

**Public Interest or Common Good of the Community? – Bringing
order to a dog’s breakfast.**

An address by the Hon Alan Demack AO to the IIPE/AAPAE Conference held in
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When I prepared the title and abstract for this address in December 2001, the commercial world¹ in USA, Australia and elsewhere was in turmoil. Much of the turmoil was generated by the people who were supposed to be the leaders in commerce. For some time, the public sector in Australia and elsewhere has been told to adopt contemporary business practices. It seemed to me in December 2001, that it was time to suggest that the commercial world needed to adopt and apply some of the concepts found in the legislative regime for the public sector which has been established in Queensland.

Since December 2001, the situation has degenerated even further. There is an urgent need for a fundamental re-assessment of the purpose of trade and commerce. Is the primary purpose of trade and commerce to serve the financial and property interests of those who are powerful enough to assert those interests? Or is there also some common good that should be served? This raises the question whether the commercial world needs a new ethical template and, if so, what ethical values should shape that template?

“Dog’s breakfast” is an Australian colloquial expression which the Macquarie Dictionary defines as “a mess: a confused state of affairs”. Is there any better

description of the commercial world in USA, Australia and elsewhere over the past twelve months?

The Inadequacy of Ethics

There is as growing frankness about the fact that this dog's breakfast owes little to the events of 11 September 2001. Rather it has been brought about by a complex set of factors which arise from long established patterns of human behaviour. In spite of overwhelming evidence to the contrary, we persist in believing that the people who do good things are altogether good guys and the people who bad things are altogether bad guys, and these two groups are as chalk and cheese.

Consequently, it seems difficult to understand how Enron could have won awards for displaying corporate social responsibility while adopting business practices which left employees, creditors and shareholders financially devastated. The assumption in this paper is that any system of commercial sector ethics must take account of the fact that respectable people are as capable of acts of dishonesty as people whom respectable people would not have home to dinner. The proposition that the concept of public interest in the commercial world has passed its use by date will be developed and the value of the concept of the common good of the community will be explored.

Let me quote from the Commentary in Business Ethics Newslines of August 19, 2002.

**Business Ethics: Should We Give It Up?
by Rushworth M Kidder**

Corporate social responsibility is a sham. Business ethics is an oxymoron. Executive integrity is a trick.

In these scandal-blackened days, cynics are all a-blather with such talk. But now we're hearing it from a disturbing quarter: **Business Ethics**, a respected 15-year-old magazine widely read by corporate ethics officers.

In the latest issue, editor Marjorie Kelly offers an anguished mea culpa. She ruefully admits the failure of the corporate social responsibility (CSR) movement to prevent the recent corporate scandals. Ending her editorial, she even appears to walk away from ethics itself.

It's an enticing thesis. But it's the wrong conclusion.

In a nutshell, here's her argument:

1. We in the ethics movement focused on CSR – caring for the environment, promoting human rights, taking tough anti-bribery stands – as a way to separate good from bad companies.
2. But Enron and its ilk proved us wrong – talking a great ethics game, winning CSR awards, and then collapsing in a blaze of scandal.
3. Yet unlike prior scandals du jour – frauds concerning defense procurement, Medicare billing, insurance selling, or junk bonds – this is “ethics’ perfect storm,” where “we’re seeing the weakness of the system design itself.”
4. So “all the things CSR has been measuring and fighting for and applauding may be colossally beside the point.”
5. Why? Because CSR cannot compete against the greed in the hands of the few powerful elites who benefit from the system, at the expense of the many who get shafted.
6. For that reason, we're giving up the fight for ethics and turning our attention to systemic reform.

Following her editorial is an italicized note saying that “**Business Ethics** is laying plans to convert itself into a nonprofit to be called the Economic Democracy Project.”

The commentary goes on to call for the application of the core virtues, honesty, fairness, responsibility, respect and compassion. It also recognises that systemic reform can encourage ethical behaviour. With respect to the learned commentator, the issue that Marjorie Kelly raises is central. Can honesty, fairness, responsibility, respect and compassion constrain or contain greed?

Social Expectations From Law

Because my training is as a lawyer, may I invite you to take a brief look at the development of the English common law in respect of trade and commerce.

When the English common law began to take shape “it was supposed to be the duty of the king and the parliament to provide directly, and by many kinds of interferences with private affairs, for the general well-being of the whole community, and of all classes of which it was composed”².

For example, in 1329, King Edward issued a commission to three judges to hear and determine cases in Northampton. This process was known as an “eyre”. One of the first proclamations or “crys” by the judges was,

“that no one must raise the prices of any goods because so many people had come into town for the eyre. And no one was to be a forestaller or to forestall any kind of provisions either for men or for horses. And no one was to take anything from anyone against his will or without paying for it at once.”³

“Forestall” is a word still in use, but its meaning has changed. In 1329, it meant intercepting goods on their way to market and buying them up so that the forestaller could command what price he/she chose when he/she got to the market. It was a criminal offence to “corner the market”.

