Trade

ACF has established a 'green jobs and industry' unit which is telling us much more than we knew previously of the extraordinary growth in the environment industry internationally. President Bill Clinton is still talking about a green GDP, Ros Kelly is talking about a green GDP, the United Nations is talking about taking natural resources into the economic accounting process. In the next few years there will be considerable trade wars, with environmental criteria one of the major considerations. It will not be possible to trade with Germany in a few years unless up to 90% of the products traded are then recycled.

Federalism

Lastly, there are the controversial areas of institutional and constitutional reform. It is clear that the natural environment in Australia knows no State boundaries. The environment is a national obligation but, with federalism and the Constitution as they remain, it is a problemtaic one; a green republic, with perhaps Peter Garrett its first president, is something to be considered.

The intergovernmental agreement on the environment is an extraordinarily complicated way of making decisions. It raises questions of how we might make environmental impact assessments that are genuine, that integrate the environment into the mainstream of political and economic decision making in this country.

Exceptional changes are needed in how decisions are made, and how we plan what we do, across the political, economic, social and cultural spectrum. The environment needs to be factored in, in ways never previously considered, because we have never known more about environmental effects than we do now.

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The consumer versus government & business

Locked out of decision making, out-gunned by business and kept in the dark: consumers still need public interest advocacy.

LOUISE SYLVAN

There are three aspects of the public interest I want to address: access to justice, access to information and decision making, and the nature of the relationship between business and government.

Access to justice

It is quite clear that in our society the wealthy can afford to buy justice (or at least a proper hearing) and the very poor – that is, destitute – can afford justice by attracting legal aid (at least for criminal matters); the majority fall between. Thus most consumers are disadvantaged seeking justice. A range of alternative dispute resolution mechanisms, tribunals and so forth have sprung up to ensure that people can get some access to justice. But as for consumers' ability to enforce their rights, I believe things will have to go much further.

One area for exploration is that of the 'fashionable' self-regulatory or co-regulatory codes. While the Australian Consumers Association (ACA) has been dismayed by the weakness of some of these codes, particularly those developed without any consumer involvement, we have made a pragmatic commitment to try to improve them and more importantly to try to ensure that consumers can actually enforce their rights under them. There are very few self-regulatory or co-regulatory codes that can actually be taken up through the Fair Trading Acts and be pursued before the Consumer Claims or Small Claims Tribunals. If such codes can find expression within the *Trade Practices Act* and Fair Trading Acts, consumers could enforce their own rights without waiting for a government regulator to take action.

For example, in the New South Wales domestic white goods servicing code, if there was a proper clause about failure to show up for a servicing appointment, the consumer who has taken the day off work to meet the washing repairer would actually be able to seek compensation through the Tribunal. This would not only ensure some justice, it might also ensure rather better performance on the part of these repairers. Having a few million consumers enforcing the rules is a lot better than a few hundred regulators (who may

be politically influenced to go easy on certain business interests).

Other aspects of consumers being able to seek individual justice include changes to the ways fees are charged and to the disclosure of information about those fees. It is time we introduced contingency fees – not the US model (which has led to some vexatious litigation) but the Canadian model where the contingency fee arrangement is regulated and reasonable. It is also time that we forced up-front disclosure of lawyers' fee-charging practices, and insisted on regular statements so that consumers don't end up with a massive and unexpected bill.[1] Consumers could then choose whether or not to engage a lawyer on the basis of a far better estimation of costs, and choose whether or not to continue. There really is no reason, in basic litigation, why lawyers cannot be required to give a firm quote which can have some minor but not excessive variations to it. If we require it of builders, can't we require it of lawyers?

For consumer or public interest organisations seeking justice on behalf of consumers, two areas of reform will be needed in the next few years. The first is the matter of standing. An organisation like ACA cannot pursue many matters simply because it does not have standing as an affected party. There should be reform in this area, enabling us to appear in circumstances when the issue affects consumers generally.

