

"Access to Justice - the Third Stage: Consumers' Access to Justice in the Global Marketplace"

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I've been asked to speak to you today on the topic of Access to Justice in the context of consumer protection. In doing so, I would like to suggest that we are now entering a third, and pivotal stage, of the evolution of consumers' access to justice. How well we tackle the challenges surrounding this third stage will be instrumental in determining the degree of protection which consumers in the global market place receive in the next millenium.

First let me back track for a moment or two and touch upon what I see as the first two stages of this evolutionary process.

In the 1960s and 70s we saw unprecedented attention given to the creation of consumer rights. In most of our home countries legislation was enacted during this period to protect consumers from misleading and deceptive claims and conduct; from unsafe products and to provide a degree of post-sale consumer protection. Such legislation was accompanied by widespread education campaigns to teach consumers about their new rights and how to enforce them.

Similarly, at the international level, the United Nation's Guidelines for Consumer Protection were established to provide guidance on the rights which all of the world's consumers should be entitled to.

Quite clearly the creation of these protections was a necessary first step for ensuring that consumers have access to justice.

By the 1980's, however, the limitations of this rights based approach to consumer protection were becoming all too apparent. Namely, it is all very well to create fine sounding rights, however, if consumers cannot afford to enforce them then they are of limited value only. The reality in my country, and I suspect in most of yours, is that most consumers do not access the court system to enforce their rights.

By the late 1970s a variety of ways of addressing this dilemma were employed including providing enforcement rights to consumer protection regulators, allowing some limited standing for public interest groups, the development of contingency fees and class actions in some countries and the introduction of what we call "small claims tribunals" - these are informal tribunals, which are cheap to access, do not require legal representation and can make decisions on disputes involving up to around \$10,000. Even with these initiatives, however, the average citizen was not accessing the justice system when their rights had been breached and regulators were not sufficiently resourced to take up more than a small percentage of complaints.

This leads me to what I have termed the second stage of the evolution of consumers' access to justice, namely the development of the numerous alternative dispute

resolution schemes which were established in the 1980s and 90's. (And I should note here that in Australia we learnt a great deal from the Europeans about this approach).

This second stage had many important facets to it but perhaps the most important from my perspective is that during it we learned the value of developing co-operative arrangements between business, regulators and consumers. Rather than retaining the us and them mentality we learnt to identify the commonality of interests we share. Businesses learnt that by listening to, and acting upon complaints, they acquired important market information about how to improve their products and services and retained customers. Regulators and the consumer movement developed a better understanding of the constraints upon business and how to reach mutually acceptable solutions.

Out of these new co-operative arrangements blossomed many significant initiatives, particularly in the areas of improved complaint handling procedures at both the company and industry levels.

When I talk about industry based dispute resolution schemes I am referring to schemes which cover all or most of an industry, are independent, provide consumers with a free and fair forum for resolving their complaints and meaningful redress. In Australia such schemes have been particularly prolific in the financial services area with a Banking Ombudsman, life and general insurance dispute resolution schemes and several others. At present such schemes are also being developed for the various utility sectors as competition is introduced to them.

These schemes have ensured that hundreds of thousands of consumers who would otherwise have not had access to redress, did so. Combined with moves to improve access to the traditional legal system I think it is fair to say that consumers in Australia today, and I suspect in most of your countries, now have considerably greater access to justice than they did 3 decades ago.

However, this is not a reason to be complacent. Surveys in Australia show that those that access the traditional and alternative systems are still predominantly white, middle class and male. We still have a very long way to go before we can confidently claim that all consumers at the domestic level have adequate access to justice. We must continue to find innovative ways to improve upon the status quo.

I want to move on now though to what I see as the third stage of the evolutionary process. This third stage, if done properly, should further strengthen existing initiatives.

OK, so what am I talking about with this third stage? I am referring to the challenge which faces us all of ensuring access to justice for consumers operating in the global marketplace. While at first glance this may appear as a daunting challenge, I believe that if we learn from the first two stages, and apply a little lateral thinking and co-operation, then we realise that the challenge is in deed achievable.

