

Government and Civil Society: Which is Virtuous?

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Government and Civil Society: Which is Virtuous?

‘What happens to an idea when it becomes a reality?’ This question, posed in a recent novel, ‘The Faculty of Useless Knowledge’¹ serves as a useful introduction to our lecture on government and civil society. I contend that the faculties of useless knowledge have been working overtime of late to convince the electorate, which elects members to this Parliament, that truth, justice and democracy lies in civil society and not in the corridors of Parliament House. I beg to differ.

In a liberal representative democracy a major virtue of government, and the parliament from which it is derived, is the enfranchisement of the unorganised, it gives them a voice and limits the claims that the many organised interests make against the commons. Civil society, whether church, corporations, trade unions or NGOs, provides citizens with vehicles to exercise private initiative. In a liberal democracy they are, thankfully, free to pursue their aims. Indeed, democracy may be enhanced by an energetic civil society. When civil society organisations, however, organise in pursuit of public purposes they compete with government and the unorganised. If successful in that competition, they become in effect, civil society regulators.² The aims of this paper are first, to report progress on the new breed of civil society regulators - advocacy NGOs - and the implications of their activities for representative democracy. Second, to suggest to legislators a tool for establishing a proper relationship between government and those would-be civil society regulators.

Here are some examples of the recent activity of advocacy NGOs, including their relations with national governments, international organisations, and business:

- The Australian Conservation Foundation announces, ‘by 2050 Australia will be a civil society. There will be a high level of community engagement in decision-making processes, a higher level of trust with their decision-making institutions.’
- The Sydney Organising Committee for the Olympic Games allows Greenpeace to judge the environmental performance of the 2000 Sydney Olympics.
- The Federal Court of Australia gives standing to a lawyer and a civil liberties group that have no instructions from, or prior contact with, the potential asylum seekers on the vessel *MV Tampa*.
- The United Nations announces that it will use Amnesty International to monitor human rights in China.
- BP announces that henceforth it is withdrawing support for political parties and funding NGOs exclusively.
- An NGO consortium lobbies the Senate to impose reporting obligations for non-financial considerations in investment products as the price of passing the *Financial Services Reform Act*.

These events suggest that civil society is taking a role in regulating the behaviour of all other actors, whether government, corporations or individuals. They are doing so through the courts, by monitoring and even delivering government programmes, by influencing

¹ Dombrovsky, Y. 1996. *The Faculty of Useless Knowledge*. London: Harvill.

² See Johns, G. 2002. ‘Corporate Social Responsibility or Civil Society Regulation?’ *Harold Clough Lecture*, Perth 16 August, Institute of Public Affairs.

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legislation, and by working directly with other centres of power, for example business and international organisations.

These activities suggest a civil society acting in a new mode. Where, in the past, civil society has acted in *opposition* to government, it has helped to secure guarantees of formal legal, political and civil equality. It has helped to secure the law and institutions that safeguard the liberty to conduct ones business based on ‘a kind of trust among non-intimates’.³ In other words, it has helped to secure a ‘civil’ society. And civil society continues in an *apolitical* mode, when it identifies problems, such as the amelioration of the plight of the sick and the poor, and produces its own solutions. In this mode, it is self-directed and voluntary, and makes few collective moral or resource claims on other citizens. In other words, it exists apart from government and the state.

The dominant mode in which civil society now operates is essentially *communitarian*. The examples above suggest multiple agendas. It appears to want to further democratise⁴ liberal democracy. It seeks a democratic community and collective solutions, it makes increasing claims on the community in an increasing number of guises and ways. For example, it is a vehicle for the idea of citizenship⁵ which becomes the basis and the source of welfare claims we have against each other. It is used as an ethical or normative idea, a vision and prescription for the good life.⁶ It seeks distributive or social justice⁷ in an increasing number of areas, including the economy. Civil society in the communitarian mode has been taken up and pressed into service as a tool to criticise liberal democracy, in particular by those who think that the state has been decimated by ‘neo-liberals’. It is used as a political slogan to advance the cause of the democratic community and as a weapon to mediate the effects of the ideology of individualism and self-interest.

It may be that liberalism is excessively individualistic and insufficiently democratic. Whether democratising the community can solve these problems, however, is problematic. Communitarians insist on the need to override the wishes of the individual in the name of the greater good.⁸ Democratic communitarians assume or require that participation in politics is the norm, whereas, in fact, it is the exception. The work of democracy always comes down to activists, so the question is—which activists and what recourse to their activity do the citizens have? NGOs expand the range of voices but, in doing so, do they expand the participation of the community or the ranks of a political elite? A cardinal tenet of liberalism is to keep democracy in its place, to regard it as an activity of limited application. By contrast, the democratic way of life encompasses more than the periodic business of government and elections. It is to be applied to most institutions, democracy in the courts (individualised justice, liberal rules of standing) the

³ Krygier, M. 1996, ‘The Sources of Civil Society’, *Quadrant*, October and November: 12-22 and 26-33.

