

RESPONSE TO QUESTIONS FOR FEEDBACK ON THE DEVELOPMENT OF A NATIONAL ACTION PLAN (NAP) FOR SUSTAINABLE DEVELOPMENT

I remind you of my earlier submission to your plan for national action for sustainable development, which was made before I received your current paper and questions on this topic. I attached an article entitled 'Open education management and communication strategies to implement regional health and sustainable development goals'. I have now received the National Action Plan for Sustainable Development and provide a response to the following key questions.

Key Questions: (1) Do the emerging issues described in the discussion paper reflect the key issues that should be addressed in the NAP? (2) Are the proposed strategies relevant to the needs of the sector? What other comments may be provided?

While the emerging issues described in the discussion paper reflect many key issues which should be addressed in the NAP, and the proposed strategies appear generally relevant to the needs of all sectors, I think the developers of the plan will not succeed unless they take into account the revolutionary nature of sustainable development requirements in terms of the challenges they pose to traditional forms of commercial and professional operation, particularly by lawyers, who represent the most powerful occupational monopoly in Australia historically and today.

In my past submission to you I proposed an open education contract model to assist implementation of health and sustainable development goals of governments, industries and communities but also pointed out that outdated educational institution requirements for confidentiality need to change in order to allow this to happen. I now discuss the problem of outdated institutional requirements further in the attached submission to the recent Australian Law Reform Commission (ALRC) inquiry into client professional privilege, set up by the Commonwealth Attorney General (AG). The response below is an extract from the broader reply to the AG's inquiry, which deals with the impact of client legal privilege on trading, human rights and investment issues which are also centrally relevant to sustainable development.

Basically, my answer to your questions outlined above is that a great many professionals have short-term vested interests in resisting the kinds of strategies which you outline in your national action plan, for reasons dealt with below and in the larger submission which I attach on these matters. In order to develop in the direction you suggest, I believe it will be necessary to find and work first with willing academics and other teachers, who are in a professional minority, in order to develop open education modules on sustainable development and other skills development in the manner which I have already suggested to you and many others. I address the key issues briefly again below in an abstract from my larger submission to the ALRC, which is attached. If you do not proceed thus, I believe that progress towards your goals will be worse than glacial.

A huge amount of re-education must be undertaken in Australia to meet the requirements of sustainable development. But many vested interests normally support current systems of autonomous collegiate control over higher education delivery, its content and research. State professional registration acts play a crucial part in

maintenance of the status quo by supporting and fostering closed academic disciplines which have traditionally been part of their source of occupational monopoly. For example, as a former NSW public servant, I spent eleven years at Sydney University trying to develop more forward looking and open education in support of sustainable development, but was prevented by my colleagues. Taking up an Australian Workplace Agreement did not help. In 2007, after I was made redundant as a result of university restructure, I wrote to Bert Evans, the Chairman of the NSW Board of Vocational Education and Training, saying I would be very happy to provide the whole or part of my subject content, to be put on any open website, for use in any curriculum, in any form. Much of my educational content aims to teach and logically extend the student's understanding and related competence in implementing the risk management approach expected in state occupational health and safety acts and in government policy directions to promote community health and sustainable development. This approach is also based on key national, World Health Organization (WHO) and UN agreements, including the Declaration of Human Rights and the Nuremberg Convention.

A general duty of care approach to protecting workers, consumers, communities and their supporting environments is necessary to attain sustainable development in Australia and internationally. This requires coordinated, broadly scientific and open approaches to all problem solving, not narrowly discipline driven and secretive bureaucratic or adversarial approaches, separated by multiple walls of legal privilege, so nobody really knows what anyone else is doing. This approach is stupid, not efficient. If open education content were on an open website it would be logically available to anybody in the world who had access to a computer and was directed to it. It would be available at any time of the day or night to anybody. It could also be designed for English and other language learning. Australia universities are currently expected to expand postgraduate education and research. If earlier education content were available in the open manner suggested, then postgraduate students from any country would understand more about what they may be expected to do in self directed post graduate research projects. However, this is not a view to which most Australian academics appear to be drawn. Work with those who are.