Before addressing the problem though, I want to make it clear at the outset that I think that there are enormous benefits to be gained by consumers from the advent of a truly

global marketplace. It should result in increased choice, improved quality and lower prices for the goods and services in the marketplace.

But, it is inevitable, as with current markets, that from time to time things will go wrong. Probably lots of things in the early days. There will be problems ranging from the non-delivery of goods which have been ordered and paid for, to the arrival of goods which are sub-standard or do not meet their description. The difference between these problems and traditional consumer problems though will be that the manufacturer and supplier may well have no connection to the country in which the consumer resides.

This will mean additional disincentives for consumers seeking access to redress. They may have to deal with such problems as "language difficulties; geographical distance; difficulties in obtaining a response from a foreign producer; ignorance of a foreign legal system; lack of information about rights; the cost of international telephone calls and so on." [Monique Goyens, "Cross-border disputes: a legal quagmire" in Consumer Policy Review: Access to Justice, Published on behalf of Consumers' Association by Blackwell Publishers, Vol 3, Number 2 April 1993,p.92.] Without encouragement to do so, many may not even think to contact their local consumer affairs agency for assistance believing that there is nothing which they could do.

The challenge for us is to ensure that the benefits of the global marketplace are delivered whilst ensuring that where competition doesn't correct market imperfections, consumers can still gain access to justice.

Obviously there is no one simple step we can take to ensure access to justice in this new marketplace. We will need to work at many different levels. Today I would like to discuss three of those levels, namely:

1. the creation of international rules or standards for acceptable conduct;
2. the creation of global co-operative networks for regulators and consumer groups; and
3. working with individual businesses and industries which operate in the international marketplace to establish fair and accessible alternative dispute resolution systems.

Ironically, the communications revolution which has given rise to the global marketplace, is likely to be our greatest ally in tackling the challenge which lies ahead of us. Our other great ally is likely to be that other underpinner of the new era, competition policy.

My organisation, the Australian Competition and Consumer Commission, (which many of you may have known in its former guise as the Trade Practices Commission), is presently looking at the issues involved in ensuring protection for consumers in the global market place. For the remainder of my time today, I would like to raise with you some of the thoughts we have had on the subject. I will group these thoughts under the three strategic approaches I have just outlined. At the end of my speech, I am keen to hear the ideas that you have about how we tackle this challenge for, as

never before, we will need to work co-operatively if we are to achieve our shared goal of access to justice.

The creation of internationally recognised rules and standards.

Normally when we think of consumer rights we think of the laws created by national and State parliaments. In the era of the global marketplace though we are going to need to discover new rule making bodies.

Europe has recognised this fact with the European Union already having created, or nearly created, several Directives/laws to protect consumers in their cross-boarder transactions. (For example, in the areas of international personal data protection, distance selling, timeshare schemes etc). In this instance, however, parallels can be drawn between the modern Europe and the system of federalism we have in countries such as the United States and Australia. That is, there is a Parliament, a traditional law making institution, to create these laws. Where such Parliaments don't exist what can we do?

As is increasingly becoming recognised, there are, in fact, a multitude of alternatives to Parliaments which can be used to create international rules and standards. While not all end products will necessarily have the force of law, some will, and there are other factors, such as competition policy, which can be brought into play where traditional mechanisms are lacking.

Let me suggest five alternatives to the parliamentary route for international rule making, namely, the United Nations; international standards setting organisations such as the Codex Alimentarius and the International Standards Organisation; regional and other governmental co-operation bodies such as the WTO, OECD, APEC etc and international industry organisations/peak bodies. Another possibility, which may not immediately suggest itself, is international non-governmental organisations such as Consumers International.

In this the fiftieth anniversary year of the United Nations there has been a great deal of criticism of the body and its lack of teeth. In the consumer protection area too there have certainly been some disappointments associated with the UN - from my perspective the failure to get passed either the UN Code of Conduct for Trans-nationals or the UN Guidelines on Global Business was an enormous disappointment - however, there have also been some great triumphs. I am thinking particularly of the UN Guidelines on Consumer Protection. These Guidelines have been used as leverage to get consumer protection regimes established in a multitude of countries. Thus, while they do not have the force of law, I think it is indisputable that they have contributed significantly to the network of consumer protection operating globally.

