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*Risk, Responsibility and the Role of  
Government*

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# Smothered by the Security Blanket

*Risk, Responsibility and the Role of Government*

‘The nine most terrifying words in the English language are: “I’m from the government and I’m here to help”.’

Ronald Reagan, 1986

## Introduction

**I**ncreasingly today, in Australia and around the world, governments have decided that they will do their best to ‘help’ us. The government wants to protect us from being fat, from smoking, from watching certain television advertisements, from spending our money irresponsibly; it wants to set the proper amounts of reading and physical exercise for children; it has even been asked to help parents ‘relate’ to their children.<sup>1</sup>

Why is this of concern? Essentially because it shows an increasingly active government—whenever something needs to be done or something goes wrong, governments all too often rush to spend and legislate. They want more and more programmes, bans and regulations.

In the last 40 years the amount of Australian public sector spending (State and Commonwealth governments combined) as a proportion of GDP has risen from 27.6% to 43.6%.<sup>2</sup> In the decade 1901-1910, the average amount of legislation

from the federal government was 23.2 Acts; by 1991-2000, the average was 177.7 Acts, nearly an eightfold increase.<sup>3</sup>

The government opts for the simplest policy for reducing risks: namely, to try to anticipate risks and prevent them from materialising. Politicians and bureaucrats are unlikely to lose their jobs for doing too much, for erring on the side of caution, so that is what they end up doing—all the time. This is a recipe for big and interfering government.

It is an old principle of liberalism that the use of government power is illegitimate if it aims to prevent us from doing harm to ourselves, and there are signs that the public may now be rediscovering this. In the UK, where the Blair government has recently taken it upon itself to stop hunters from hunting, smokers from smoking, and parents from disciplining their own children (all because the Government knows best), a recent opinion survey found more than 7 out of 10 voters agreed with the view that, ‘Too many infringements on personal liberty are being proposed on matters that should be for individuals to decide for themselves.’<sup>4</sup> In a free society, individuals should be free to make their own judgments about the risks they are prepared to take in pursuing their preferred courses of action.

This paper will consider the sorts of risks we face in modern society. Are they different from those faced a century ago? Do they call for new policy responses and, if so, what are those policy responses? It will examine the size of government in modern society; how government is creeping into more and more aspects of our lives, wearing away at individual liberties and responsibilities. It will set out the merits and the problems associated with different strategies for risk-reduction, and it will outline preferred strategies.

### **The ‘risk society’**

According to German sociologist Ulrich Beck, people’s demand for increasing protection from risks reflects the increasing price that has to be paid nowadays if things do

go wrong. Beck points to ‘the gap of a century between the local accidents of the 19th century and the often creeping, catastrophic potentials at the end of the 20th century’.<sup>5</sup>

Beck argues that in contemporary societies people have become very good at reducing everyday, personal risks, but are now faced with global risks.<sup>6</sup> The chances of something going wrong today are dramatically lower than the risks of 100 years ago (consider, for example, industrial accidents, deaths in childbirth and threats of disease). But the *cost* if something goes wrong has increased dramatically. Beck points to nuclear power, the storage of radioactive waste, climate change and environmental sustainability as illustrations. The major risks of today are said to be risks arising from modernisation itself—manufactured risks—rather than those from nature, which science has done well to temper.<sup>7</sup>

Beck sees modern society as a ‘risk society’, distinct from the industrial era where technological advances sought to better economic performance, to increase health standards and to make everyday life easier. The core value of the risk society is one of safety, taking a negative and defensive approach to technology because of the scale of the dangers it presents.<sup>8</sup>

The theory of a risk society goes some way to explain popular fears of genetically modified (GM) food, stem-cell research and mobile phones. Anything which is new, untested and has unknown long-term effects attracts fear and cynicism. Beck believes this is legitimate, for the dangers of manufactured technology are far greater than the natural dangers humankind has faced thus far. Better, therefore, to err on the side of caution. He acknowledges that this way of thinking is negative, that it focuses on what should not be done rather than opening up new avenues of activity.<sup>9</sup> Beck suggests then that democratic procedures should be strengthened by allowing public participation to determine which risks should be accepted by the community and which should not:<sup>10</sup>

I argue for the opening up to democratic scrutiny of the previously depoliticised realms of decision-making

and for the need to recognise the ways in which contemporary debates of this sort are constrained by the [philosophical] and legal systems within which they are conducted.

Beck prefers participatory to representative democracy. In his view, representatives—whether they be elected officials, or scientists and other experts who have had decision-making powers delegated to them—can no longer be trusted:<sup>11</sup>

Today's recognised knowledge of the risks and threats of techno-scientific civilisation has only been able to become established *against the massive denials*, against the often bitter *resistance* of a self-satisfied 'techno-scientific rationality' that was trapped in a narrow-minded belief in progress. (author's emphasis)

(Beck seems to have forgotten that his own position relies on experts: the only reason he can write about the enormous threats posed by modern society is because scientists have told him about them.)

Beck advocates application of the so-called 'precautionary principle' across a range of public policy-making. The precautionary principle demands that in a high risk society democratic governments must adopt a highly risk-averse approach in framing policy. New York University Law Professor Mark Geistfeld defines the precautionary principle as follows:<sup>12</sup>

According to the precautionary principle, any uncertainty regarding the hazardous properties of a substance or activity ought to be resolved in a manner that favours regulation (and the associated possibility of risk reduction), with cost considerations of secondary importance.