The quality of education partly depends on the needs of the learner. Nobody can judge education quality in the absence of full knowledge about its content. Yet such full knowledge is normally only possessed by higher education students who have already paid outrageously high fees to complete the subjects. The latter may nevertheless disappear from the curriculum in later semesters, as the dominant collegiate interests rally in restructure to protect entrenched collegiate disciplines and jobs of old friends. These are often also the most privileged, and they demand closed education. Universities are currently devising many strange and expensive systems to measure education quality, yet refuse to see the obvious need to make education content open. Nobody would ever buy a car in the absence of seeing and driving it first if they wished. Education ideally need be no different in this regard. Certification of competent practice is a separate issue.

Thank you for the opportunity to make this submission.

Yours truly

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This submission addresses questions raised in the Australian Law Reform Commission (ALRC 2007) issues paper 'Client Legal Privilege and Federal Investigatory Bodies' which was written to support the Attorney General's current inquiry into the topic.

THREE SHORT ANSWERS TO QUESTIONS ON CLIENT LEGAL PRIVILEGE

This submission primarily addresses Question 1-2 'Does client legal privilege serve broad 'public interests'? It answers NO. End client legal privilege in Australia unless another course of action can be shown to be in the public interest.

A privilege is a right to resist disclosing information that would otherwise be ordered to be disclosed. It commonly covers the confidential communications passing between a client and his lawyer in civil or criminal courts, but is applied far more widely throughout society. The privilege is shown later to be the expression of English feudalism. It should be seen as against national competition policy because it protects the central, occupational monopoly of lawyers, while also passing on the costs of secretive behaviour to all more generally effective, law abiding and open competitors, potentially causing them to fail. For example, client legal privilege costs were passed on to Australian stockholders, taxpayers and related communities of producers and consumers, in the recent failures of Enron and HIH. Privilege increases the risks borne by all beyond the protected circle of the relevant business managers and friends. The court knows no risk, only expensive expansion, driven by regulation paid for by the public. In a global economy ruled by common law and privilege, this feudal dysfunction can only get worse, which should be a major worry for national fund managers and the Australian public. One remembers, for example, that Enron began in clean energy and later entered broadband development, at least in theory. In reality, its managers did billion dollar deals where many new partners managing other peoples' money also took their cut. Enron did everything possible to advance its stock price, which centrally involved the massive exercise of creative trading and accounting and all related exercise of privilege. Arthur Andersen destroyed more than one ton of Enron files when the Enron crash came, and so many ended up in court. A general risk management approach to investment, like that proposed by Buffett (Hagstrom 1995), is preferable. This stresses the critical investment factor is ability to determine the value of a business and paying a fair or bargain price. Such judgment requires broad education and business and government openness, not dysfunctional regulation. As an Enron manager once said to a California legislator, 'Doesn't matter what kooky rules you guys put in place, we've got a bunch of people who will make money anyhow'. (See the video 'The Smartest Guys in the Room' or the book by McLean and Elkind, 2004).

This submission also addresses Question 1-1: What are the best contemporary rationales for the doctrine of client legal privilege? There are no satisfying rationales for a doctrine of client legal privilege. It is a vile relic of feudalism.

Objections to the favourable arguments presented in the issues paper on Client Legal Privilege and Federal Investigatory Bodies (ALRC 2007) are later presented below.

A submission to the NSW Ombudsman's review of parts 2A and 3 of the Terrorism (Police Powers) Act (2002) on preventative detention is also attached to the current submission because it provides a similar, broadly logical view about client privilege to the one discussed here. Together these submissions link the concerns of regional communities and relevant federal and state authorities in a more consistent and therefore quantifiable manner, in order to manage all environments better, whether apparent breaches of the law and other disputed matters are civil or criminal in nature. Expectations regarding client privilege should generally be consistent across all jurisdictions, unless another course of action appears to be in the public interest. This would allow more rational, qualitative and quantitative approaches to be taken to data collection, in order to understand social problems, treatments and outcomes better, and in order to reduce them. But courts do not see themselves as social services, to be held accountable. They are still feudal masters.