At present these guidelines are under review. I think it is imperative that we all contribute to this review. In the context of today's discussions on Access to Justice, I suggest we should be asking ourselves how we can use them to help ensure that consumers have access to justice in the international market place.

Another group of alternative rule making bodies I referred to are the international standards setting organisations such as CODEX and the International Standards

Organisation - I have very specific recommendations to make in respect of both of these body.

To start with the ISO. While Standards produced by this body may not have the force of international law, they are often adopted by governments or become recognised as international best practice so that companies who want to compete in the relevant marketplace have a great incentive to adopt them.

In the past both the International Standards Organisation and domestic standards bodies have, I think, been associated in most peoples minds with technical standards and safety standards etc. This is changing, however, with probably the best known example of the new expanded role for the ISO being the ISO 9000 series which deals with international standards covering quality systems.

The Australian equivalent to the ISO has also expanded its role and has recently released an exceedingly innovative and important Standard dealing with complaint handling. [Standards Australia, Australian Standard: Complaints Handling, AS 4269-1995] The Standard has wide application in that it sets standards for complaints handling at the enterprise level. (It is not designed to cover dispute resolution at the next, industry wide, level.)

The Standard deals with elements which are essential to a good complaints handling system. Things like visibility, accessibility, fairness, responsiveness and charges. In a nutshell, the Standard suggest that complaints handling must be easily seen, be easily accessed, must be free, fair and be overall "user friendly". The standard also stresses the importance of data collection so that systemic complaints can be identified and addressed at source.

One item for discussion at the next meeting of the OECD Consumer Policy Committee is the possibility of the Committee writing to the ISO and recommending that they develop a similar standard for the international community. I would urge all of you and your organisations to support such a development for, once established, we can encourage firms operating in the global marketplace to adopt it. For the firms who take up the initiative there should be a pay off in the form of increased customer satisfaction and loyalty and for regulators and consumers it should help ensure that in many disputes there is a simple, quick and free means of accessing justice.

My recommendation in respect of the Codex Alimentarius, as with other international standards setting bodies, is that regulators in the area of consumer protection, and consumer organisations need to ensure that they have a voice in these standards setting exercises so as to ensure that the eventual standards produced, do in deed, provide an adequate standard of protection for consumers.

But onto the other organisations I referred to. In the area of co-operative government bodies, organisations such as the World Trade Organisation (which has been established to remove impediments to international trade) and some of the bodies responsible for regional economic cooperation also suggest themselves as bodies we can be working with in an attempt to establish international consumer protection norms.

While at first glance the charter of the WTO might suggest that its functions may be to remove protections which consumers currently have, I think that a good case can be made to them that since we are always going to need some basic consumer protections, the WTO should be seeking to establish global norms so that consumer protection requirements cannot be argued to be a barrier to trade.

This argument will not surface by itself, however, so it is up to all of us with an interest in ensuring the protection of consumers to be urging our Governments' representatives to the WTO to put and support the case.

An example of such a governmental cooperative body already working to establish international consumer protection norms is the OECD's consumer policy committee. On its work program at present is work to develop standards in such areas as distance selling, consumer protection in dealings with utilities, improved product safety regimes and many other important initiatives. Just as the privacy principles developed by the OECD some years ago are now being used as global norms, I am hopeful that the work of this committee will have a similar impact.

Another example in this area, and one which many of you may be less familiar with, is APEC's current work to establish mutual recognition on conformity of assessment. There is a pilot project in place where APEC members are inspecting each others' testing laboratories and quality assurance systems etc. Where a country agrees that the others' conformity assessment procedures meet their own standards then a system of mutual recognition will be introduced. The system, however, will not stop countries inspecting imports as they see fit and should a country be shown to have relaxed its standards they can be taken off the list. This is just one example of the many ways in which such bodies can be used - in this instance to help prevent abuses occurring in the first place.