⁴ Cohen, J. and A. Arato, 1992. *Civil Society and Political Theory*. Mass.: MIT Press, 26.

⁵ Harris, D. 1987. *Justifying State Welfare*. Oxford: Basil Blackwell.

⁶ Seligman, A. 1992. *The Idea of Civil Society*. Princeton N.J.: Princeton University Press, 201.

⁷ Minogue, K. 1993. ‘Ideal Communities and the Problem of Moral Identity’, in J. Chapman and I. Shapiro eds. *Democratic Community*.

⁸ Berry, C. 1993. ‘Shared Understanding and the Democratic Way of Life.’ In Chapman, J. and I. Shapiro eds. *Democratic Community* NOMOS XXXV New York: New York University Press, 67.

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home (feminism), the workplace (industrial democracy), the corporation (corporate social responsibility), the economy (market socialism). Democracy may work in some of these without destroying the purpose of the institution, but where it does not, there are costs attached. The application of democratic processes to all walks of life should be contingent on its utility, not on its ‘morality’.

As for social justice agendas, these attempt to justify the transfer of funds from one group of people to another. ‘Justice turns into the problem of how to distribute goods and losses without any very direct relation to law and order or even constitutionality. To mark its new role, the term ‘justice’ is commonly partnered by ‘social’, and social justice is what happens when all basic goods, which may notionally include individual talents and skills, are centrally distributed in accordance with a rational scheme.’⁹ The welfare state continues to grow, seeking ever more elaborate justification. ‘The core of the citizenship theory of the welfare state is community membership. From our membership in our community flow the welfare rights we can assert and the *duties we owe* to contribute to the support of our fellows.’¹⁰ Often it is the second part of citizenship which is left out. Moreover, what happens when insufficient people believe in the theory?

Challenges to the Virtues of Government

The new mode of civil society has become more prominent because the earlier work—the establishment of liberal democratic institutions and the welfare and regulatory state—has been largely achieved. This communitarian civil society stems also from the massive growth of professional activist groups and the pressure they bring to bear on government (see Box 1). It has resulted in an explosion of the channels by which political business is conducted. The new civil society demands new relations between government and civil society.

Communitarian civil society is growing because liberal democracy’s ability to voice citizen disquiet is unprecedented. It makes the present democratic institutions appear inadequate, less trusted. This position is one that cashed-up NGOs and international agencies favour, and business has to live with. The irony is that the critics of liberal democracy—indigenous, feminist, gay, environmentalist, civil libertarian, socialist—have all had their greatest successes in liberal democracies. They are not doing so well in crony capitalist, Islamic, or communist states, even less well in tribal polities. In fact, where they threaten to do particularly well is at a supra-national level—EU and UN—where electorates have no direct control over them. Having been granted many of their wishes, these movements challenge the legitimacy of important elements of the system that sustains them—the electorate’s veto over policy-makers, the distribution of the economic surplus, the commitment to evidence as the basis for policy, and the rule of law—hallmarks of the liberal democracies. Each of these is being challenged, in part by prominent NGOs, in part by other players within and outside government. The result may herald the rise of a dictatorship of the articulate, the aptly named Culture of Complaint.¹¹

⁹ Minogue, 1993, 42.

¹⁰ Harris, 1987, 145.

¹¹ Hughes, R. 1993. *Culture of Complaint: The Fraying of America*. New York: Oxford University Press.

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Box 1: Dimensions of a New Civil Society

Size
Oxfam has an annual income of \$862 million and 2 million supporters in 14 countries. WWF has an annual income of \$720 million, 3,300 staff and 5 million supporters across 96 countries. Amnesty International has an annual income of £19 million, 320 staff worldwide and one million supporters in 162 countries.
Number
There were 213 international NGOs in 1909, presently there are over 50,000. ¹² In 1998 about 9,500 international meetings were organised worldwide in 184 different countries (17% took place in Asia and Australasia), up from 8,800 and 170 respectively in 1993. ¹³
Reach
There are more than 5,000 transnational NGOs, NGOs based in one country that regularly carry out activities in others. ¹⁴ The number of country-to-international NGO links increased from 24,136 in 1960 to 126,655 in 1994. ¹⁵
Australia
There are 37,000 Income Exempt Charities and 15,000 organisations that have Deductible Gift Recipient status, which indicates the very large number of organisations that have significant access to the Commonwealth Government. ¹⁶

The work of the state is as much to counter the tyranny of the minorities, including individuals, as well as to counter the tyranny of the majority. The task is to limit the claims on the commons, to depoliticise much of life, to make it less amenable to public dispute. In the most prosperous of times, in the most prosperous of nations, there is the invention of permanent poverty.¹⁷ In the most benign of modern production regimes, there is the invention of a permanent litany of environmental disaster.¹⁸ In the most egalitarian and peaceful of nations, there is the invention of a permanent litany of human rights abuses.¹⁹ The application of these civil society agendas to the liberal democracies shows a lack of objectivity and loss of sense of perspective and of magnitude on the part of the advocates.