It could not be expected that these concepts could survive the industrial revolution. They were belonged to a time when commerce was limited, and the markets supplied basic necessities. Increasing trade and the development of more complicated commerce led to ideas of freedom of trade based on the doctrine that each individual person and every group of people, however constituted, is the best judge of their own interests and ought to be allowed to pursue those interests by any method short of violence or fraud.⁴

This doctrine eventually led to the abolition of the laws that limited the rate of interest that could be charged by money lenders. “But their total repeal (in 1864) gave opportunities to such iniquitous practices on the part of some classes of money lenders that, less than half a century after their repeal, the Legislature was obliged to intervene”⁵. The need for legislative intervention was not restricted to the limiting of interest rates, but extended across trade and commerce.

Convergence of Private and Public Interests

The extent of the intervention has varied over the past century, and it is beyond the scope of this paper to explore that. What is important is to note that, in our present “market economies”, the primary doctrine remains that each individual and every group of individuals, however constituted, is the best judge of their own interests and ought to be allowed to pursue those interests by any method short of violence and fraud. Because such a system is liable to be abused, some form of regulation is called for, but that should be kept to a minimum.

However, the regulation is concerned to protect the same kind of “interests” which, when pursued unfairly, cause harm within the community. Certain conduct which involves violence or fraud constitutes criminal offences. As commercial life becomes more complex the identification of conduct which is properly identified as being criminal becomes more controversial. Other conduct which causes harm to interests within the community is controlled by a regulator or regulators. One contemporary issue in Australia is whether such regulatory offences should be made more clearly

criminal offences by imposing jail sentences. But the interests which are pursued, and the interests which are harmed, all involve interests in property or finance.

So, in Australia, we have an Australian Competition and Consumer Commission. Its purpose is to promote competition and fair trading. At bottom, this means that traders, whose financial or property interests are damaged by unfair pricing policies, receive some protection for those financial or property interests. Similarly, the financial and property interests of consumers are protected. A small number of goods are banned under the relevant legislation, the *Trade Practices Act*, but it is most likely that this is done to prevent consumers wasting money, rather than to protect their health.

This is quite understandable in a market economy where financial considerations predominate. However, it means that, for practical purposes, in the commercial sector the phrase “the public interest” has come to be identified with the promotion and protection of private interests⁶. So far as these interests are pursued in the market place, they are financial and property interests. The pursuit of those interests in as open a way as possible is in the public interest.

Once this is recognised, it is not hard to see why things went wrong in Enron, HIH and in other troubled corporations. Personal interests and public interests have such a measure of overlap in the actions of senior management and directors, that a debacle is almost inevitable. A CEO with share options is pursuing both a personal interest and a public interest when practices are adopted which push up the value of shares. When private interest and public interest converge, the pursuit of private interests is encouraged rather than restrained by public interest.

It is for this reason that I assert that the concept of “public interest” has passed its use by date in commercial sector ethics. Its identification with the promotion and protection of private financial and property interests deprives it of any practical use. It is obvious enough that, even in the commercial sector, people use the phrase in ways which appear to embrace factors other than financial and property interests. However, such usage generally equates public interest with what is of interest to the public. This is seen most clearly when public figures, including journalists, claim to speak or act in the public interest.

On the other hand, the phrase “common good of the community” looks beyond the interest of individuals, even beyond the collective interest of a number of individuals. It looks “for the general well-being of the whole community, and of all classes of which it (is) composed”. It even dares to suggest that there may be some standard to which behaviour should be directed and which can be described as “good”.

The Queensland Public Ethics Regime

May I now turn to the Queensland *Public Sector Ethics Act 1994* to show how the two phrases “the public interest” and “the common good of the community” can be used. The Act declares that the following “ethics principles” are fundamental to good public administration: -

- ? respect for the law and the system of government
- ? respect for persons
- ? integrity

? diligence

? economy and efficiency

s.4

Each of these principles is expanded to create “ethics obligations”. The ethics obligations which are derived from the “integrity” principle are: -

Integrity

9. (1) In recognition that public office involves a public trust, a public official should seek –

- (a) to maintain and enhance public confidence in the integrity of public administration; and
 - (b) to advance the common good of the community the official serves.
- (2)** Having regard to the obligation mentioned in subsection (1), a public official -
- (a) should not improperly use his or her official powers or position, or allow them to be improperly used; and
 - (b) should ensure that any conflict that may arise between the official’s personal interests and official duties is resolved in favour of the public interest; and
 - (c) should disclose fraud, corruption and maladministration of which the official becomes aware.