#### **Four strategies for reducing risk**

The precautionary principle is one of four possible strategies for reducing risks which will be considered. Of the four, it



demands the greatest amount of governmental involvement. Given the support in academic and government circles which the precautionary principle has received, along with the broad areas of public policy where it has been applied, this first strategy deserves particular attention.

The second strategy is a kind of 'libertarian paternalism'.<sup>13</sup> Here the government puts people into schemes and subjects them to regulations, whilst at the same time giving people the right to opt out if they wish. Because people often forget or could not be bothered to exercise their rights, they thus are by default co-opted into the standards which the government thinks are optimal. At the same time, proponents of this strategy would argue, individuals' liberties are maintained.

The third strategy for reducing risks is for the government to adopt an educative role, informing people about the risks which they are taking and the possible consequences should the risks materialise. The rationale of this strategy is that people make bad decisions, which they would not have made if more information was available to them. Thus by providing information about what it thinks are the major risks of today, and how best to reduce those risks, the government might make people better off.

The fourth strategy which will be considered is the *laissez faire* approach. This involves minimal state involvement, leaving people to assume their own risks and wear the consequences.

### **Strategy One: The precautionary (or risk society) approach**

There are three problems inherent in Beck's risk society approach to managing risks. The first is that by definition the risk society demands large-scale government interference, which erodes personal liberties. Second, the risk society encourages irresponsibility, or 'learned helplessness'. By taking away and assuming more and more of people's liberties and responsibilities,

governments in effect are discouraging individuals from showing any initiative or resilience. Third, the risk society is economically unsustainable—the costs associated with this degree of prevention are huge, and will only increase as more and more protection is demanded.

*(i) The erosion of personal liberties*

Nothing is allowed to go wrong in the risk society; it is an inherently defensive society which tries to anticipate problems before they arise. As such, if anything does go wrong, the immediate response is to look around for somebody to blame, creating an incentive for politicians and officials to ‘cover their backs’. They over-regulate and ban whenever there is a perceived risk of something going wrong. This is hugely counterproductive in the long-run, as it quashes individual initiative and rules out innovation. Just as in the old Soviet Union, officials in the risk society know they are unlikely to be criticised for stopping something new that might have borne benefits, but they will certainly carry the can if they fail to stop something which later causes problems.<sup>14</sup> Thus government policies are framed in an environment of constant fear of recrimination if there is no regulation. Likewise, opposition members are given an incentive to propose unnecessary regulations—it gives an appearance of working hard in defence of the public interest.

The net effect of precautionary over-regulation is a steadily increasing loss of personal liberty. Some examples follow.

*Fast food*

A current health concern is the growing rate of obesity, particularly among children. According to the Australian Heart Foundation,<sup>15</sup> approximately 21% of adult Australians are obese, and 20% of boys and 21% of girls are also either overweight or obese. Excess weight is linked to an increased risk of ill health and death from heart and vascular diseases. The Heart Foundation’s message is simple: ‘The key to

achieving and maintaining a healthy weight is to enjoy *healthy eating and regular physical activity.*' (emphasis added)

This may seem to most people an obvious individual responsibility (or in the case of children an obvious parental responsibility). If someone is obese, and they are concerned about it, the solution is in their own hands—eat less and/or more healthily, and exercise regularly. But this is not how the political commentators and health experts see it. For them, obesity is at least in part a responsibility for government.

In the lead-up to the 2004 federal election, the Australian Labor Party (ALP) blamed the rise in child obesity on junk food advertising during children's television shows. Its solution was a complete ban:<sup>16</sup>

A Labor Government will enforce a total ban on all food and drink advertising during all P (preschool) and C (children) programmes, and during G (general) classified programmes that are, as defined by the ABA, clearly aimed primarily at children.

Asked in Parliament if he would support the proposed ban on junk food advertising, the Prime Minister, John Howard, said: 'I think that is something for parents.'<sup>17</sup> He continued:

I think governments have to be very reluctant to embrace too willingly the nanny state in banning this, that or the other. . . . We will never build a nation of independent, proud, self-reliant people until we reinforce—indeed revive—the notion of parental responsibility for their children.

But within a fortnight Mr Howard was no longer criticising the 'nanny state'; he was too busy announcing \$116 million of government spending to target childhood obesity.<sup>18</sup> Most of this money (\$90 million) is to be used to establish after-school physical activity programmes.

Whether it is with an iron fist or velvet glove, both the opposition and government proposals assume that if there is a

problem, there must be a role for government in solving it. Yet it is not even clear that the proposed solutions would work. The ALP's proposed ban on advertising ignores evidence that similar bans in Sweden and Quebec had no effect on levels of childhood obesity.<sup>19</sup> Advertising might encourage children to desire certain kinds of commodities, but it is ultimately parents who make purchasing decisions. And aside from its ineffectiveness, the ALP's ban can be objected to on other grounds. As is always the case with government regulation, there is a risk that unintended (and perhaps unanticipated) negative consequences will arise. For example, the proposed ban would be likely to make children's television less commercially viable, with an estimated cost to the industry of \$200 million (approximately 7% of the industry's total revenue base).<sup>20</sup> Further, the ban's sphere of application is possibly limitless—what exactly *is* healthy food? Lawyer Andrew Christopher asked: 'Is fried food deemed unhealthy only when served at McDonald's or KFC?'<sup>21</sup>

The government's proposal may seem preferable, as it does not curtail people's liberties. But it does involve spending taxpayers' money to bring about change in people's behaviour which is arguably none of the government's business. And like the ALP's proposed advertising ban, it might have unforeseen and unacknowledged consequences. If the government funds after-school physical activity programmes, it may 'crowd out' community programmes which were planned or already in place. This would not be the first time that a government programme destroyed social capital by undermining communities' own initiatives.