Legal practitioners are prevented by narrowly prescriptive legislation and their learning of anachronistic legal principles, from any candid understanding or implementation of a whole of government and related industry policy approach to the attainment of the public interest. For example, courts provide little or no data to assist scientific management approaches. The legal fraternity does not systematically classify cases or study outcomes of a broad range of apparently related judgments, to gain better understanding of outcomes for groups or individuals, so as to promote injury prevention, rehabilitation, premium setting, fund management or better law and policy in future. The practice and presumably, therefore, the education and training for the law provides an example of an authoritarian, pre-scientific approach to dispute resolution. This may be contrasted with more recent, holistic and scientific approaches to apparent breach of statute and to dispute, such as those championed by Sir Lawrence Street (2002) and others (NADRAC, 2001; Strang and Braithwaite, 2001; Braithwaite, 2000, 2002).

In Question 7-8 the ALRC discussion paper asks about the best way of ensuring that lawyers are properly informed about their professional ethics and responsibilities.

As shown later, legal education is an enormous social problem, because lawyers must be taught so much incredible, feudal rubbish from any later scientific, democratic or related managerial perspective on productive practice or morality. Once graduated, and thanks partly to the Australian Constitution, students may join powerful company and have major economic and social incentives for defending this drivel against any attack - not that there ever seems to be much need. I have published an article entitled 'A healthier approach to justice and environment development in Australian communities and beyond' in *Administration Today*, the magazine of the Institute of Public Affairs of Australia (IPAA, 2006). It discusses establishment of alternative dispute resolution and open education systems. These could obviously meet the needs of industries and communities more cheaply and effectively than traditional institutions currently do.

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content and research. State professional registration acts play a crucial part in maintenance of the status quo by supporting and fostering closed academic disciplines which have traditionally been part of their source of occupational monopoly. For example, as a former NSW public servant, I spent eleven years at Sydney University trying to develop more forward looking and open education in support of sustainable development, but was prevented by my colleagues. Taking up an Australian Workplace Agreement did not help. In 2007, after I was made redundant as a result of university restructure, I wrote to Bert Evans, the Chairman of the NSW Board of Vocational Education and Training, saying I would be very happy to provide the whole or part of my subject content, to be put on any open website, for use in any curriculum, in any form. Much of my educational content aims to teach and logically extend the student's understanding and related competence in implementing the risk management approach expected in state occupational health and safety acts and in government policy directions to promote community health and sustainable development. This approach is also based on key national, World Health Organization (WHO) and UN agreements, including the Declaration of Human Rights and the Nuremberg Convention.

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TOWARDS A HISTORICAL APPROACH TO CLIENT LEGAL PRIVILEGE

From the modern perspective, all law should have clear aims and related policy should drive competitive administration, so all may identify and compare service outcomes. This is the approach required in many WHO and UN agreements Australia has signed. These requirements are also reflected in regional free trade agreements such as the Asia Pacific Economic Cooperation (APEC) agreement and in related Australian national and state agreements and legislation to promote health and sustainable development. However, the Australian Constitution describes a government administrative process which then drives the policy process, rather than the reverse. This drastically limits the potential effectiveness of any government or community plans to achieve health and sustainable development competitively, partly because program budgeting cannot be implemented effectively by government. From the perspective of national industry policy development, the Constitution provides a dysfunctional system in which Australians must now tackle major international problems such as global warming or the development of national communications policy, driven by lawyers, administrators and money managers.

In his terms of reference to the current ALRC inquiry into client legal privilege and investigatory bodies (2007) the Attorney General calls legal professional privilege ‘a common law privilege’. The common law is essentially a pre-scientific set of assumptions and practices derived from feudal England as a result of Australia’s history as an English colony. The Constitutional form of Australian government cements the power of the English common law through related statutes and the supreme power of the High Court to interpret the Constitution. The Constitution states it represents ‘the sovereignty of the Australian people’. However, It actually appears to be a set of national administrative practices standing in for a Supra-natural Power which takes a prescientific approach to all development. How else can the supreme authority of Its’ word over all other law made by the contemporary community or future generations be explained? This is a feudal, authoritarian, and monopolistic approach to development rather than a competitive, scientific and democratic one. History suggests each generation is usually more informed than the previous one and ideally should correct past mistakes in the light of new experience. This is not possible under the Constitution, which forces Australians always to look backwards for decisions. In the legal paradigm, the words ‘just’ and ‘justice’ are also different from ‘fair’, and synonymous with access to the courts (Commonwealth Attorney General’s Dept., 2002, p.195), as if the lawyers’ monopoly and adversarial methods alone guarantee perfection. This is a ridiculous way to work.