While the Act is concerned with public sector ethics, not commercial ethics, the well drafted legislation⁷ helps to clarify thinking on the issues being dealt with. It is common in discussing public sector ethics to contrast private interest and public interest. Here personal interest and official duties are contrasted. This is a practical way of identifying conflicts of interest that need to be addressed. A public official’s “official duties” can be readily identified and the kind of “personal interests” which may come in conflict with those duties can also be readily identified.

This means that in most cases “public interest” has a meaning which is different from that which I have discussed. When the conflict is between the personal interests of a public official and that official’s duties, the public interest requires the performance of the duties at the expense of the personal interests. This is so because of the structured

nature of the obligations of a public official which includes ethics obligations. Public interest is here concerned with the performance of official duties.

A far more difficult issue arises when a public official finds that the performance of a task involves a conflict between official duties. For example, the ethics principle “respect for persons” includes the obligation to “act responsively in performing official duties” (s.8 (2)). The ethics principle “economy and efficiency” includes the obligation to ensure that public resources are not used extravagantly (s.11). A public official involved in preparing recommendations about a project may find that to act responsively to concerns from within the community would require extravagant proposals.

In circumstances like that, the public official is reminded that public office involves a public trust so that the official should seek to advance the common good of the community that official serves (s.9(1)(b)). This approach is necessary where there is a conflict between official duties. Both duties cannot be fulfilled to the letter, so that the public interest, as identified in the legislation, cannot be served. The resolution of the issue is to be found in advancing the common good of the community. This would go beyond financial and property interests to consider “the general well-being of the whole community, and of all classes of which it is composed”. Those words are taken from the supposed duty of the king and the parliament in medieval England.

Public Sector Ethics and Commercial Sector Ethics

There is, of course, a fundamental difference between the purpose of the public sector and the purpose of the commercial and industrial sector. The public sector must serve the entire community and it is based on the trust the public places in it. The commercial and industrial sector allows for the pursuit of private interests. However, as corporations grow in power, it is hard to see why the primary responsibility of those who manage them should be to protect the interests of shareholders rather than promote the common good of the community. The collapse of HIH had a profound effect upon the whole of Australia, not just upon shareholders.

The most useful place to explore this possibility is to examine the process involved in privatising government owned entities. The continuing debate in Australia about the full privatisation of Telstra illustrates how difficult it is to provide some regulatory structure that allows a large corporation to serve the interests of its shareholders and to promote the common good.

What I propose to do is to examine the procedure followed in Queensland for the corporatisation of nominated government entities. The process is established by the *Government Owned Corporations Act 1993*. Corporatisation changes the condition and the structure under which the entities operate so that they operate, as far as practicable, on a commercial basis and in a competitive environment while remaining in public ownership. The process allows the State, as owner on behalf of the people of Queensland, to provide strategic direction to the entities by setting financial and non-financial performance targets and community service obligations. This direction is given by having the shares in the Government Owned Corporation (GOC) held by Ministers in the Government.

The concept of “community service obligations” enlarges the obligation which the management of GOCs must fulfil by requiring them to perform activities which are not in the commercial interests of the GOC to perform. This may be done when the shareholding Ministers give directions to a GOC’s board. However, it is difficult to balance the idea that a GOC should operate on a commercial basis and at the same time perform activities which are not in its commercial interests. Consequently, in the years following 1993 this issue was closely examined.

In 1999, the Queensland Treasury prepared a policy framework for community service obligations. It included: -

In some instances, the Government provides a range of products and services to the community through businesses which it owns such as electricity corporations, port authorities, Queensland Rail and Queensland Forestry.

Most of these products and services are provided on a strictly commercial basis with the direct intention of making a commercial return to the owners of these businesses – the Queensland community. However, some products and services are provided by these entities to meet other, *non-commercial* or *community service outcome* objectives of Government. For example, in the case of transport, the Government has traditionally funded Queensland Rail to provide discounted prices on rail travel to lower income groups of the community, such as students and pensioners. This meets its community service objective of redressing the social inequity that may exist in the community in terms of access to essential and other services.

In recent years, these businesses have been given a direct commercial mandate and are focused on improving their overall productivity and efficiency. The profits of these businesses are then available to be distributed to the community through the State Budget to meet a range of wider community needs. Some of these Government owned businesses are now directly competing in markets alongside private sector entities.

In simply requiring these Government owned businesses to, for instance, lower their charges for products and services to certain groups of consumers, they would no longer be operating with a truly commercial focus. This undermines the incentives for the business to improve its efficiency and operate to the best of its ability in providing a wide range of products and services for the community.