Also in my short list of alternative rule making bodies we have international peak industry organisations such as the International Chamber of Commerce. We need to be making links with these bodies in order to get them involved with establishing things such as International Codes of Practice for certain industries or issues. The ICC, for instance, is currently developing a code in the privacy area and there is no reason why such bodies can't be encouraged to develop the same range of codes as we see being developed domestically. Codes covering such areas as, for example, financial services, distance selling and advertising on satellite TV.

Of course, for such codes to work you need strong industry bodies, with wide coverage and the power to impose meaningful sanctions on members who breach a code to which they are a party. However, as global commerce continues to increase, the incentive for individual companies to form organisations to promote their common interests will increase and thus too will the power of such bodies to help establish industry standards to protect both the interests of the industry by promoting confidence in it and the interests of consumers.

Finally, and related to the last group of potential rule making bodies, we have international non-governmental organisations such as Consumers International.

As many of you may be aware, on the 13th of October of this year, Consumers International released a *Consumer Charter for Global Business*. The Charter is aimed at encouraging ethical behaviour and a more consumer-centred approach by large trans-national corporations. It covers such areas as ethical standards; competition issues; marketing practices; product standards; labelling of products; the provision of information; complaints procedures and guarantees. While the provisions are drafted in a very general and non-prescriptive way, the Charter provides an excellent, ethical and consumer friendly underpinning for global business.

Corporations will be able to apply to Consumers International to adopt the Charter. Upon application CI will carry out an investigation into the activities of the corporation to ascertain whether it is complying with the content and spirit of the charter. A decision will then be made as to whether to accept the corporation as a member of the Charter.

I think that this is a very important initiative with the potential to give an enormous marketing advantage to ethical corporations. I would urge all of us to do whatever we can to educate consumers about the existence of the Charter and to encourage corporations, via our purchasing power, to adopt it.

As well as providing protection for the world's consumers, it should be noted that the charter should also benefit global trade in that it can help give consumers the confidence needed to participate in this new marketplace. Hopefully, when the positive nature of such a Charter is recognised the United Nations will again revisit its own failed initiatives in this area.

Global co-operative networks for regulators and consumer groups.

The second of the strategies I suggested was the creation of global co-operative networks for regulators and consumer groups.

I am pleased to say that this is already happening. With modern technologies such as the internet, which some of us are lucky enough to have access to, such co-operation can be expected to flourish and grow.

The serendipitous nature of international information flows in the past will hopefully become a thing of the past and we will be able to establish international data bases which all agencies can easily tap into.

The OECD's product hazard alert system, which is an on-line information system, is already in place and showing benefits. This system, I'm please to say, is to be replace by an open access internet system which, amongst other things, will provide a product hazard alert system and an information sharing system for such things as judgements, interesting articles and other non-confidential information.

Even this improved system though will still not meet all of the information needs of modern consumer protection agencies. Either we will need to expand it still further to cover other types of problems or complementary data bases and information sharing systems will need to be established.

Electronic communication alone though cannot create fully effective co-operative networks. Working together doesn't happen automatically. It only happens when a common bond is developed through regular contact, including personal contact, and through discussing common problems and shared ideas. Just as many of us here today have national enforcement networks, I think we also need Regional and International enforcement networks.

In terms of such networks, the closest thing which I am aware of at the governmental level is the International Marketing Supervision Network which was established about three years ago by people associated with the OECD's Consumer Policy Committee. This body currently meets twice a year. To date, I would have to say, that it has been a disappointment, however, I believe that with the addition of a permanent secretariat, greater commitment from participating countries and, say, a system of interchanges for enforcement officers between different countries, it has the potential to become a dynamic body.

Of course, to really succeed in our role as consumer protection officials in the global marketplace, we need a network which is truly global and not restricted to OECD membership.

Which leads me to a proposal I would like to float - the establishment of the *International Society of Consumer Affairs Officials*. (The idea is modelled in part on the Society of Consumer Affairs Professionals (SOCAP), the predominantly private sector network of consumer affairs professionals).

What I am proposing is the establishment of an international professional association made up of individual consumer affairs officials involved in administering consumer protection laws. ISCAO would aim to encourage strong networking and a cooperative approach to solving consumer problems and sharing ideas so that emerging problems arising out of the creation of borderless markets and technological advances can be dealt with effectively.