Research shows that it is parents who have the greatest influence on their child's weight. One study found that children with overweight parents were four times more likely to be overweight themselves.<sup>22</sup> Clare Collins, a senior university lecturer in nutrition, believes both the government and opposition initiatives are destined to fail 'unless they influence the lifestyles of whole families'.<sup>23</sup>

So what will happen when (as seems likely) advertising bans and/or government sponsored health and fitness programmes have no discernible impact on obesity levels among children? Demands will surface for ‘more to be done’. The more the programmes fail in their declared objectives, the stronger becomes the pressure to bring in even more controls and regulations. When regulating the activities of children fails to work, whole family regulation will not be far behind.

### *Smoking*

Smoking tobacco is not illegal in itself, but smoking is gradually being criminalised. Smoking has been banned in confined shared spaces such as airplanes, offices, taxis, and other areas where if one person smokes, those around him or her have no choice but to be affected. This has been followed by moves to ban smoking in pubs and nightclubs, and now there are attempts to ban it in open-air public areas too. In NSW, for example, Manly council has passed a resolution banning smoking at beaches; within 10 metres of all children’s play areas under council’s care; on all council playing and sporting grounds; and for all events run or sponsored by the council.<sup>24</sup> Manly mayor Peter Macdonald said:<sup>25</sup>

[T]he important thing that’s going to come out of it is it ‘denormalises’ smoking. . . . This is about saying smoking is not acceptable, it’s not normal behaviour; there’s a subtle educational effect.

Proponents of these kinds of extensive bans on smoking normally claim three justifications. The first is that smoking outdoors leads to large amounts of littering, which is undesirable. Second, smoking can harm others. And third, smoking harms smokers themselves.

Certainly, cigarette butts can be a nuisance: some smokers simply flick them away at beaches, in parks, bush areas, and on the streets. According to Clean Up Australia,<sup>26</sup> almost 50% of all litter in urban areas is tobacco related (including butts,

cellophane wrapping, foil inserts and packaging). Cigarette butts have been found in the stomachs of young birds, sea turtles and other marine creatures and there have even been incidences of young children eating discarded cigarettes. Cigarette butts are not very biodegradable, with one estimate of 15 years before a butt breaks down; and, catastrophically, discarded cigarettes can cause bushfires.

All these facts underscore the importance of cracking down on littering. NSW Premier Bob Carr was right when he spoke of the importance of tough penalties for people who do not dispose of cigarettes properly:<sup>27</sup>

Discarding a cigarette butt in bushfire conditions can attract a sentence of at least five years if it could be regarded as arson . . . [I]t is just cruelty to your fellow Australians to toss a lit cigarette out of your car.

But a clear distinction must be made between saying there is a need to stop smokers from littering, and saying there is a need to stop smokers from smoking. Following cigarette butts, Clean Up Australia's statistics say plastic chip and confectionary bags are the next most littered items.<sup>28</sup> Should people be banned then from eating chips and sweets in public? The regulators may well conclude that eating food in unbiodegradable wrapping in public is neither acceptable nor normal, and that a new 'subtle educational effect' is required.

As for the arguments that smoking is bad both for smokers themselves, and those around them, these are answered by the basic principles which John Stuart Mill wrote of in the 19th century.<sup>29</sup> People should essentially be able to live their lives however they please, so long as this does not encroach on others' ability to live *their* lives as they please. Evidence of the dangers of second-hand smoke could justify some limits on where people can light up, but telling smokers they cannot smoke in the open air amounts to a tyranny that Mill warned against—the 'tyranny of the majority' created when those in authority impose their views on minorities for no

good reason. The deputy mayor of Mosman council, Andrew Brown, appealed to majority opinion to justify his ban on open-air smoking:<sup>30</sup> ‘There’s a minority which thinks it has a right to deprive the majority of fresh, clean, non-toxic air.’ But Mosman council’s jurisdiction includes Military Road and the Spit Bridge, which are major areas of traffic congestion and pollution. Brown’s claim that open-air smokers are causing air pollution in the Mosman area looks absurd when set against the hugely greater pollution from congested traffic which his council continues to tolerate.

*Regulation in the name of the environment*

In a recent paper, Dr Jennifer Marohasy criticised environmental controls which are imposed without any regard to evidence:<sup>31</sup>

I consider myself an environmentalist. I want to ensure a beautiful, healthy, biologically diverse planet for future generations. But this will be best achieved if we are honest to the data and proceed with our minds open to the evidence. . . . While environmental campaigners express great concern over a problem, they often seem deeply committed to the continued existence of the same problem.

Marohasy cites an example of environmental over-regulation in Australia with the ban of broad scale tree clearing in Queensland. This is despite a state government report<sup>32</sup> showing that there has been a 5 million hectare increase in the area classified as woody vegetation over the period 1992 to 2001 in Queensland, and also that 26% of all clearing in 2000-2001 was of land that had no trees in 1991. The ban will be a significant cost to the small Aboriginal community of Napranum—unless the community can win an exemption, the ban will scuttle a \$200 million plan to grow soya beans, sorghum and fat cattle for sale in Asia.<sup>33</sup>

Marohasy also examined GM products, which are banned or restricted significantly. GM cotton has proven successful in

Australia, with the earliest variety reducing insecticide use by an average of 56%, and more modern varieties are expected to reduce insecticide use by 75%.<sup>34</sup> GM cotton seed is used to produce vegetable oil, which has been in widespread circulation. But GM canola attracts opposition.<sup>35</sup>

Every state government has accepted there is no health or environmental issue with GM canola, but claim concern for Australia's clean green image and our international markets. In the case of the Victorian Bracks government the decision *directly contradicted recommendations in the two reports it had commissioned* on the issue. (emphasis added)

### *Violent behaviour*

Following two incidents in Victoria where broken glass was used as a weapon against police officers, Victorian Police Chief Commissioner Christine Nixon proposed a ban on glasses in pubs and nightclubs.<sup>36</sup> Ms Nixon was quoted as saying:<sup>37</sup>

There might be a fair bit of thinking we can do here—say, after a certain time we serve it in a plastic glass, or maybe we don't use bottles. . . . We just need to think through a way to prevent the injuries.

