not impressed.)

For more examples of the difficulties related to competition, consumer policy and the incapacity of ACCC legal practice, one may 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. (In my book so are watchers of TV.) However, the ACCC, from its great height, is now dangerously undermining such perspectives. As Duckett (1997) has clearly pointed out in regard to health services, Medicare has protected the health of Australians more broadly, equitably and cost-effectively, in comparison with the situation faced by US consumers of health care services. Medicare is a natural monopoly? Could one create others?

In 2000, the Treasurer initiated an inquiry into telecommunications competition regulation. In its report of inquiry, the Productivity Commission (2001) stated that, 'the main way in which pay TV providers compete is via content – in the words of some participants (in the government inquiry) 'content is king' (p. 145). Telstra currently accounts for around two thirds of total services revenue. The carrier has also been called the biggest consumer of legal services in Australia (Productivity Commission, 2001, p. xxv). Yet, in spite of so many declaring that the consumer is king in the communications industry, neither the ACCC nor any others currently inquiring into new television broadcasting licenses appear interested in the nature of the TV content that ordinary people may want to watch. This seems a shortsighted and expensive approach to obtaining the national interest or effective competition, to say the least. It implies TV has little potential for assisting skills development. In my view, industry would be mad to support this current approach.

In its Report on Telecommunications Competition Regulation, the Productivity Commission (2001, p. 40), defined 'access' in relation to services providers in the market, rather than in relation to the ultimate program consumer, like me. 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'.

What are the TV program watchers in this formulation – chopped liver? The report also states that access arrangements are governed by Part XIC of the Trade Practices Act (TPA). In its analysis of new television licences, the ACCC (2006) states, on the other hand, that **access** is defined in the 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.' (I wonder who came up with that?)

Those of us brought up on dictionaries rather than a legal approach to definitions (interpretations) may find it strange to see a word (**access**) defined by the repeated use of the word itself. One also wonders what the concept of 'content services' means. Are health, education and other community services considered to be in that category? What other service categories are there and is labour defined as a service? The Australian Bureau of Statistics must surely be highly interested in this.

The ACTU believes that labour is not a commodity and so do I. However, the economists' approach to education as 'human capital' had a lot of good things going for it in my opinion, because it clearly recognized that education is valuable to industry as well as to the student consumer. This insight appears increasingly to be lost, to the general detriment of society, in my opinion. Its value may be reclaimed through industry planning and development which also recognizes and takes a value added approach to education.

Legislated superannuation requirements may also be primarily regarded as a means to accumulate industry and national funds which 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 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 obviously cannot be solved by a simple amendment to the TPA, because the legislation already has an enormously broad, and occasionally industry based scope, which constant additions have nevertheless rendered increasingly irrational. Vote for a big restructure. Don't let the ACCC approach screw us.

### **Selected References**

- Drucker, P. (1999) *Management Challenges for the 21<sup>st</sup> Century*.. New York: Harper Business.
- Duckett, S. (1997) *Health Care in the U.S.: What Lessons for Australia?* Australian Center for American Studies, Sydney: University of Sydney.
- Galbraith, JK. (1952) *American Capitalism: The Concept of Countervailing Power*. Penguin.
- Galbraith, J.K. (1973) *Economics and the Public Purpose*. New York: New American Library.
- Independent Committee of Inquiry (1993) *National Competition Policy (Hilmer Report)*. Canberra, AGPS.
- McLean, B. and Elkind, P. (2004) *The Smartest Guys in the Room: The Amazing Rise and Scandalous Fall of Enron*. New York: Penguin Group.
- National Committee of Inquiry (1974) *Compensation and Rehabilitation in Australia*. Canberra: AGPS.
- NSW Government (1986) *NSW Workers' Compensation: Options for Reform (Green Paper)*. Sydney: Government Printer.
- NSW WorkCover Review Committee (1989) *Report to the Hon. J. Fahey, Minister for Industrial Relations and Employment*. Sydney.
- O'Donnell, C. (2006) "A healthier approach to justice and environment development in Australian communities and beyond", *Public Administration Today*, Public Administration Australia (ACT Division), Issue 9, Oct.-Dec. pp.12-20.
- Premiers and Chief Ministers (1991) *Communiqué*. Adelaide.
- Productivity Commission (2001) *Telecommunications Competition Regulation*. Report No. 16.