An earlier ALRC issues paper (2005) was produced for a review of the uniform Evidence Acts, (the Evidence Act 1995 (Cwth) and the mirror statutes of New South Wales, Tasmania and Norfolk Island) which stated:

‘A privilege is essentially a right to resist disclosing information that would otherwise be ordered to be disclosed..... ‘Client legal privilege is premised on the principle that it is desirable for the administration of justice for clients to make full disclosure to their legal representatives so they can receive the right legal advice’ (ALRC 2005, p. 151).

This privileged discussion between a client and his lawyer has apparently been called ‘the oldest of the privileges of confidential communication’ (ALRC 2007, p.23).

The ALRC paper also stated that:

On balance, this freedom — is considered to outweigh the alternative benefit of having all information available to facilitate the trial process (ALRC 2005, p. 155)

A central legal assumption appears to be that the lawyer should rightfully conceal or mould what his client believes is true, in order to maximise his interest in revenge or escape from any guilty judgment and its results. From a scientific perspective such adversarial behaviour is fraudulent because it forbids the ideal search for objectivity which is essential for effective scientific practice. An oppositional approach to presentation of expert or related evidence is doubly expensive, encourages professional and related tribal bias and silences many who might otherwise wish to be heard, while often turning science into junk. Maintenance of this feudal framework is anti-democratic and stupid from the logical point of any civilization which seeks to develop effectively, fairly, scientifically and sustainably, in cooperation with its neighbours. Client legal privilege and all related bureaucratic management greatly reduce the effectiveness of all more scientifically driven forms of investigation, judgement and general education. Legal struggles in this backward looking environment increase legislation, and create more expensive tangles of red tape for all. Open education for sustainable management practices would be more effective than increasing peoples' legally and bureaucratically generated ignorance. All could then develop the knowledge and confidence to question or point out problems for resolution as work continues. This is democratic progress.

Since the 18th century, economists have argued that perfect competition depends upon perfect information being available to market traders. Perfect information is also necessary for perfect science, democracy, accountability, and perfect risk identification and control. In this modern context, client privilege and the ancient, feudal practices of the English common law appear to be madness which serves mainly the lawyers' continuing occupational monopoly and those rich enough to benefit from it most. It is tragic, for example, that the implementation of Australian national competition policy has been entrusted to a legal monopoly which operates using feudal principles while taking cases under a Trade Practices Act (TPA) which reifies economic assumptions from the 19th century as if these are truths, rather than highly contestable economic propositions. (See the attached submission to the Productivity Commission (2007) issues paper to assist the Treasurer' inquiry into Australia's national consumer policy framework.)

Hilmer's views on competition, as accepted by Australian governments in 1993, are different from the outcome of their adoption into the TPA, which is administered by the Australian Competition and Consumer Commission (ACCC). Hilmer and heads of government saw competition as striving for goals which are not necessarily monetary, such as societal fairness, health and environment protection. The TPA implicitly recognized only the economic goals of traders. It was designed to prevent 'unfair' monopoly and did not deal with a subset of traders called consumers. To implement Hilmer, the TPA was amended while retaining its earlier, prescriptive approach. Consumers were addressed in an addition to an increasingly illogical competition policy framework. This old fashioned, prescriptive approach is unable to value conceptual clarity, consistency or the collection of data to assist injury prevention, rehabilitation or cost containment. It seems ironic that a legal monopoly with so many

feudal assumptions and practices has won control of law and related practice in regard to competition, while more obvious and competitive management approaches were agreed to but not enacted. Hilmer's recommended competition policy principles should be enacted into new legislation and earlier, related legislation should be reviewed and repealed. This was the approach when state occupational health and safety acts were introduced. All engaged in work should logically have a duty of care to protect workers, consumers, communities and their environments. A duty of care approach to work and industry management also provide the clearest, simplest and most comprehensive approach for effective management of all related risk. The alternative is to watch the current, highly expensive and dysfunctional legal costs keep growing, centrally assisted by client legal privilege.