One way to prevent the injuries is to reduce the crime. Research indicates there are plenty of measures which the state may take in order to reduce levels of crime, one of the most important of which is to increase the likelihood of detection.<sup>38</sup> Instead, the most senior police officer in Victoria suggested a ban on glasses in pubs.

Such a ban may not appear a major issue. But drinking from plastic cups detracts from the consumer's pleasure, just as banning them from smoking at an outside table would do. Law-abiding citizens are therefore inconvenienced, and the quality of life fractionally eroded still further, in order to obviate the antisocial behaviour of a few. In effect, a ban like this says: 'We know you are going to assault one another, so we'll only allow you to do it with plastic'. It is like parents



keeping sharp objects away from their children—except that we are not children, and Christine Nixon is not our mother.

A second example comes from NSW. In a push to reduce alcohol-related crime, NSW Premier Bob Carr recently announced a range of new fines and restrictions.<sup>39</sup> Many of them are worthwhile, including increased powers being given to police to move drunk and/or violent people away from licensed premises. However, included amongst the reforms is a \$1,100 penalty for people who purchase alcohol for their intoxicated friends. This would extend the application of penalties which already apply to bar staff who sell to intoxicated people, so as to include patrons as well.

The \$1,100 penalty has a number of problems. The first and most obvious is that it would verge on impossible to enforce. But even if the penalty was enforceable, it marks yet another step away from making people take responsibility for their actions, and, in so doing, it encroaches on others' liberty. In trying to prevent potentially violent drunks from wreaking havoc, the penalty shifts the onus of responsibility away from the drinker and instead to his or her friends. Meanwhile responsible drinkers are left having to speculate each time they go to buy a round of drinks whether they will be in breach of the law. This detracts from the consumer's pleasure, and again, law abiding citizens' liberties are eroded, all because of the potentially violent behaviour of irresponsible drinkers.

A third example of a risk society response to violent behaviour was detailed by the UK Labour MP, Frank Field.<sup>40</sup> Field was being harassed by gangs of violent youths outside his house. He phoned the police. Over the ensuing days he was then given a number of excuses as to why no charges could be laid: the suspect will just run away; after the 11 September terrorist attacks the police were very busy; it would have been easier to pursue if there had been an assault; and later, as a qualification, it would have been easier to pursue if there had been an assault with a knife. Field was offered counselling twice, and 'began to understand why the average London

policeman achieves three convictions a year'. Eventually the 'local beat bobby' did what most people might expect of the police—he enforced the law, charging the suspect with threatening behaviour and other offences.

Field's case is not just an example of police inefficiency; it illustrates a preference for the easy option of trying to cure short-term problems, and a disregard for the long-term implications. The officers offered the victim counselling rather than going after the suspect. Even if that offer of counselling was accepted, and Field was made to feel happier about his situation, nothing would have been done to reduce the crime which made Field a victim in the first place. Instead there is an implicit tolerance of the unlawful behaviour. As with restrictions on glasses in pubs and on friends' ability to buy rounds of drinks, those who are actually guilty of crime are not made to take responsibility.

*(ii) The creation of learned helplessness*

The second reason why Beck's preventative approach to reducing risks is undesirable is that it encourages irresponsibility. If governments insist on taking it upon themselves to reduce everyday risks, and people are either forced or are happy enough to delegate to the government, then the outcome will be individuals without any initiative, ability or ambition. Further, everyone will be so pampered that if anything—however minor—goes wrong, there will be a rancorous search for someone to blame.

Welfare dependency is one useful indicator of the degree of learned helplessness in society. In Australia, the number of welfare recipients has increased significantly over the last 40 years. In 1965, only 3% of working-age adults relied on welfare payments as their primary source of income; whereas today that figure is 17% (one in six people).<sup>41</sup> As Professor Peter Saunders of CIS wrote: 'Adults who are capable of looking after themselves but who rely instead on long-term welfare are likely to find it difficult to sustain a meaningful

sense of self-worth.<sup>42</sup> They are also likely to attract resentment from those who *are* working and who are left to pay higher tax rates, which will only increase further as government increases its spending commitments. This has a spiralling effect: as more people receive welfare, taxes rise, making working for a living less attractive, so even more people receive welfare, raising taxes further, and so on. The root of the problem is the view that it is the government's duty to support people regardless of why they fail to support themselves.