¹² Union of International Associations 1999. *Yearbook of International Organisations 1909-1999*.

<http://www.uia.org/uiastats/ytb299.htm>

¹³ de Coninck, G. 1993. *Statistics on International Meetings in 1993*. Union of International Associations <http://www.uia.org/uiastats/stcnf93.htm>. de Coninck, G. 1998. *Statistics on International Meetings in 1998*. Union of International Associations <http://www.uia.org/uiastats/stcnf98.htm>

¹⁴ Carothers, T. 2000. 'Think Again: Civil Society.' *Foreign Policy Magazine*. Winter 1999-2000 edition.

¹⁵ Judge, A. 1994. 'NGOs and Civil Society: Some Realities and Distortions: The Challenge of "Necessary-to-Governance Organisations" (NGOs)', *Union of International Associations*.

<http://www.uia.org/uiadocs/ngocivil.htm>

¹⁶ATO submission to *The Inquiry into Charities and Related Organizations*, January 2001, 26.

¹⁷ Dennis, N. 1997. *The Invention of Permanent Poverty*. The Institute of Economic Affairs. Cox, J. 2002. 'The Poverty Line Revisited.' *Agenda* 9(2): 99-111.

¹⁸ Lomborg, B. 2001. *The Skeptical Environmentalist: Measuring the Real State of the World*. Cambridge University Press.

¹⁹ Karatnycky, A. and A. Puddington, 2002. 'The Human Rights Lobby Meets Terrorism.' *IPA Review* 54(1): 6-10. Also Robertson, J. 2002. 'Take the Candle to the Darkest Dark First.' *IPA Review* 54(2): 7-8.

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In what ways is communitarian civil society beginning to stretch representative democracy's capacity to cope? In what ways is civil society gaining influence over the political and economic realm? The major difficulties arise from its two major alleged virtues—democracy and social justice. The inappropriate application of democratic processes and the inappropriate claim to justice will undermine the legitimacy of liberal representative democracy. The result may be an electorate less likely to trust government, less likely to favour equality, and more individualistic, less likely to believe in common action.

To a large extent, political activism has been contracted out. In the early phase of the establishment of the major political parties there was certainly a strand of, or at least pretensions to mass (class) involvement in politics, although in fact the numbers were never large. At present, the parties are brand names run by professionals, paid for by the state to do the work of politics.²⁰ This is not a criticism. On the contrary, the criticism is of those who believe that civil society activists are more democratic. Civil society activists, as represented by NGOs are brand names—WWF, Greenpeace, Amnesty International—run by professionals. They are less constrained by their membership than say business and union interest groups, and totally unconstrained by the need to run candidates for public office. They are good at voicing opinion, not at resolving the myriad claims that present to government. They have a different part to play in the great democratic panoply, but they are no more democratic.

Communitarian Civil Society in Action

To some extent our communitarian civil society is, a straw man. We have loaded it with a great many dubious virtues. Nevertheless, the fact is that civil society has been used as a vehicle for these very virtues and it is legitimate to gather them for scrutiny. The following case studies illustrate sources of challenge to government in a representative democracy. To the extent that the challenges succeed, they damage the virtues of liberal democracy. The ways are many, among them are, the misuse of evidence in physical science, the use of social science techniques in an attempt to impose minority views on the electorate, governments handing responsibility to NGOs, courts straying into the legislative domain, legislation that invites a wide ambit for civil regulation, and bogus measures of corporate reputation.

*Case Study 1: WWF and the Great Barrier Reef*²¹

The World Wide Fund for Nature (WWF) mounted a campaign that led to both the Commonwealth and Queensland Governments recommending urgent and significant changes to land management practices in catchments that drain onto the Great Barrier Reef. WWF alleged that there was evidence for localized deterioration on nearshore reefs from agricultural run-off. In June 2001, WWF published a *Great Barrier Reef Pollution Report Card*, which concluded that the Great Barrier Reef was being threatened by land-

²⁰ See Johns, G. 2001. 'Desirability of Regulating Political Parties', *Agenda* 8(4): 291-302.

²¹ See Marohasy, J. and G. Johns, 2002. 'WWF Says Jump: Governments Ask, How High?' <http://www.ipa.org.au/pubs/ngounit/wwffs.html>

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based pollution. While the report made many allegations of reef impact from agriculture, it did not substantiate any of the claims.