CLIENT LEGAL PRIVILEGE SHOULD NOT BE SEEN AS A HUMAN RIGHTS

It has apparently been claimed that client legal privilege is 'a fundamental human right' and the European Court has called it a 'characteristic of democratic systems' (ALRC 2007, p. 36). While the latter is true, this may most logically be seen as an unfortunate result of the historical maintenance of feudal monopoly power at the centre of a developing state and later democracy. Client legal privilege is not mentioned in the UN Declaration of Human Rights, which may be conceived as the logical beginning of a new world order based on the central requirements of respect for all individuals, not just the normal Christians. Earlier forms of the common law and human rights concepts live on in very contradictory formulations, depending on the common law context. For example, under the US Constitution the right to carry a gun and not to vote are seen as major moral precepts for the society whereas in Australian law the reverse is true. For a developed country, the US approach to human rights encourages comparatively huge numbers of people to kill their fellow citizens each year. Will support for key US human rights approaches be coming soon to a court, university or cinema near you, just like everything else in markets dominated by the US? From the national and global perspective I take, the UN Declaration of Human Rights is the starting point for more scientific administration of justice. This is ideally conceived of as a public service, similar to health or education services, and administered according to broadly similar principles.

Some judges have apparently supported the privilege against self-incrimination as exercisable on the grounds of '*human rights which protect personal freedom, privacy and human dignity*' (ALRC 2005 p.174). Personally, I find it dangerous and obnoxious to see the privilege of silence on the basis of self-incrimination linked with human rights. I would have thought that the concept of human rights must be tied essentially to a scientific search for truth rather than to adversaries striving for narrower forms of personal advantage, if anyone is ever to find genuine justice. I am relieved that judges have found it is '*a less than convincing argument that corporations should enjoy the privilege against self incrimination (p. 174)*', but wonder why corporations should be treated differently in judicial opinion. The legal system normally defends privacy to the hilt. This benefits lawyers but makes law increasingly fragmented, unclear, inconsistent, long and irrational.

In contrast, legal privilege should be perceived as a practice entrenched in English society by the parliament of the monarch, long before the development of an effective

market economy, let alone a democratic government or welfare state. Its central alliance with the ultimate national power has always guaranteed client legal privilege as a central plank of the courts' monopoly practice of the law, albeit in a manner which is still feudal, and therefore prescientific, anti-democratic, obnoxiously expensive, and dysfunctional in all related emotional ways. The more genuine the general social democratic structure and practice of any society, the more that client legal privilege is overwhelmingly against the public and individual interest. It remains entrenched primarily as the tool of powerful people who want to hide the truth because it is their extremely lucrative job to do so and their incredibly stupid discourse also has the highest systemic level of social power.

On the client side, those who value client legal privilege are perhaps frightened of the government or others, and/or trust in lawyers because their comparatively criminal self interest dictates that they should do so. From my ideally modern Australian perspective, as a follower of the Declaration of Human Rights, I believe anything written about human rights before 1948 should be seen as history and that many justifiable fears related to openness can be dealt with appropriately. (For example, see the attached submission on police powers and preventative detention, referred to earlier.) While the Declaration is silent on client professional privilege, Justice Kirby believes it is a human right (ALRC 2007 p.36). I believe that rights are forged in struggles during human development, not given by God and I bet the Chinese would agree with me. Kirby's view is the narrower, Christian, common law position. Is this the same Justice Kirby who was probably a practising homosexual and lawyer for a long time before Australia passed anti-discrimination legislation, and homosexuality was no longer a crime? If so, who would blame him for adopting his position? The secrecy of lawyers appears to work for him.