Another indicator of irresponsibility is the amount of civil litigation. The mentality of the risk society will lend itself to large amounts of civil litigation, because nothing is allowed to go wrong—problems are meant to be anticipated and prevented from occurring. Academic Tom Morton observed: 'In many ways, our tendency to go to law over more and more trivial injuries is a logical consequence of life in the global risk society.'<sup>43</sup> In the United States, 19 year old Ryan Pisco drank copious amounts of alcohol, drove recklessly, exceeded the speed limit, crashed and died—his family then filed a lawsuit against beer manufacturer Coors because it sponsored sporting events which Ryan had attended.<sup>44</sup> (The Pisco lawsuit later was dropped after threats of sanctions for wasting the court's time.) In NSW, the supposedly wheelchair-bound Richard Sheehan began proceedings seeking \$750,000 as compensation after he slipped on a potato scallop (unfortunately for Mr Sheehan's claim, he has been photographed lifting his wheelchair and loading it onto the back of his car).<sup>45</sup>

The common law courts are meant to be an avenue to compensation rather than welfare, and until recently, the law was failing to acknowledge this.<sup>46</sup> Over the last 70 years, the limits of negligence law were gradually worn away by a number of borderline cases. By 1992 the Australian High Court held that standard professional practice was an irrelevant consideration in determining whether a doctor was negligent, and found a doctor liable for failing to warn his patient of a complication expected once in every 14,000 operations.<sup>47</sup>

Former Oxford law professor Patrick Atiyah wrote that a 'damages lottery' is created by judges' increasing willingness to 'stretch the law'.<sup>48</sup> Fortunately, after recent developments both in judge-made law and in statute, a restricted duty of care is being effected. In two recent High Court cases, Diane Burns sued Hoyts after she was injured trying to sit in a cinema seat that had folded back,<sup>49</sup> and Rosellie Cole sought compensation from South Tweed Heads Rugby League Football Club having been run over by a four wheel drive after being asked to leave the Club's premises (her blood alcohol content was 0.238gm per 100mL).<sup>50</sup> Both claims were unsuccessful. Recent state legislation has also restricted the duty of care in negligence proceedings, incorporating a number of considerations from the common law.<sup>51</sup> Reforms in this area are to be welcomed.<sup>52</sup>

Finally, the learned helplessness created by a risk-averse culture can change people's views about what constitutes 'damage' or 'loss' when they sue one another. For example, following a botched sterilisation procedure Kerry Melchior gave birth to a perfectly healthy son, Jordan. She then successfully sued her doctor for the costs of raising Jordan, in effect characterising his birth as a legal loss for which she deserved compensation.<sup>53</sup> The Australian High Court split 4:3 in Ms Melchior's favour. In a strong dissenting judgment, Justice Heydon said:<sup>54</sup>

It is wrong to attempt to place a value on human life, or a value on the expense of human life, because human life is invaluable . . . [S]hould Jordan ever read the judgments of the courts, or be told about their contents in detail, he will learn of his parents' decision that his mother should undergo a sterilisation operation to ensure that he would never be born, he will learn that his mother gave evidence that his birth was 'a major disruption to the family', he will learn that it caused her to become 'depressed and angry' and he will learn that she found his care 'exhausting'.

State governments across Australia have passed legislation overruling the High Court majority's decision. But of note is the fact that the mother sued at all. Today 'wrongful life' cases (as they are known) are an emerging area of negligence law.<sup>55</sup>

*(iii) The economic cost of a risk-averse society*

The social costs of a risk-averse culture include decreased individual autonomy, increased irresponsibility and a growing cynicism. The third problem with Beck's risk society is that, along with these social costs, there are significant *economic* costs associated with taking a precautionary approach to everyday life.

Nothing is allowed to go wrong in the risk society; it is defensive and seeks to second guess problems before they can arise. As such, large amounts of money need to be expended to meet regulations, centrally directed targets, and the costs associated with over-litigation. Geistfeld points out that the costs of pursuing extreme safety are huge:<sup>56</sup>

Suppose a regulation is expected to save one more life in the United States than an alternative regulation, but costs a billion dollars more to implement . . . [E]normous sums of money would be required, exhausting the resources that could be used to address other pressing social problems, including those involving risks to life or health.

Excessive litigation leads to rising insurance premiums and, by extension, to a reduction in important services. High insurance premiums have given an incentive to professionals to retire early, and they create gaps in key areas of specialisation which are highly litigated, such as obstetrics. According to the Australian Academy of Technological Sciences and Engineering, 'the effect is to increase risks greatly by the withdrawal of services, or an unwillingness to innovate.'<sup>57</sup> High insurance premiums will curb individuals' abilities to live their lives as they wish. Local fetes, parades and other events cannot go ahead when

uninsured. This is the risk society at its worst, too eager for precaution to be able to do anything.

There are also significant costs associated with large amounts of welfare dependency. Saunders points out:<sup>58</sup>

Back in the 1960s we could afford what we were spending, for there were comparatively few welfare recipients. . . . [T]here were 22 people in employment to support every one person of working-age living on benefits. Today, this dependency ratio has collapsed to just five to one.

In 2003, Australian governments spent more than \$75 billion (over 10% of Australia's GDP) on social security and welfare provisions.<sup>59</sup>

Wolfgang Kasper wrote recently about the difficulties of the German economy, largely brought about by the policies of the coalition government led by Chancellor Gerhard Schroeder.<sup>60</sup> Many of these policies are in line with risk society principles, and their results are disturbing:<sup>61</sup>

[L]ocal governments have gone broke, roads remain unattended, public services deteriorate, hospital waiting lists lengthen, the task of rebuilding the devastated east is left unfinished despite continuous transfers of a massive 4% of the national product, unemployment is stuck above 10%, businesses and the young flee the Berlin republic, public deficits persist, and the anaemic economy drags down its EU neighbours. . . . Germans now have the fourth lowest per-capita income.

The German government has persistently sought to prohibit, regulate and subsidise. The agricultural and industrial sectors enjoy large amounts of protection, the former because of resource scarcity and the latter to avoid more businesses leaving the country. Welfare levels are up, and the government has taken the drastic step of subsidising early retirement so as to prevent unemployment levels from rising further.