The Queensland Government responded to pressure from the WWF campaign by establishing a Reef Protection Taskforce. At its establishment, representatives on the Taskforce asked that the current level of scientific understanding on impacts of terrestrial run-off on the Reef be provided. A science statement was developed for the Taskforce to provide a 'consolidated view of our current understanding of the impacts of terrestrial run-off on the Great Barrier Reef World Heritage Area'. Further, 'the statement seeks to allay concerns that there are conflicting views in the scientific community'. This document discussed threats to the Reef, but provided no reference to actual damage to the Reef.

Several Taskforce members noted this fact, with the following comments being made by members: 'So the widespread impact [of terrestrial run-off] is not substantiated.' 'But the scientists have tried very hard to prove there is an impact.' 'Let's not get hung up on the science.' And this from the WWF member, 'Let's go forward on the basis of the precautionary principle.' At the insistence of several Taskforce members, the science adviser agreed to redraft the science statement. A revised science statement was issued with the comment to the Chairman of the Taskforce that 'We wish to clearly point out that whilst there is no evidence of widespread deterioration, there is documented evidence of localized deterioration on individual nearshore reefs'.

This was the first statement from reputable scientists clearly alleging an impact from land-based run-off on the Reef. Unfortunately for the proponents, the scientific papers on which this conclusion was drawn provided no evidence that agriculture or other land-based sources of run-off were having an adverse impact on the Reef.

The Reef Campaign came at the price of undermining scientific integrity. According to Professor Carter of the Marine Geophysical Laboratory, James Cook University, 'one of the relatively new problems that faces us is that governments are increasingly basing their actions on advice provided by unnamed consultants, or on unrefereed reports from government agencies ... This is a recipe for disaster. Good science operates on a consensus basis, using material that has been subjected to rigorous peer review and published in journals of international standing. It is therefore at their own peril that democratic governments attempt to 'control' the scientific process for political ends.' It is a dereliction of duty for governments to devise standards for water quality and run-off regimes without direct studies of impact. That some scientists would play along with them suggests that politics and science are no strangers. The issues could have been resolved if governments had been prepared to scrutinize the evidence in the published scientific literature.

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Case Study 2: Deliberative Polling

Deliberative polling²² is a technique which combines deliberation in small group discussions with random sampling to provide public consultation for public policy and for electoral issues. The technique assumes that citizens are often uninformed about many public issues, especially where they have little reason to confront trade-offs or invest time and effort in acquiring information. At its core is the belief that if citizens were better informed they would come to the ‘right’ conclusion. It stems from the romantic notion of participatory democracy,²³ a part of the communitarian philosophy. In fact, what the poll does is to gather unsuspecting citizens and subject them to an intensive brow-beating by the consensus of intellectual fashion at a particular point in time. It is tantamount to suggesting that the intellectual elite should rule, indeed that they would get it ‘right’ but for the ignorance of voters. Representative democracy works on a quite different assumption—although the elite govern, their policies are constrained by the electorate, in the light of the electorate’s assessment of events.

Two national Deliberative Polls® have been conducted in Australia, the first before the November 1999 referendum on the Republic, and the second in February 2001, on Reconciliation with Aborigines. When participants had the opportunity to discuss intensely the referendum on the Republic in a deliberative poll, ‘opinion shifted dramatically’. There was a 20 percentage point increase in ‘yes’ voters, from 53 to 73 per cent and support for the direct election of the President collapsed, from 50 to 19 per cent. Unfortunately for the Deliberative Pollsters, the Referendum failed miserably. One of the reasons it failed miserably was because of a very large sentiment among the public for a directly elected President!

The second Poll was again an exercise in impressing the electorate with the intellectual orthodoxy, in this case in Aboriginal Reconciliation. The proof of the success of this poll was that ‘opinion shifted dramatically’ as a consequence of the experience. The perception of Reconciliation as an important issue facing the nation rose dramatically from 31 per cent prior to deliberations to 63 per cent following deliberations. With changes in perceptions of the importance of the issue and increases in levels of *political knowledge* (my emphasis), levels of support for a range of national initiatives rose. Support for formal acknowledgement that Australia was occupied without the consent of indigenous Australians rose from 68 per cent to 82 per cent and, an apology to the ‘stolen generation’ rose from 46 per cent to 70 per cent.

²² Developed by James Fishkin of Texas University, The Center for Deliberative Polling.
<http://www.la.utexas.edu/research/delpol/cdpindex.html>

²³ There are many forms of deliberative democracy. For example, ‘Democratization is largely (though not exclusively) a matter of the progressive recognition and inclusion of different *groups* (my emphasis) in the political life of society.’ Dryzeck, J. 2000. *Deliberative Democracy and Beyond*. Oxford: Oxford University Press, 113. These sentiments assume that the group is more important than the individual in terms of participation.