The other problem which prevents us from litigating is the cost rules. With costs following the event, we have no certainty about the money needed to be set aside for litigation. Since we are a non-profit organisation, an opponent can delay proceedings and increase costs substantially, winning if we are forced to withdraw. If we can argue successfully that the litigation is in the public interest, then I think there should be agreement, at an initial hearing, that each party will bear its own costs. We could then plan the amount of money that we will need to spend, without facing the possibility of an enormous bill from the other side.

The last matter in the area of justice concerns the reform of the legal profession itself. I have been dismayed by the attempts of various State governments to reform their legal profession; I am now not sure if any of the States can succeed. Once the Hilmer Review reports, I think we will see an extension of the *Trade Practices Act* so it covers unincorporated trading.[2] This will go some way to focusing the spotlight on the anti-competitive practices of this profession – anti-competitive practices that ultimately affect the consumer either directly or indirectly through the higher prices of goods and services. Such restrictive trade practices also affect this country's international competitiveness – so there needs to be some backbone to the pursuit of reform.

Access to information

At its most basic, the first aspect of access to information is simply people's right to know, to have information which is in their interests, either as individuals or as members of the citizenry. This includes, for example, access to information about the toxicity and health implications of certain approved chemicals; it includes plain English contracts for financial and other complex products; and so on.

A second aspect of access to information is the right of people to participate in and influence the decision-making of governments. A prime example of the failure of the public interest, through a lack of government consultation and a lack of government listening to people, is the extent to which Treasury views have had ascendancy on economic policy over the past 10 years. The result has been that efficiency is the goal of the nation.

If you had asked an informed electorate I don't believe that efficiency would necessarily have been their prime goal. Efficiency is obviously important, especially in relation to our domestic international competitiveness, but it need not have become a 'godlike' goal; an informed people might well have said equity is as important.

When people are locked out of such decision making, governments generally make poorer decisions. It is particularly serious when those locked out are major groups of people, for instance Aboriginal people or those who do not speak English as a first language. We must pursue with vigour the rights of people to participate in decisions which dramatically affect them and their nation. Electing one government no different from the last every three years does not sufficiently serve good democratic development.

An aspect of public participation and consultation in governmental decision making is the trend for many decisions to be made internationally. With the trade agenda a high priority among the developed nations, there is a strong push to harmonise standards throughout the world. With food standards, for example, it is insufficient for ACA to contribute at federal government level. We have to be in Geneva, where meetings of the Codex Alimentarius Commission are held, to ensure that our desires as citizens are not set aside simply for trade purposes.

This is not an idle issue – it will be a major problem in the deliberations on Australian standards on food irradiation. It is not clear in relation to the GATT round (and the proposed use of the Codex Alimentarius Commission as the arbiter of appropriate international standards), whether the people of Australia will have the right to say that they do not wish to have irradiated food. This has major implications not only for food standards and health and safety, but for issues such as environment protection and national sovereignty; it is a classic case of governments putting trade as a top priority whereas a citizenry might have set more stringent protections for food supply as their top priority.

Relationships between business and government

There is one area in the public interest that I believe we have left largely untackled: the proper relationship between business and government.

Governments need business investment to produce growth and to produce jobs. They need this at the same time as there is a perceived need for them to reduce their own fiscal expenditure. In the past 10 years we have seen the return of the 1950s US ideology that says 'What's good for GM is good for the nation'. I thought it had been painfully demonstrated that this is nonsense, but it seems that our politicians and bureaucracies have forgotten the

lesson. This ideology is driving the microeconomic reform agenda. ACA supports much of that agenda, but excessive reliance on the private sector (the main beneficiaries of micro reform) to pull us out of this economic downturn is naive. Current profits of companies are high, investment figures are low, and job creation figures are low: it is quite clear that what is good for GM has *not* been good for the nation.

I think this poorly considered relationship, and some of the changes which have been made under the name of government and business relationships, need to be examined in the bright light of public scrutiny. I am not only talking about the extreme cases, like WA Incorporated. I am talking about changes such as the substantial encouragement of academic institutions and governmental research institutions to find money from the private sector. In academia, for example, we see a phenomenon that I call 'the rent-a-professor phenomenon'. Academics who have been working with ACA on a variety of issues have changed their positions by 180 degrees some short while after receiving significant amounts of industry funding; most of that industry funding is from major and often multinational corporations.