## **Strategy Two: Changing people's default behaviour**

A second policy option for reducing risks which is available to government is that propounded by University of Chicago Professors Cass Sunstein and Richard Thaler.<sup>62</sup> Sunstein and Thaler do not defend government policies which block individual choices, however they recognise that 'in some cases individuals make inferior decisions in terms of their own welfare—decisions that they would change if they had complete information, unlimited cognitive abilities, and no lack of willpower.'<sup>63</sup> For example, prospective patients informed that a procedure has a 90% success rate are much more likely to agree to the procedure than patients informed of a 10% death rate.<sup>64</sup> Similarly, people living in areas prone to flooding are unlikely to buy insurance if there have been no floods in the immediate past.<sup>65</sup>

There is a body of work from psychologists, social scientists and economists on 'unrealistic optimism'—the observable phenomenon that people have a strong tendency to think that their own levels of risk are less than those faced by their peers. Professor Neil Weinstein, a psychologist from the State University of New Jersey, found that people will be unrealistically optimistic about their susceptibility to a health problem when they have not yet experienced that problem—as with the flood example, there is a tendency to use past experience to estimate future vulnerability.<sup>66</sup> Professor Ron Gold, a cognitive psychologist at Deakin University, wrote that unrealistic optimism may be causing people to ignore advice on the prevention of sexually transmitted diseases, alcoholism, and—issues considered earlier—both smoking and obesity.<sup>67</sup> Sociologist Andrew Hopkins observed that prior to major accidents all too often there are warning signs which go unnoticed because of a culture of denial, a belief that 'it can't happen here'.<sup>68</sup>

Sunstein and Thaler's solution is to change people's default behaviour. An example is employee savings rates (these are

particularly important in Australia, which does not seem to have saved enough for its ageing population). A recent study found that where employers allocate a portion of employees' future wage increases to savings, whilst giving employees the right to opt out of the scheme at any time, the result is a significant increase in savings rates.<sup>69</sup> That is, employees do not exercise their right to take their money in current wages and are consequently better prepared for retirement. Sunstein and Thaler observed, 'many people value freedom of choice as an end in itself, but they should not object to approaches that preserve that freedom while also promising to improve people's lives.'<sup>70</sup>

Changing people's default behaviour seems preferable to bans and regulations. But both policy options make two questionable assumptions: (i) that governments know what problems need addressing, and (ii) that governments will know what should be done to cure those problems. The risk society approach demands a bold stance from government, saying 'we know what the problem is and this is how to fix it'. Sunstein and Thaler's approach has a more watered-down stance, saying 'we know what the problem is and this is how we think it should be fixed, but if you want to disagree we will allow you to do so'. Both approaches betray the attitude that the state knows best.

Sunstein and Thaler use an example from Sweden which in their view supports the contention that the state *can* know best. The Swedish government recently adopted a scheme aimed at giving people greater choice for their savings: the government partially privatised its social security system, allowing people to select their own portfolios (as distinct from the government-selected one) into which their money would go. The result was an over-investment in internet stocks. Sunstein and Thaler wrote of this:<sup>71</sup>

We outline the Swedish experience to illustrate a more general question. How much choice should people be given? Libertarian paternalists want to promote



freedom of choice, but they need not seek to provide bad options, and among the set of reasonable ones, they need not argue that more is necessarily better.

Here emerges a fundamental weakness of this second strategy to reducing risks—that, in many ways, it is exactly the same as the first strategy. This is because once the so-called ‘libertarian paternalists’ decide that people are exercising their freedom of choice improperly, they want to intervene, and eventually that intervention will come in the form of a ban or regulation rather than a voluntary scheme with a preferred default option. The question ‘How much choice should people be given?’ is far more paternalistic than libertarian. And in asking it after the Swedish example, Sunstein and Thaler forget the very real possibility that the Swedes chose imprudent investment portfolios because until then they never had to bother themselves with such a choice—such was the learned helplessness when it came to preparing for their future. People had no idea how to save their money wisely, and instead opted for get-rich-quick internet stocks.

A further objection to policies of changing people’s default behaviour is that those policies amount to ‘inertia selling’. Strictly defined, inertia selling is the practice of inserting into an agreement a provision requiring someone to indicate positively that he or she does not wish to be bound by the agreement. An example is where someone posts goods to someone else, and says ‘unless you return these I will assume you want to buy them’. The practice does not create a binding agreement according to contract law,<sup>72</sup> and also according to legislation in the area.<sup>73</sup> It is a criminal offence in Australia, the United Kingdom and Ireland, and other jurisdictions.<sup>74</sup> It seems odd then that Sunstein and Thaler should think that governments could engage in otherwise illegal behaviour to achieve their goals. The reason that inertia selling is illegal is because it can be used oppressively. Having the right to opt out of something is *not* the same as having the right to opt in. This is an old argument which is made about compulsory

unionism—that there is a big difference between being free to join a union and being free to leave.

### **Strategy Three: The value of information**

A third strategy for risk reduction sees government taking a much more passive stance, not interfering but providing information to help people make more informed decisions. Psychologists can ‘cure’ unrealistic optimism by leading people to imagine scenarios which may seem to them unlikely (this is known as cognitive behavioural therapy). For instance, someone ‘who feels he is not at risk of an accident despite regularly driving a motorbike at high speed would be asked to imagine a scenario in which he was responsible for a road crash.’<sup>75</sup>

Thus, for government, by raising levels of public understanding about given risks or problems, people’s (unrealistic) assumptions about their vulnerability may be changed. An illustration is smoking, where government public information campaigns have helped consumers understand the possible outcomes of given patterns of behaviour.