As currently envisaged, this professional organisation would be independent of government and have no government affiliation. Having said that, it would still be appropriate for governments employing members to support the organisation through various means such as sending officers to an annual conference.

The aims of the organisation could include creating a global network of consumer affairs officials; encouraging best practices in consumer policy regulation and administration; developing global consumer protection policies; encouraging the development and harmonisation of consumer protection laws; encouraging agencies to exchange research, open up training programs to overseas officials and commit themselves to the use of technology for interagency communication; advocating cost effective consumer remedies and encouraging business to adopt consumer responsive, market sensitive, mechanisms for dealing with consumer problems.

Communication between members could be via a variety of means including an annual conference, regional conferences, regular newsletters, and the internet.

Our current thinking is that ISCAO could initially be funded by an individual membership fee of \$100 each (although discounts or free membership would need to be available to officials in developing nations who may not be able to afford this amount). If there is strong support for the concept then this should provide sufficient seed money to fund a part-time secretariat which could produce the quarterly newsletters, plan the annual conference etc. Some of us in Australia would be happy to provide an interim secretariat until such an organisation was officially created.

Such a global network, with shared intelligence about scams, unsafe products, enforcement techniques etc, should be able to significantly expand out ability to protect consumers from such things, thus, via a circuitous route, assisting their access to justice in the global marketplace by helping to prevent problems occurring in the first place. For, to corrupt a cliché, prevention is always preferable to seeking to access justice after the event, no matter how consumer friendly the system may be.

If others of you are as excited about this idea as I am I would be happy to speak with you further about it either in the break or if you contact me upon my return to Australia. [I can be contacted by writing to the Australian Competition and Consumer Commission, PO Box 19, Belconnen, ACT, 2616, Australia or by the internet on allan.asher@acc.gov.au or by faxing 0011 61 06 264 2226]

Before moving on from this idea though, I should note that I am particularly hopeful that such networks, both human and technological, will benefit consumers in developing countries which have often in the past been the dumping ground for some of the developed world's most dangerous products as well as those past their used by dates. The irony is that in those areas of the world where the greatest protection is needed often the fewest resources are available for consumer protection. A global network for intelligence and enforcement efforts should be particularly beneficial to such countries.

Regulatory agencies are not alone in planning these new global networks - the consumer movement is also doing so through the Consumers International (formerly IOCU). Regulators also need to ensure that they liaise with, and hook into, these new international consumer networks. This is especially important since it is often the consumers' movement which is the first to know about an unsafe product or practice etc. By sharing our knowledge and experience we can exponentially expand the effectiveness of both regulators and the consumer movement.

And I should say here that not only will technology allow regulators and the consumer movement to better communicate, it will also allow us all to more easily reach consumers with the messages which will inform them of their rights and hopefully assist them in avoiding problems in the first place.

One last word on new networks is to say that because of modern technology, networks need no longer be confined to regulators and organised groups. Individuals can create, and are creating, their own networks to advance the cause of consumer protection.

Let me give you a small example of what I am talking about. Just prior to having our offices connected to the internet, a few of us were discussing how you deal with

consumer scams on the Net. We decided that we would write to Bill Gates and suggest that Micro-Soft establish a homepage to alert people to such scams. While we may still do this, the very day we were trained to use the new system, amongst the first things we found were several homepages which warned of such scams. As well as one run by the US Federal Trade Commission there were also pages run by what appear to be private individuals with net users from all over the world contributing. [See eg: "Bad Traders List" <http://server.berkeley.edu/~cdaveb/traders.html>] When you think of the effort consumer agencies have gone to over the years to try to gather information on scam traders what could be better than having literally millions of net users acting as watchdogs for each other and at the same time, if we are smart, tipping off the regulators.

But, when talking about new co-operative and liaison mechanisms we should not just restrict ourselves to global networks. As we are all aware, privacy restrictions, amongst other things, can place serious impediments on enforcement agencies sharing information. We are all used to the concept of mutual assistance treaties in the area of criminal law but I would suggest that the time has come for us to establish similar mutual assistance treaties in the area of consumer protection. In enabling agencies to better undertake their investigations, or to take action on behalf of an overseas agency, we will again be working to ensure improved access to justice for consumers in the global marketplace.