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Unfortunately for the Pollsters, support for the political agenda²⁴ behind the Reconciliation initiatives remained relatively unchanged after deliberations. Those who did not support a treaty or set of agreements between indigenous and non-indigenous Australians rose from 46 per cent to 50 per cent. Those opposed to the allocation of special seats in parliament for indigenous Australians declined from 57 per cent to 55 per cent.²⁵ Like the Referendum, the Deliberative Poll was an exercise in elite frustration with the electorate. Civil society leaders showed impatience with the political leaders and their masters, the voters. Voters changed their sentiment on the parts that did not affect them, they ‘learned their lines’ but they did not change their views on the parts they thought may affect them.

Case Study 3: Greenpeace and the Sydney Olympics

Environmental NGOs played a key role in the development and delivery of the environmental agenda of the Sydney Olympics. Greenpeace mounted a significant Olympics campaign over 7 years leading up to the Bid and the Games, and there was a close working relationship with the Games organisers. Greenpeace International and its office in Sydney, Greenpeace Australia, actively participated in the 1993 bid to host the Games, joining with government and industry in drafting the ‘Environmental Guidelines’, Sydney’s plans for an environmentally-friendly Games.

Greenpeace adopted a ‘watch-dog’ role which included monitoring the performance of organisers, offering advice and criticism and reporting on the performance of Games organisers. SOCOG dealt with Greenpeace in a number of ways. ‘SOCOG treated Greenpeace as an organisation with a legitimate interest in the Games and involved them as much as possible. This reflected their role in the Bid, their expertise in the environment, their ability to tap a global network of knowledge and their ability to become involved *whether we wanted them or not* (my emphasis).’²⁶

The Greens helped to establish the standards in all key performance areas, energy conservation, water conservation, waste minimisation, pollution avoidance and the protection of the natural environment. A consortium of Greens lead by the ACF were paid \$160,000 for their work by the NSW and Commonwealth governments to keep an eye on the organisers; Greenpeace, true to their view on independence, did not accept government funds. The Greens were on the stage at the launch of various environment initiatives with SOCOG, for example, the CEO of Greenpeace launched the waste strategies initiative with the Minister for the Olympics.

Essentially the strategy of SOCOG was to invite the Greens into the tent, to minimise their potential to damage to the Olympic brand. It was part of the ‘engagement strategy’

²⁴ Points put to the assembly in Old Parliament by the author and two other speakers, Dr Ron Brunton and Dr Keith Windschuttle.

²⁵ Issues Deliberation Australia, 2001. *Australia Deliberates: Reconciliation – Where From Here?* Report tabled in the Federal Parliament of Australia, September 25, pp 59-60.

²⁶ Otteson, P. 2001. ‘Greenpeace and the Sydney 2000 Games: What Are The Lessons?’ Paper delivered at 4th IOC World Conference on Sport and Environment, Nagano, Japan 33-4 November. Also interview with Peter Otteson, 26 June 2002.

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now common in the corporate sector. It used the language of ‘stakeholder’, which implies equal standing among competing interests. Essentially, a stakeholder is ‘anyone who can do you damage.’ It is the damage that a Green group can do to a company’s image that allows it to gain status with the real stakeholders, those who have a contractual relationship with the organisation, whether taxpayers, investors, employees or suppliers and customers.

It was also a ‘beyond compliance’ strategy, doing more than the law required. The Olympic Games showcased the best of the best, so everything associated with the Games has to be the best of the best. Greenpeace used the Games like any other business, to use the badge of the Olympics to push their product. In this case, however, they paid nothing and they delivered nothing, except the threat of bad publicity. The strategy of engagement delivered power over programmes and the judgement of outcomes to those who threatened blackmail. There was a time when such behaviour was considered bad form. Greenpeace stole a moral march on the IOC and the governments—and the IOC, the fans and the taxpayers paid for it.

A proper acquittal of government funds would ensure that public servants and technically competent people were in the decision-making positions, albeit with advice from lobbies. The Sydney Olympics pushed well beyond the proprietaries to indulge in an exercise of damage control and used funds for experiments in environmental management that had insufficient scientific scrutiny.

Case Study 4: Judicialisation of Politics

It may be the ultimate form of individual political involvement to take a matter to court, but the effect of many people litigating many issues, means the transfer of decision-making rights from the legislature to the courts.²⁷ The trend to settle a wider ambit of issues in the courts has multiple origins. It stems from the trend in law, both judge-made and statutory, towards a preference for individualised, discretionary solutions as against the principled application of general laws.²⁸ It stems from the explosion of legislation and the tendency for Parliaments to pass law with general standards rather than specific rules,²⁹ the widening of the law of standing³⁰ and the tendency for the judges to confuse compensatory justice for distributive justice, as with the current crisis in tort law.³¹

It is now easier for collectives not directly involved in issues to intervene in more legal matters. In *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd (2000)* the High Court of Australia has widened the capacity of NGOs to take legal action against business. The consensus of the High Court in TAM v MIM was that the

²⁷ See Vallinder, T. 1994. ‘The Judicialization of Politics: A World-Wide Phenomenon.’ *International Political Science Review* 15(2): 91-9.