This third strategy for reducing risks is likely to be of use, however it suffers from three key problems to which attention must be drawn. The first problem is that information is rarely neutral. The selection of ‘facts’ to broadcast is likely to be clouded by partiality, reflecting one set of values and priorities while ignoring others. For example, incumbent governments in Australia have often used public information campaigns as thinly-disguised election advertisements. If the government takes it upon itself to become the purveyor of ‘correct information’, it necessarily privileges one set of beliefs over another. In principle, in a perfectly competitive market of information there is little (if any) role for government. The competition of ideas between private interests pursuing their own ends should in most cases generate the widest range of information.

Second, government attempts to help people make as informed a decision as possible might swiftly degenerate into

hectoring people to observe certain patterns of behaviour. In Western Australia, the government has a 'Go for 2 & 5' campaign. Its website declares:<sup>76</sup>

Right now, on average, West Australian adults eat around 1½ serves of fruit and 2½ serves of veggies per day. The fact is you at least need *2 serves of fruit* and *5 serves of veggies* each day. So, you are already halfway there. (original emphasis)

Not only is this information fallible (health advice seems prone to frequent variations from one year to the next), but it illustrates an unenlightened conception of the proper relationship between a government and its citizens. 'Eat your veggies' is something a parent might say to his or her child; it is wholly inappropriate for the state to say this to free, adult and responsible citizens.

Third, government information campaigns cost money. There is a serious moral issue to be raised about governments forcibly taxing people in order to use their money to change their behaviour. This is particularly reprehensible when governments use public money to further their own interests. I mentioned above that incumbent Australian governments often use public 'information' campaigns to boost support at election time. Similarly, the UK government is using taxpayers' money to promote the merits of adopting the European Constitution, on which the British public is due to vote in 2006.<sup>77</sup> In some cases there may be a role for government in helping people make more informed decisions, but the government must stop well short of advocating behaviour, and it must respect people's decisions when they are made.

### **Strategy Four: Individual resilience**

A final strategy for risk reduction is to let the vast majority of risks be assessed, and then be accepted or rejected, by individuals, who then accept the consequences of their decisions. This is the classical liberal solution, which demands

a high degree of liberty on the one hand, and responsibility on the other.

University of California Professor Aaron Wildavsky defended this fourth strategy by distinguishing between ‘anticipatory’ and ‘resilient’ approaches to risk reduction.<sup>78</sup> In Wildavsky’s view, an anticipatory strategy is one where all potential dangers are sought to be averted before damage is done, whereas resilience ‘is the capacity to use change so as to better cope with the unknown; it is learning to bounce back.’<sup>79</sup> Wildavsky said:<sup>80</sup>

When the one sure thing is that we won’t be able to predict important difficulties that the nation will face in the future, developing diversity and flexibility, . . . not sticking with what we have, is the best defence.

This strategy for dealing with risks can be compared to biological studies of evolution, where species progress and adapt as a result of iterative trial and error. That is, they learn what works, then start over. In *The Fatal Conceit*, F A Hayek wrote of the market as a similar mechanism of discovery:<sup>81</sup>

Economics has from its origins been concerned with how an extended order of human interaction comes into existence through a process of variation, winnowing and sifting far surpassing our vision or our capacity to design.

He continued:

Modern economics explains how such an extended order can come into being, and how *it itself constitutes an information-gathering process*, able to call up, and to put to use, widely dispersed information that no central planning agency, let alone any individual, could know as a whole, possess or control. (emphasis added)

By contrast, Beck’s risk society approach is all too often simply to keep the status quo. It wants to end the adaptive, evolutionary

approach which has served humankind thus far. In the long run, this is dangerous. When future, unforeseen risks present themselves, an adaptive society would be far better equipped to deal with those risks than a preventative society.

Admittedly, should a large global risk materialise—such as an environmental catastrophe or a nuclear disaster—adapting might not be possible. So Wildavsky concedes that some degree of governmental anticipation is necessary, dependent on whether and to what extent the government is able (i) to identify the risks which need addressing; and (ii) to act effectively in reducing those risks.<sup>82</sup> But Wildavsky uses an example from the late 1970s to show that even for large global risks blanket protection of the status quo can be dangerous. Following the fall of the Shah of Iran, the Carter Administration warned that the United States would use nuclear weapons if necessary to secure its access to Persian Gulf oil. Wildavsky wondered: ‘is it too much to suggest [then] that enhanced use of nuclear power might mitigate the danger of nuclear war over oil supplies?’<sup>83</sup> The Carter Administration’s policy was to use all means necessary, even if that involved nuclear conflict, to maintain its access to oil. An adaptive policy would have been to enhance the safety and use of other sources of energy than oil, including nuclear or perhaps renewable sources.

Regarding environmental protection, governments have been so eager to act in the name of the environment that they have often gone beyond scientific research, banning and regulating excessively, and forgetting resilient strategies which may be of use. As mentioned earlier, modern varieties of GM cotton are expected to reduce insecticide use by 75%.<sup>84</sup> There is no evidence to suggest GM cotton is harmful, but excessive use of toxic insecticides is certainly undesirable. Thus there is a choice between an anticipatory approach, which demands protection of the status quo (exposing us to the risks of excessive use of insecticide) and a resilient approach, which the government’s commissioned evidence suggests is to be preferred.<sup>85</sup>

Nowadays these anticipatory strategies are being applied more and more to everyday life. Governments want to intervene to prevent people from having too much fast food, from smoking, even from being exposed to the dangers of a glass in a pub. This denies personal responsibility—for one's weight, health, actions and budget.