Working with business.

I have saved what I think is the most challenging of the three strategies to last in the hope that if anyone's attention is waning this will recapture your imagination.

As I alluded to in discussing the second stage of the evolution of consumers' access to justice, enforcement agencies will never have sufficient resources to take up all consumer complaints at the domestic level, let alone the international level. Therefore we need to be looking at smarter and more resource effective means of ensuring access to justice.

One of the areas where I see the greatest potential for success is working with international peak industry bodies and with individual companies operating on the global stage.

In this context I would refer to a Canadian Professor, Nancy Adler, whom I heard on the radio in Australia recently. She too was talking about the globalisation of markets and she had two very interesting points to make. First, she talked about the expanding power of trans-national corporations vis-a-vis governments as state borders become more and more meaningless in a practical sense and, secondly, she talked about the need to foster ethical CEOs since so much power, in terms of the future directions of the world, is within their control.

Now, whilst she wasn't talking specifically about consumer protection enforcement, I think that her observations are exceedingly relevant in the context of our discussions today.

We should be looking to identify those CEOs who are interested in promoting global business ethics and work with them as well as seeking to imbue a similar ethos in other CEOs. There are already organisations in place which are supportive of these goals, for example, the co-round table (CAUX), which is a forum of 20 or so trans-national CEOs whose objective is to develop a global code of ethics for business and the Minnesota Centre for Social Responsibility in Business. The networks I discussed earlier, be they of regulators, the consumer movement or a combination, should be identifying the protections which need to be in place at the international level and approaching such organisations to seek their assistance in fostering such protections.

Similarly, as discussed earlier, one of the approaches which I believe holds the most promise is to work with international peak industry bodies to develop internationally recognised codes of conduct, charters and dispute resolution schemes. We should be aiming, for example, to have global financial services Ombudsmen to resolve disputes involving cross border transaction. Just as we have had success at the domestic level in this area, I believe that success can equally be had at the international level.

Once again there is a mutuality of interests. For, unless consumers have confidence in the integrity of the global market they won't use it. Thus, ethical businesses have a legitimate interest in ensuring that reasonable standards are met within their industry. The proactive work of direct marketers to establish international protections for distance selling provides a good illustration of this as do the chargeback arrangements that exist in the merchant agreements of everyone who deals with VISA and Mastercard. Existing efforts though need to be expanded in much the same way as they have been domestically.

Now, while I believe that we should be working with such peak bodies, and should be getting organisations such as the OECD Consumer Policy Committee, Consumers International and the Society of Consumer Affairs Professionals (SOCAP) working with them, I also think that there is potential to be had from simultaneously working with individual companies.

It is possible to have an enormous effect by targeting just a few companies. Let me explain what I mean.

I read somewhere (and unfortunately I can't find the source) that as of 1993 approximately 37,000 trans-national corporations existed, having between them some 170,000 affiliates and subsidiaries around the world. As we know, transnational corporations control a large part of global trade and foreign investment. Indeed, 1% by number of trans-national corporations own 50% of those 170,000 affiliates that operate around the world. Thus, if we targeted just some of those one percent, that is, a more manageable sounding 370 trans-nationals, to implement effective fair trading codes with suitable alternative dispute resolution mechanisms we could have an enormous effect on establishing acceptable international norms. And once such norms are in place in even some of these trans-nationals, competition is likely to ensure that they will be emulated or surpassed by others.

As a recent Australian study by SOCAP/AMEX showed, prompt fair and easily accessible dispute handling mechanisms are incredibly important in terms of customer loyalty. So, I believe that it is possible to sell these ideas in terms of sound business

principles and not just be appealing to the "better nature" of the corporations in question.

These have been just a few suggestions for steps we can all take to ensure that consumers in the global marketplace have access to justice. I am sure that you all have many more ideas.

I hope that debates such as we are having here today will assist in spurring us all on to still further action since the new world order described today is not some distant gleam. It has started, and, unless enforcement agencies, policy makers, business and the consumer movement are prepared, they will not be in a position to properly assist in safeguarding the interests of tomorrow's consumers.