SOME ANSWERS TO THOSE WHO FAVOUR CLIENT LEGAL PRIVILEGE

The ALRC discussion paper argues that the privilege belongs to the client rather than to his lawyer. However, only lawyers are in a position to centrally manipulate the privilege, through the courts and the related administrative arenas which they either monopolize or ultimately control, and therefore always heavily influence. Lawyers thus have both an occupational monopoly over the practice of law and a collective vested interest in the maintenance and extension of all legal privilege. Collectively they seem unlikely to do other than pretend to see good reason for it and pursue it further. This is reflected in the rationales and historical extension of privilege discussed in the ALRC issues paper. If one read Bentham, Weber, Keynes or Galbraith, one would see a different view, but might give this up as being too uncomfortable to hold for long. The ALRC (2007) approach to legal privilege appears suitably postmodern, which is always convenient.

The first reason the ALRC gives for favouring client legal privilege is that it discourages perjury (p.24). I think it is more likely to encourage perjury because it presents success in life primarily and ideally as a matter of superior, self-interested gamesmanship, not as the result of a superior search for truth, which tries to eschew narrower expressions of self-interested, pecuniary or religious interest, to champion a higher good. 'Dirty Harry' and many other popular movies celebrate police taking the law into their own hands because they know that law and lawyers may render the guilty and/or powerful immune.

I can well imagine that police may be encouraged towards perjury by the law. Some may know more than is provable in court and thus develop more creative accounting practices.

McNicol's quote on p.26 seems to assume that narrowing or extending client legal privilege involves a kind of balancing game regarding the extent to which 'individual rights and interests should be protected from undue interference of the law'. However, the interests of an individual are not ideally balanced against those of the state in a democracy. They are ideally included within it and expressed by it, whether or not the state withers away as a result. The Declaration of Human Rights is fundamentally about the need for protection of human diversity and the related development of adequate living standards and freedoms for the individual. From this global, broadly scientific, comparative, cultural perspective, an individual is conceptualized as part of a specific community group. Her normal situation can only be understood geographically, historically, culturally, economically and personally, through study of larger groups of similar persons, in which each individual situation represents either an apparently normal expression, or some departure from more common outcomes. In the modern world, an understanding of how to protect individual rights or interests is likely to be gained most effectively through exposure to television, the internet, basic statistical information about societies and a related general knowledge of the history and basic principles of the UN Declaration of Human Rights. This should also be accompanied by an understanding of related major responsibilities, such as the necessity for informed self-determination, as outlined in the Nuremberg Declaration. This knowledge can be implemented through broadly scientific approaches to identification and management of risk. Legal privilege is damaging in this global and scientific context where justice is conceived as service.

On page 27 the ALRC paper alludes to the view that a man of honour (i.e. the lawyer), should not betray a confidence. Whether this is true depends entirely on the nature of the confidence. If it is about something evil it should not normally be protected just for pursuit of client and related legal advantage. On page 28 client legal privilege is supported on the grounds that furthering justice is gained through furthering the trust and candour in the relationship between the lawyer and client. This is absolutely true for the lawyer, because the concept of justice is equated in the legal mind with the delivery of the common law, but this is actually dysfunctional for scientific or democratic practice.

On pages 28 and 29 the desirability of protecting the client against self-incrimination and protecting his privacy are discussed. However, it is not made clear why privacy is considered to be in the public interest. In an earlier inquiry into privacy issues, it was claimed in Chapter 1 of the issues paper (ALRC 2006), that scholars cannot define privacy or state why it is important. This illustrates the intellectual and economic inadequacy of the legal interpretation, in comparison with the general utility of dictionary definitions, which are a product of the European Enlightenment of a later period. The fact that one may read interpretations in the Trade Practices Act today, and be no wiser at the end than one was at the beginning as to their meaning, indicates the incredible inadequacy of this feudal legal practice for a modern age. Why not use dictionaries?

In general, a dictionary suggests that privacy and confidentiality are both the same as secrecy. Until one knows why a person or organization may seek privacy (secrecy) in regard to something, one cannot judge the consequences of their actions in moral and related public interest based terms. I guess that people want privacy to be able to:

- obtain a commercial advantage
- commit a crime or other breach of law without detection
- avoid public embarrassment, censure or harassment by others (e.g. the OECD Guidelines on Privacy seem sensibly established primarily to avoid this)
- stop persons close to them or others (e.g. wives, telemarketers) making calls upon them which they do not wish to know about or meet.