It is in the situation where Government owned businesses are providing services to meet the Government’s social objectives that community service obligations (CSOs) play an important role. The provision of certain social or other non-commercial products and services to the community continues to be an important responsibility of

Government. However, the responsibility for ensuring that such services are provided is one for the Government itself, rather than of Government-owned 'commercially-focused' businesses operating independently and at arm's length.

Against this background, this paper outlines the Queensland Government's CSO policy framework. The paper outlines the broad guidelines that will apply in situations where the Government seeks to have commercial businesses (Government-owned or privately-owned) deliver certain 'non-commercial' products and services to the community.⁸

Government Responsibilities and Commercial Sector Responsibilities

This approach means that the cost of meeting community service obligations is now met by the Government. It also means that some community service obligations will be performed by entities not owned by the Government.

This is a significant matter because it means that if the concept of the common good of the community is to be used in the commercial sector ethics, it is not necessary or desirable to include within the ambit of the concept any larger social purpose. Four purposes which are the responsibility of government are identified as: -

- ? delivery of services to final consumers or industry at uniform prices, regardless of variations in the cost of supply (eg: uniform electricity tariff);
- ? delivery, at no charge or below cost, of services or service levels which would not be provided on purely commercial grounds (eg: suburban rail services);
- ? requirements to grant price concessions to particular groups of customers (eg: various pensioner/senior concessions); and
- ? requirements imposed on Government-owned commercial business entities to purchase inputs at levels or types that differ from purely commercial levels in order to achieve other objectives (eg: employing additional apprentices).⁹

Experience may show that there are other obligations which a government may wish to assume by paying government or private service suppliers. For present purposes this indicates matters which need not be considered within the concept of the common good of the community.

It is important to keep in mind that the concept of community service obligations found in the *Government Owned Corporations Act 1993* involves activities which are not in the commercial interests of the GOCs to perform. Consequently, I am not suggesting that businesses will not offer discounts to pensioners or sponsor sporting teams and events when the publicity associated with such practices makes them commercially attractive. The corporate social responsibility awards, referred to in the Business Ethics Newslines Commentary previously quoted, appear to reward activities which advance the commercial standing of the recipients.

Shaping the Common Good Template

What then is left is the concept of the common good of the community which makes it a more useful ethical template than the public interest? The common good of the community is served by the commercial world when the members of the community can see that their well-being is being promoted by the commercial world.

The ethics principles found in the *Public Sector Ethics Act 1994* (Qld) can shape an ethics template –

- ? respect for the law and the system of government
- ? respect for persons
- ? integrity
- ? diligence
- ? economy and efficiency

If this is so, the difference between the public interest and the common good of the community becomes clear. The pursuit of individual financial and property interests gives undue weight to economy and efficiency. If that happens, the system is out of kilter and in danger of coming apart, something that has been demonstrated by a number of very significant corporations.

On the other hand, if economy and efficiency are not seen as ethical norms, the norms which are chosen do not engage with commercial reality. It is important to express core values such as those quoted in Business Ethics Newline – honesty, fairness, responsibility, respect and compassion – in ways that confront the issues the commercial world faces. The Queensland five do that.

Respect for the law and the system of government keeps the purpose of the criminal sanctions and the regulatory requirements in proper perspective. It is often the case that regulation encourages people to find ways of minimum compliance and maximum avoidance, something that will be eschewed, if there is respect for the law and the system of government.

Respect for persons embraces most of the core values previously quoted, but looks beyond people as consumers or unionists or regulators. It offers respect to all.

Integrity integrates the multiple and complex obligations of corporate governance.

Diligence restores faith in financial statements.

Economy and efficiency serve the common good of the community while protecting the financial and property interests of the commercial world.

Yet this is not the key that opens the gate that leads into utopia. It is only an ethical template that is shaped to test commercial reality and to meet community need. Greed will ever present a challenge and for better or for worse we have moved beyond 1329.

¹ By “commercial world” or “commercial sector” I mean that part of the business community which provides the corporate governance of the trade, commerce and industry of a country. That seems to be the place where the difficulties have arisen.

² Stephen’s History of the Criminal Law of England. Vol 3, p.193.

³ The Eyre of Northamptonshire, 1329-1330, Vol 87, Selden Society, p. 9.

⁴ Stephen, op. cit. p.203.

⁵ Holdsworth, A History of English Law, vol 13, p. 330.

⁶ “Handbook of Administrative Ethics”, ed T L Cooper , per D F Morgan at 126.

⁷ I was not involved in the drafting of the legislation.

⁸ Community Service Obligations – A Policy Framework, Queensland Treasury, 1999. p.1

⁹ Community Service Obligations op. cit at p.5