Companies' privileges

Sir Geoffrey Vickers, in a book called *Freedom in a Rocking Boat*, said that we have changed our world significantly through the idea of limited liability companies. He proposed that we have created two classes of citizens: the companies and the rest of us; class distinctions, of course, mean that one group is privileged over another.

There are undoubtedly significant privileges accruing to limited liability companies (and probably to other forms of businesses as well). One is the ability to declare material 'commercially confidential' even when it is clearly in the public interest. Despite the importance of people's access to information, we have a situation where, in therapeutic goods and in agriculture and veterinary chemicals, for example, a company can say simply that material is commercially confidential. Even if it is public health information, a company can keep it out of the public domain.

Legislation in these areas should demand that such information be public and that the argument for commercial confidentiality be made out by the company; the information should be withheld only if the company can demonstrate significant economic or commercial damage. In fact the onus of proof in most of the legislation, and the burden of the proof for access, has been placed on us the consumers. That is simply wrong thinking by government, and a cosiness with industry that is inappropriate.

A second issue is that of 'limited liability'. The notion of limited liability has been eroded to some extent, especially in the United States but also in Australia: unsecured creditors, for example, will be able to sue directors of defaulting companies. But we have to solve the problem of the $2 trading company, from which people cannot ultimately recover their funds. We need to deal with this issue of the 'corporate veil'.

Trying to lift or pierce the corporate veil has resulted in some interesting corporate behaviour, more noticeable in the US than here. The new corporate behaviour in the US is to rotate people through the 'hot seat' – that is, the position where one might most likely be sued or charged as an executive director of a company. Legal costs will be paid if directors are charged, and a position will be held for them if they happen to be put in jail. This strange behaviour is an acknowledgement by corporations that the veil is being lifted slightly, even if it is not yet torn aside.

A third issue in relation to the privileges of companies is the tax system which underwrites the current imbalance in power between citizens and corporations. It is said that examining taxation is boring, but it is crucially important. (If you don't believe that taxes can drive an agenda in a country, look at Old Amsterdam to see what one form of tax can do to the development of a city. Those tall buildings nestled one against each other evolved in part because property tax was based on width – resulting in narrow tall buildings!)

One of the most astonishing power imbalances in our society, underwritten by our tax system, is the ability of companies to deduct legal expenses, and the inability of consumers to do likewise. If I sue a company for breach of contract, I bear that cost out of previously taxed dollars. The company, defending itself against me, can actually take the legal expenses as a deduction from its corporate income whether it wins or loses. Who asked the citizens whether they wanted such an unfair system put into place?

We need to limit these deductions. I am not proposing anything too radical: to give you one example of corporate tax reform in another realm, Bill Clinton in his economic package has limited the extent to which corporations can deduct executive salaries. A salary over a certain amount is no longer a deduction against corporate income. This is not a particularly big money earner, but it is a wonderful way of giving a message to your corporate sector about their behaviour and excesses, and about sharing the costs of a recession with all citizens.

We can limit the amount of deductions in certain types of trade practices litigation; in other cases, we can simply prohibit the deduction. For instance, if a consumer opponent cannot deduct legal expenses, then the firm should not be able to either. This would increase pressure for the development of non-legal dispute mechanisms which is good; it would also put some brakes on legal charges.

We have to remember that the notion of limited liability and the company structures that have evolved around it are historically quite new ideas – they are only about 250 years old. As a society it is not surprising that we are still grappling with the idea and with the changes it makes to the way we manage and govern ourselves. It took several hundred years to get the relationship between church and state sorted out; I hope that it does not take quite that long for us to clarify the relationship between business and state.

References

1. A reform of this type has since been enacted: *Legal Profession Reform Act* 1993 (NSW): Schedule 3 – Ed.
2. This has since taken place to an extent with the enactment of the *Legal Profession Reform Act* 1993 (NSW) – Ed.

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