In spite of being unable to define privacy or state why it is necessary, the ALRC (2006) paper asked scores of questions about privacy legislation and invited responses. In general, the writers of the issues paper were logically unable to meet the terms of reference of the review, which asked about changing community perceptions of privacy, because they refused to go beyond the boundaries of the Privacy act itself. What the writers did was like treating the legislation as a bible, without seeing it as a product of a broader social and historical environment. Undertaking an inquiry into legislation whilst being apparently blinkered by the act which is supposedly under inquiry, is not an intelligent approach to social problem identification and resolution. The current issues paper is historical but also fails to provide a public interest based justification for privacy.

It is claimed on p. 29 that ‘the adequate protection according to law of the privacy and liberty of the individual is an essential mark of a free society’ and that client professional privilege represents ‘some protection of the citizen – particularly the weak, the unintelligent and the ill-informed citizen – against the leviathan of the modern state’. Essentially, there are many more accessible, scientific and cheaper ways to protect the individual more effectively against ‘the leviathan of the modern state’, than courts. Think of education, newspapers and related information, communication, debate, dispute settlement and data gathering systems. Lawyers fight to prevent all historically later alternatives to their services because they have an economic interest in denying social control to others, while claiming to fight on their behalf. The rich may also be more likely to have a lot to hide than the poor, and are also more capable of providing incentives to lawyers to help them do so. The poor may not be able to afford a lawyer.

On pages 30-34, in the discussion of the administration of justice and the promotion of the adversarial system, the principle interest seems to be in the projection of the feudal monopoly and related application of the law as an apparently perfect evidence gathering and decisional process. This suggests total ignorance or determined avoidance of any more broadly scientific approaches to problem identification, treatment and outcomes which have arisen in recent centuries. The claim (pp. 34 and 35) that client legal privilege will discourage litigation and encourage settlement and compliance depends on the combination of the personal morality of the lawyer, and where he sees interests lying.

For example, lawyers and financial advisers from the major US banks and many other key institutions crawled all over Enron from its inception. For six years, Fortune

magazine, on a yearly basis, named Enron as America's most innovative company. The following year, after the rich had made their money from doing their deals, talking up the share price and had sold their shares, the company collapsed after delivering on hardly any service expectations. Lucky Australians, caught between feudalism, the US and their most powerful Australian friends. It could feel like rape without your wits about you.

Alternatively, consider the following logical proposition about client legal privilege. Information which is only available to one or two people means total ignorance of it for everybody else and we are always the ignorant others. To approve and multiply such ignorance throughout societies as a desirable concomitant of more specialized development, must be socially dysfunctional, unless it is presupposed that everybody is ideally arranged in trusting, private duos, who are potentially at war or in competition with everybody else. In contrast, consider that the civilized development of any child depends upon his ability to gather and share an increasing amount of information more widely. Consider also that when children fight, good parents sensitively probe them all round, in an effort to discover the apparent truth about a matter, and in order to promote a generally empathetic understanding. They do not instead send each child off to maximise his interests through a secretive alliance with a lawyer. Why then are modern adults encouraged and often forced to behave like this, apparently on the assumption that we should all trust lawyers more than government or anybody else? Personally, I am sick of being administratively thrust into situations posing as adversarial, apparently just so lawyers and their surrounding friends can make money by repeated execution of unnecessarily complex processes. This occurs whenever a house is made a loan security.

The development of civilized society fundamentally depends upon the general capacity to gather and share a growing amount of useful information widely. When two people each have a piece of information and trade their single piece with each other, then both end up with two pieces each, not just one, which used to belong to someone else. No other form of trade seems so potentially enriching to all as this continual, broad trade in information which doubles knowledge in an infinitely more productive way than lawyers ever do. (Think of Google and Wikipedia.) The ideal, mainstream trend of historical development is away from tribal societies warring over scarce resources and real or imagined slights, towards wealthier, more tolerant, diverse and educated societies and markets. Client legal privilege and all related legal practices drive backwards against this progressive educational trend by making practices more secretive, difficult to understand and verbally confusing. Whenever people increasingly defer to lawyers things are going wrong.