²⁸ Gleeson, A. M. 1995 ‘Individualised Justice: the Holy Grail.’ *Australian Law Journal* 69: 421-33.

²⁹ McHugh, M. (1995) ‘The Growth of Legislation and Litigation’, *Australian Law Journal*, 69(1): 37-48.

³⁰ *Truth About Motorways Pty Ltd v Macquarie Infrastructure Management Ltd (2000)* HCA 11 (9 March 2000).

³¹ Atiyah, P. 1996. ‘Personal Injuries in the 21st Century: Thinking the Unthinkable.’ In P. Birks ed. *Wrongs and Remedies in the 21st Century*. Oxford: Clarendon Press.

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Parliament had the power to legislate to allow ‘any person’ or ‘a person’, or the like, to have standing under Commonwealth statutes. The Court stated that the Parliament may ‘allow any person to represent the public interest and, thus, institute legal proceedings with respect to a public wrong.’ It further observed that a number of laws had been enacted in recent years, which allowed proceedings to be brought, by any ‘interested person’ (for example, in certain laws relating to the environment, industrial relations and financial markets) or ‘person affected’ (for example, in certain companies and securities, investment and environmental laws).³² This widening of the law of standing could prove fertile ground for lawyers and NGOs to press their agendas through the Courts in environmental, industrial relations, companies and securities and anti-discrimination, as well as privacy, and finance and investment arenas.

Consider the controversial litigation last year concerning the *Tampa*.³³ The proceedings were instituted by a lawyer and a civil liberties group that had no instructions from, or prior contact with, the potential asylum seekers. Both were given standing by the Court on the assumption that they were acting in the ‘public interest’ to protect a vulnerable group against government excess. History has now conclusively disproved that untested assumption, at least in so far as 131 people given asylum and permanent residence in New Zealand are concerned. Had the *Tampa* plaintiffs won their case, they would have succeeded in having most of those on the boat detained at Woomera, Curtin or Port Hedland for the last 10 months, eventually to see their asylum application rejected, with the result that they must return to a war-ravaged Afghanistan. Those who instead chose to go to New Zealand under the Government-sponsored plan have, with a few exceptions, been given asylum and permanent residence in that country. With hindsight, it seems clear that for many on the *Tampa* the Government initiatives delivered them a more favourable outcome than the ‘public interest’ litigation.

Judicial activism is seen by some as an expression of the rule of law in safeguarding individual rights and civil liberties against executive abuse. It is also claimed, though not often explained, ‘that judicial activism forms part of a new democratic settlement between the government and the community. If judicial method is as capable or better than legislative or executive method for distilling enduring community values, that needs to be demonstrated.’³⁴

*Case Study 5: The Financial Services Reform Act*³⁵

The *Financial Services Reform Act* of 2001 is a legislative step into the brave new world of corporate citizenship. It seeks to place open-ended moral restraints on private investment decisions. If they were applied to individuals, there would be an outrage. The

³² Australian Chamber of Commerce and Industry, 2000. ‘High Court Empowers Social Action Groups’. http://www.acci.asn.au/index_key.htm

³³ See McMillan J. 2002. ‘Immigration Law and the Courts.’ Address to the Samuel Griffith Society, Sydney, 15 June.

³⁴ McMillan, 2002, 7.

³⁵ See Hoggett, J and M. Nahan, 2002. *The Financial Services Reform Act – A Costly Exercise in Regulating Corporate Morals*. IPA Monograph.

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Act includes disclosure provisions in the offer of financial products designed to give prospective investors sufficient financial information to decide whether or not to invest.

The provision applies particular disclosure requirements to all superannuation, life insurance and managed investment products. The requirement is that the financial institution concerned disclose for every product the extent to which it has taken into account labour standards and environmental, social and ethical considerations. The requirement is thus imposed on approximately \$650 billion of Australian savings, including the principal form of government-enforced savings—superannuation.

Disclosure requires the institution to formulate and express its attitudes and practices to matters that range from difficult to impossible to define. It is open to businesses to state that they do not take these matters into account in their investment decisions. No institution will state that it does not take such matters into account, in part because if they did, NGOs and the media would label them as unethical or anti-social. Silence would be treated as guilt. More importantly, businesses in reality almost always ‘take into account’ these issues to some degree, so a nil return would in most cases be untruthful. The normal investment selection processes involve winnowing out fraudulent (that is unethical) propositions or those with high risk exposures arising from their corporate practices. NGOs would exert pressure for highly detailed disclosure statements under each of the headings and would seek to supervise the behaviour of the institutions concerned against those written statements in ways favoured by those groups.