The sheer size of government today means it will feel justified in telling people how to live their lives. This is because the government is left to pick up the pieces if things fall apart. The government spends huge amounts of money on welfare, pensions and the health system, and in return claims the right to tell smokers not to smoke, to tell obese people to lose weight, and so on. The more people rely on publicly provided goods, the less they can complain about being bossed around.

The pattern of increased government provision being linked to increased intrusiveness is well illustrated in the United Kingdom, where the Blair government recently increased its health spending dramatically, and now it is starting to call in the debt. Under plans being considered by the UK government, 'Every public health patient in Britain would receive a personalised diet and fitness programme ... to cut the nation's obesity levels and shift the focus of the medical system from cure to prevention.'<sup>86</sup> It was reported that the government 'wants to cut the drain on the taxpayer's purse of so-called lifestyle diseases.'<sup>87</sup> As the government spends more on preventative policies, it will claim a (growing) mandate to tell people what to do. Personal liberties will be eroded, responsibilities will be evaded, and the economy will suffer, all in the name of anticipation. As Reagan put it, the government ends up enslaving us as a result of doing its best to 'help' us.

## **Conclusion**

David Hume wrote: 'It is seldom that liberty of any kind is lost all at once.'<sup>88</sup> This is the case with government attempts to manage risks in society. Governments doubtless have the best

of intentions in trying to prevent risks, and think themselves justified each time they encroach that little bit further on individual liberties. They see no real danger in applying the principles of Beck's risk society to everyday problems, trying to second-guess and prevent anything from going wrong. But these small infractions add up. Each time personal liberties are removed, the government encourages dependency and irresponsibility, and it also provides excessive burdens on the economy. What is worse, as these strategies come unstuck—as they inevitably do—governments feel an onus to legislate further. Calls are made for 'more to be done'. And a cycle is created, with liberties eroded still further, learned helplessness in the community increases, and the economy becomes unsustainably strained.

Four strategies for managing risks have been considered, with particular criticism being given to the first of these strategies. Such criticism should not be taken to suggest that we deny the positive role which governments and the courts can often play in our lives. The criticism merely takes issue with the increasing and pervading view that every time something goes wrong or something needs to be done, the best solution is to have another ban, regulation or lawsuit. That view, which places an unwarranted degree of faith in government, is also seen in the second and third strategies for managing risks.

It is the fourth strategy for managing risks which is to be preferred. Individual responsibility, ingenuity and resilience will almost always outperform centralised authority. The process of iterative trial and error is the best means to ensure a robust, responsible and innovative society, and ought to be the first point of call each time a problem arises.

## Endnotes

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- <sup>4</sup> Cited in Muriel Newman, *PC-free New Zealand* Newman Online (3 December 2004), [www.act.org.nz](http://www.act.org.nz)
- <sup>5</sup> U. Beck, *Risk Society: Towards a New Modernity* (London: Sage Publications, 1992), p. 22.
- <sup>6</sup> As above, p. 21.
- <sup>7</sup> It should be noted that Beck's basic premise—that the risks we face today are potentially of much greater consequence than the risks faced a century ago—has been questioned. Critics point out that there has been no nuclear holocaust or similar man-made catastrophe to date; that for all of Beck's gloomy forecasts there is little supporting evidence. However, this paper does not question this presumption for two reasons. The first is that I do not think the best means of judging a risk is to look at whether it has materialised in the past. The second is that the main emphasis of this paper is not to offer a categorical critique of Beck's risk society *per se*, instead it is to criticise the increasing use of risk society principles when creating public policy. Wildavsky concedes that in some circumstances a degree of governmental anticipation is required. But regardless of the merits or demerits of having government anticipation, I take issue with the fact there is so much from today's policymakers.
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- <sup>13</sup> C. Sunstein R. Thaler, 'Libertarian Paternalism is not an Oxymoron', *Working Paper 03-2* (Washington: AEI-Brookings Joint Centre for Regulatory Studies, 2003).



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- <sup>32</sup> *Land Cover Change in Queensland 1999-2001*, Queensland Department of Natural Resources and Mines, Indooroopilly (January 2003); cited in J. Marohasy, 'Environmental Fundamentalism', *Policy* 20:3 (Spring 2004), p. 42.
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- <sup>52</sup> But I express reservations about reforms capping damages and imposing general damages thresholds. See C. Conde, 'The foresight saga: Risk, litigiousness and negligence law reforms', *Policy* 20:3 (Spring, 2004), p. 28.
- <sup>53</sup> *Cattanach v. Melchior* [2003] HCA 38.
- <sup>54</sup> *Cattanach v. Melchior* [2003] HCA 38 at [353], [391].
- <sup>55</sup> In New South Wales, for instance, two disabled people sued the doctors who oversaw their births, claiming that had the doctors been more diligent in spotting the likelihood of a disability their parents would not have had them: *Harriton (by her tutor) v. Stephens; Waller (by his tutor) v. James & Anor; Waller (by his tutor) v. Hoolahan* [2004] NSWCA 93.
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- <sup>72</sup> There is no intention to create legal relations on the part of the offeree. Also, an expression of future intention which is not put forward as an offer, and which does not invite acceptance or rejection, is not an offer for the purposes of constituting a valid contract: *Australian Woollen Mills Pty Ltd v. Commonwealth* (1954) 93 CLR 546.
- <sup>73</sup> See *Trade Practices Act 1974* (Cth), s 65.
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