CLIENT LEGAL PRIVILEGE ENCOURAGES FUND MISMANAGEMENT

Since the Australian government's introduction of superannuation requirements for all businesses and the wider development of an international market, there has been a growing necessity for industry fund managers to invest their clients' funds effectively in the individual and public interest. This provides a compelling new rationale for the abandonment of client legal privilege as the dysfunctional relic of a feudal past. The ALRC (2007) issues paper suggests that legal privilege has assisted tax avoiders, and others who may avail themselves of lawyers most effectively when they are already rich. More honest and effective competitors may thus lose out in the race for

business. The privilege also supports an increasingly risky investment environment for all more ordinary Australians who once depended upon government pensions for subsistence in old age. They are now expected to provide for themselves through investing their lifetime savings. The spectacular demise of Enron, as well as many lesser Australian examples of fraud, such as the collapse of HIH, are warnings of financial and related legal problems which will always be repeated as long as they are not properly understood and dealt with by the Australian community.

Enron presented itself as a clean energy crusader as part of its increasingly consuming and creative quest to boost its stock price, partly by turning all areas of its operation into profit centres and encouraging trading. This all seemed like excellent behaviour until the company crashed and delivered little but the huge costs of its total failure to value productive outcomes rather than just the stock price. In the Australian Financial Review (AFR 12.2.07, p. 60) Leslie Hosking, who claims to have been actively involved in the design of many futures contracts listed on the Sydney Futures Exchange, damned the current Australian National Emissions Trading Taskforce and its concept of energy trading as unworkable. Among other things, he said:

‘Carbon trading is the most (sic.) fungible global product of all time. Supply is out of control and unpriced. The product has a borderless uninhibited import and export flow and its major producers are bent on free uninterrupted oversupply.’

(I guess Hosking meant to say most fungible instead of least fungible.) According to Matthew Lockwood, senior research fellow in the climate change team at the UK based Institute for Policy Research:

The chemical company DuPont has accused its rivals of overstating emissions reductions from such projects....There is no framework for establishing such facts and no assurance that emissions really are being reduced as much as claimed.....

.....According to Vincent de Rivas, chief executive of EDF Energy, ‘the long-term price of tradeable emissions allowances is too uncertain to be a driver of systematic technological change in an industry whose generating capacity investments must be planned over thirty year periods’ (AFR, 9.2.07, Review, p.6):

This was the market environment Enron entered, to make serious money for those who ran the company. Its continuing operations depended on regulatory dysfunction and related public ignorance and short term greed, as well as client professional privilege.

In Australia, in a talk entitled, ‘Removing Market Distortions to Promote Sustainable Development’ (2.11.06), Philippe Barde, a former OECD economist, stated that from his perspective, the only justifiable use of government funding to support sustainable development was for:

- Funding to promote more environmentally friendly production
- Funding to assist people out of polluting industries

From this perspective, one may assume, as I do, that many financial traders and their lawyers may appear as an undesirable market distortion, who have a vested interest in preventing Australian industry from gaining more direct and immediate ways of meeting global sustainable development goals faster, and businesses goals more effectively.

The alternative is a competitively delivered, government and industry based approach to environment protection as well as to community, consumer and worker protection. The World Wide Fund (WWF) book 'A Prosperous Low Carbon Future' provides valuable information for such a development processes. This approach to sustainable development and research may then be based on an insurance model of controlling work related risk, in a manner consistent with Warren Buffett's attitude to investment (Hagstrom 1995). The latter depends on the investor being able to clearly understand the intrinsic nature and comparative value of a business, and holding a few well managed businesses for a very long time, while controlling the ability of senior managers to make super profits for themselves, and being comparatively patient about returns to investors. This is very different from the Enron way of dealing in the market. Conceptualizing risk purely in pecuniary terms is promoted by many US writers and this is alarming because high risk takers pass on their costs to everybody else. (See Schiller's 'The New Financial Order' and compare his views with those of Muet and Stiglitz, the editors of 'Governance, Equity and Global Markets', for another contrast between risk and investment positions.)

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