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

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

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

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

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

The Trade Practices Act (TPA) should not only be renamed but also repealed along with the Competition Policy Reform Act (1995) and all associated outdated legislation.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modern principles should guide a new Competition Act under which the more sensible elements of the TPA and related outdated legislation are then incorporated in the form of updated regulations, codes of practice or guidance notes as appropriate. This was the approach taken to the plethora of outdated, prescriptive and inconsistent safety legislation when new state occupational health and safety acts were introduced throughout Australia in the 1980s.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

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

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

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

The attached article entitled, 'A healthier approach to justice and environment development in Australian communities and beyond', shows that international and regional health and related environment development agreements introduced a new international governance paradigm which also raises risk management and sustainable development to new importance. Implementation of this new international management paradigm requires broad administrative reform in Australia and beyond to meet the evidentiary requirements of scientific and quality management which current legal approaches are incapable of meeting because they are essentially feudal in their operations. Some key instances of this are also provided later as well as in attachments.

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

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

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

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

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

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

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

> Care would need to be given to the design of the institutional arrangements for administering the allocation and use of permits. Variation in the number of permits on issue or the price would have huge implications for the distribution of

> income, and so could be expected to be the subject of pressure on Government. There is a strong case for establishing an independent authority to issue and to monitor the use of permits, with powers to investigate and respond to non-compliance '(2007, p.65).

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

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

- A healthier approach to justice and environment development in Australian communities and beyond
- Response to 'A healthier future for all Australians' a report of the National Health and Hospitals Reform Commission (NHHRC)
- We are all capitalists now: A consumer's response to the Treasury Consultation Paper on Australia's future tax system (2008)
- An ideal trust structure for the beneficiaries: An example from an Australian superannuation fund and a bank

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

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

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

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

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

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

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

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

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

Hilmer defined competition as, **'striving or potential striving of two or more persons or organizations against one another for the same or related objects' (1993, p.2).** If adopted, this could have led naturally to management partnerships using triple bottom line accounting – economic, social and environmental – which is necessary for sustainable development. The TPA contains no definition of competition, only an 'interpretation', in

Section 4. This states, ‘competition includes competition from imported goods or from services rendered by persons not resident or not carrying on business in Australia’.

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

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

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

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

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

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

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

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

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

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

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

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

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

The development of an international economy and related national approaches to fairness, health and environment protection, have also led, in many quarters, to management aims which are necessarily broader than purely financial goals. An example is acceptance of the need for trading systems which have the goals of reducing the environmental problems which may arise from any production which has traditionally shifted such costs to others.

New UN requirements for triple bottom line accounting recognise the existence of social and environmental goals which should be met in partnerships with more traditional business operations driven by shareholder interests, in order to avoid the problem of cost shifting onto more vulnerable communities and environments, and destroying them.

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

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

End all outdated distinctions between economic and social regulation

The regulatory approach found in the TPA is reflected in a recent Productivity Commission (PC) paper which distinguishes between economic and social regulations. According to the PC, economic regulations (like the TPA) 'intervene directly in market decisions such as pricing, competition, market entry or exit'. Social regulations 'protect public interests such as health, safety, the environment and social cohesion.'(PC 2008, p.5). Such a distinction between economic and social regulation is wrong, because economic activity is undertaken ultimately with the social aim of supporting life and its associations. Like the TPA, the distinction reflects the outdated assumption that

competition is always for money and that the greatest number of market players provides the ideal conditions for the contest, which can only do everybody good. In this paradigm, the consumer may be conceived as being like any other kind of trader or ignored. In the TPA, the consumer is treated in a comparatively recent addition to the act. This does little or nothing to rectify the wrong and outdated central assumptions on which the TPA rests.

Hilmer recognised the currently ruling distinction between economic and social regulation was conceptually unacceptable when he gave his definition of competition, which does not assume that it can only ever be for money. He also pointed out that the earlier Australian legislation related to competition followed the US Sherman Antitrust Act of 1890 (1993, p.8). This stated that all 'unfair' business 'monopolizations' and 'combinations' are against the consumer and related national interest. In 'American Capitalism, The Concept of Countervailing Power', JK Galbraith pointed out that, 'To suppose that there are grounds for antitrust prosecution whenever three, four or a half a dozen firms dominate a market is to suppose that the very fabric of American capitalism is illegal'(1952, p.68). He also pointed out that this has never discouraged the briefless lawyer. Drucker later pointed out that the four greatest growth sectors during the 20th century were government, health care, education and leisure. He indicated that none of these sectors operate according to traditional notions of supply and demand, which were established when manufacturing was the main engine of economic growth. During the last two decades in Australia, there has also been spectacular growth in financial services such as banking, insurance and superannuation, which need to be properly managed but cannot be because of all the outdated law which surrounds them and makes transparency impossible.

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

The US has a colonial history of perceiving government as a malign interference in the otherwise benign outcomes of market operation, or as a related defender of the faith. Government is allowed to attack supposed monopolies, but not the obvious ones of lawyers and related professionals. One wonders what most Americans now think they have won as a result of this other than obscene income differentials, lower minimum

wages, fewer paid holidays, inadequate health care, higher education costs, unstable employment, lost savings, huge debts, by far the highest murder rate in the OECD and family deaths and injuries from constant war.

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

The assumption that market operation will automatically produce the best social result if only government will stick to war and attempting to break up unfair monopoly is outdated, but still reflected in the division between economic and social regulation. Australian government concern has recently extended to the effects of all production and consumption on the natural environment surrounding individuals and communities. The carbon pollution reduction scheme is an example of this recognition. One now wonders whether government thinks this new scheme should be treated as economic or social regulation. This stupid but current distinction matters, because courts are rule bound, feudal organizations and the financial and other trade related law they implement, including the TPA, may drag centuries behind the conceptual development of other social and business arenas which nevertheless have less power. (This is discussed again later.)

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

Follow the regulatory approach taken when state OHS acts were passed

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

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

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

Legislated superannuation requirements may also be primarily regarded as a means to accumulate industry and national funds which ideally pay pensions aimed at effective and efficient attainment of the nationally legislated guarantee of minimum living standards, especially in old age and situations of disability. These funds are composed of savings gathered over the individual's lifetime. However, such funds are also a potential means of assisting individuals and their related organizations not only to achieve their primary goals but also to make even more money through wise investment of the savings. In this context it is again important to note that the consumer protection provisions (Part V) of the TPA do not apply to financial services. However, the problem cannot be solved by a simple amendment to the TPA, because the legislation already rests on wrong suppositions to which constant additions, many of which are industry based, have rendered increasingly irrational. Don't let the ACCC keep extending its control as it rapaciously seeks to do.

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

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

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

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

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

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

For key examples of the difficulties related to competition, consumer policy and the incapacity of ACCC legal practice, one may also turn to recent development in the health, education and communications industries and to competing notions of 'access'. The term **access** has a long history of use in studies of health, education and other community services, where it also refers to the patients, students and clients as consumers. However, the ACCC, from its great height, is now dangerously undermining such perspectives.

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

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

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

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

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

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

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

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

Yours truly, Carol O'Donnell, St James Court,10/11 Rosebank St., Glebe, Sydney2037.