In the end, this is no less than an attempt, by indirect and stealthy means, to impose new and poorly defined community service obligations and prescribed behaviours on business. By means of legislation and mandatory guidelines, the corporate sector is obliged to undertake actions (and report on them) that may adversely affect its profitability³⁶ and that it would not necessarily undertake voluntarily. The Act will encourage significant distortion of investment decisions and management effort to placate hostile groups, which have little financial stake in the institutions or businesses affected.

These provisions dilute the influence of shareholders and the responsibility of corporate management to its shareholders. It could provide an excuse for company boards and management for poor financial performance. In the extreme it might be used as an excuse for business failure on the grounds that the company had focused, perhaps very successfully, on the four non-financial criteria and had thus failed to make a profit. Failure to control labour costs might be equated with high labour standards. Zealous environmental performance might translate into closure of operations huge expenditure to avoid trivial environmental injury and so on.

The expansion of these ‘bottom line’ concepts is accompanied by the phenomenon of a growing list of interest groups which elect themselves as ‘stakeholders’. A stakeholder is traditionally a person who has a stake, that is, someone who has put up something of

³⁶ See Ali, P. and M. Gold, 2002. ‘An Appraisal of Socially Responsible Investments and Implications for Trustees and other Investment Fiduciaries.’ *Centre for Corporate Law and Securities Regulation*. University of Melbourne.

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value to promote the enterprise in question and risks losing it. This delicate trade-off of risk and reward traditionally included shareholders and lenders. It is this trend towards giving everyone a say in everyone else's business that lies beneath much of the pressure for the FSRA provision. It is a perversion of the idea of democracy, a new form of corporatism.

*Case Study 6: Reputation Index*³⁷

Corporate reputations are a valuable commodity, a poor one can lead to a loss of income for investors and employees. This is precisely why some NGOs seek to advance their agendas by trying to capture corporate reputations. A prime example is *The Sydney Morning Herald* and *The Age* newspapers' list of Australia's 'best' 100 corporations. Each is rated on a number of factors, which are combined to form the 'Good Reputation Index'. The Index purports to measure corporate performance on employee management, environmental performance, social impact, ethics, financial performance, and market position. The judging is undertaken by 'influential' organisations, such as the Ethnic Communities Council, Greenpeace, Amnesty International, the St. James Ethics Centre, the Institute of Chartered Accountants, and the Public Relations Institute of Australia.

An analysis of the data³⁸ shows that, according to the Index and therefore the CSR regulators:

- *Financial performance and social responsibility are inversely related.* Only one of the top ten most socially responsible corporations is ranked among the top 20 firms in terms of financial performance. Conversely, just three of the top ten financial performers were ranked in the top 20 in terms of social responsibility.
- *Government protection and direction is good and market competition is bad.* Five of the top 10 most socially responsible corporations are government-controlled. Two, Australia Post (ranked 1st) and Queensland Rail (ranked 5th), are government-owned monopolies. Telstra is partially government-owned and heavily regulated. Holden and Ford are sustained by taxpayer subsidies. None of the top ten financial corporations are government-owned or subsidised and all face vigorously competitive markets.
- *Funding social activists is a key to social responsibility.* Each of the highly ranked socially responsible corporations donates heavily to corporate social responsibility groups (including many of the organisations who acted as judges for the Index). Westpac (ranked 2nd), Alcoa (ranked 6th) and ING (ranked 10th) are not simply generous financial contributors, but are also strong promoters of the triple bottom line. Westpac has taken the lead in promoting ethical investment in Australia and ING has taken a similar approach around the world. One must at least suspect that their high ranking is a reward for their contribution to the cause.

³⁷ See Johns, G. 2000. 'Corporate Reputations: Whose Measure?' *IPA Review* 52(4): 3-5.

³⁸ 'The Good Reputation Index 2001', *Sydney Morning Herald*, October 22, 2001.

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The Index gathered the opinions of those who have an interest in gaining some leverage over the activities of corporations, but who have no direct interest in their operations. It has precious little to do with actual performance of tasks that corporations need to undertake in order to fulfil their obligations to their customers, shareholders, and their workforce and to society through their legal obligations. The tussle between corporations and NGOs over corporate reputation has reached new heights. It is now a game of cat and mouse, with shareholders having to pay to bribe the civil society regulators.

The Protocol³⁹

An essential task for democratic government is to maintain a balance between the organised and the unorganised interests in society and to counteract the tendency for state power to be used to satisfy organised interests. The principle means to achieve this balance are already in place: a conservative constitution devoid of a Bill of Rights and a House of Representatives based on single member constituencies. A further one is to resist the tendency to allow more power to rest in the hands of international institutions where electorates have no direct veto. In addition, in the domestic context, there should be disclosure on the part of all those who have access to the resources of the government. The protocol is the instrument proposed. This is designed to reassert the primacy of the formal democratic institutions, to limit the impact of communitarianism by corralling it through the Parliament, where it is constrained by the electorate.

The Australian Tax Office submission to the Inquiry into Charities noted the lack of information provided by non-profits that enjoy tax concessions. There have been concerns about accountability to donors, possible erosion of confidence in the sector, the lack of data for policy development, and so on:

The Commission is concerned that accountability to donors and the general public is inadequate in terms of the availability of easily understood information and the transparency of operations. This may reduce donor confidence and ultimately public support for the sector.⁴⁰

In some overseas jurisdictions, legislation gives public access to various information about concessionally taxed non-profits, including administrator's decisions, constituent documents and financial data. For example, in the USA:

Registered charities must file (annually) form T3010 that requires detailed information on their revenues and expenditures, assets and liabilities, remuneration paid to senior staff, and more general information about their charitable purposes and activities. All of this information is available to the public.⁴¹

³⁹ See Johns, G. 2001. 'Protocols with NGOs: The Need To Know.' *IPA Backgrounder* 13(1).

⁴⁰ Quoted in submission by Australian Taxation Office to *Inquiry into Charities and Related Organisations*, January 2001, 20.

⁴¹ Quoted in submission by Australian Taxation Office to *Inquiry into Charities and Related Organisations*, January 2001, 20.

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Consistent with these views, where an NGO wants access to a government, it should be granted on the condition that the NGO is competent in the areas relevant to the particular task required. Each of these competencies requires proof. Specifically, an NGO should provide data about their source of funds, their expertise, their membership and the means of electing their office-holders. Specifically, where a government grants standing to an NGO the following information should be gathered and made available to the public:

Legal status: sufficiently detailed to prove the status of the organisation and to identify office holders, along with the structure of responsibilities and appropriate systems to ensure accountability.

Operating status: Proof that the organisation is voluntary, non-profit and non-government.

Membership: There must be a verifiable list of the membership, one that distinguishes members—people with voting rights—from supporters. List should not be made public, although there should be evidence that new membership is encouraged.

Elections: Document the election process and processes by which members are able to be involved in the policy-formation, including the ability of members and supporter to access all decisions of the governing body.

International affiliation: provide information on off-shore affiliates, associated parties; on the degree of non-resident input in terms of board membership and general membership, and extent of offshore funding.

Financial statement: The financial position should be prepared in accordance with accepted accounting principles and include: significant categories of contributions and other income, expenses of major programmes and activities, and all fund-raising and administrative costs.

Use of funds: Money should be used in a manner specified by the NGO when it asks donors (and those funds are tax-assisted) for donations. Information should be provided which shows the percentage of total income from all sources applied to programmes and activities.

Fund-raising: Solicitations and informational materials must be accurate, truthful, and not misleading. Solicitations shall include a clear description of the programmes and activities for which funds are requested.

Claims to expertise: other than membership interest. The qualifications, whether formal or by way of publications, of those who will speak or act on behalf of the organisation in its representations to the provider, research undertaken, and whether research has been assessed by independent peer review.

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Conclusion

NGOs that seek access to government resources should be the subject of scrutiny, and the results of that scrutiny should be made available to the public. The acceptance of an NGO as a body with standing should lead to the publication of the data on a publicly accessible register. This simple procedure would reassert the dominance of the relationship between governments and their citizens, a dominance that has tended to be displaced by the all-too-ready willingness of providers to accept NGO 'stakeholders without responsibility' rhetoric. NGO activity is not going to fade, in many regards it is to be welcomed, but it should be put in perspective. Citizens need to know about the NGOs that seek access to their resources. The simple device of a protocol should help put the citizens back in charge. It may help to modify the tendency evident in civil society to pursue the agendas of the articulate with the resources of the inarticulate, or those too busy to play politics.

Liberal democracy has the virtue of securing a degree of liberty consistent with the views of the majority and the protection of the rights of minorities. It is predicated on a limited politics, where civil society and the economy make their own contributions to society. A civil society that promotes such an outcome shares the same virtues. On the other hand, a communitarian civil society where citizens lay claims on fellow citizens in increasing ways and for an increasing number of reasons could create a less liberal society. Its virtues may not be approved by the majority. The only defence against such insurgency is better information about those who make the claims and organise the voices.

Government in a liberal representative democracy has the legitimacy to arbitrate and conciliate, incorporate and resolve the claims on the commons. Mere assertion of the public interest does not make it so. This is difficult in a liberal society where all voices must be heard, all due weight given to opinion, whoever expresses it. The present difficulty arises because the ability to voice opinion is outstripping the ability to resolve the claims voiced. The strengths of liberal democracy are being used against it. The trick is to retain the strengths and manage the challenges.