THE SUPER *LEAGUE CASE*

Marianne Robinson

"There will be wickedness as long as there are men"
(and legal cases as long as there is sport).
Tacitus First Century AD

The Sport Law Hall of Fame was an illustrious one even before the Super League case. In 1995 alone its members included Kieran Perkins, Bradley Clyde, Andrew Ettinghausen, David Hookes, Gary Ablett and a list which goes on and on. Each of the above high profile sportsmen share a unique sporting experience as each has entered the realm of what was once one of the most exclusive of sporting clubs – the court room. Interestingly enough sport's law cases virtually always involve men. Cases involving women are extremely rare hence my classical reference. The Super League case certainly bolstered the number of high profile players who have joined the illustrious ranks of litigant or defendant.

Australia's prowess in the sporting world is well known but increasingly so is its reputation for going to court. If you believe that sport is one of the last frontiers free from greed, lust, revenge and all the other less favourable aspects of life then your illusions will be shattered by a brief trip through the sporting cases of the last 90 years. Violence, manslaughter, bribery, corruption, drug doping, libel and slander have all found their way into the sports law cases of even the last two years. In fact, sport law cases are so popular that they could almost form their own category of TV quiz show.

The sheer diversity and range of sports law cases should dispel any belief held by many sporting administrators that sport is in a world of its own and immune from the harsh realities of everyday life. The law always existed. It's simply that now there is more sport played, more aggressively in a more commercial market with so much more to lose and to protect.

There is no doubt that most sporting organisations today have a basic understanding of some of the legal risks now facing their associations and their members. When I first started working in this area in

the late 1980s, sporting organisations simply did not believe that the management of legal risks was of relevance to them. Many still have this attitude towards the law but the Super League case, if nothing else, has heightened the awareness of many sports, amateur and professional alike, to the fact that they are part of the world of big business and finance. They are just as vulnerable to take overs, union action and consumer boycotts.

The 1990s have been years of enormous change and challenges for sport and the need to find financial resources in order to compete on the international level forced many Australian bodies to explore commercial sponsorship to an unprecedented degree. They did so with little real understanding of the long term implications of their actions. Many of the sporting bodies failed to recognise the impact that sponsorship and endorsements would have on the very essence of sport itself or the relationships between individual sportsmen and women with their administrators. I believe that they were simply naive about the level of intrusion that commerce would bring to their sport.

Sponsorship brought the much needed cash but it also changed forever something fundamental about Australian sport which came to a head with the Super League case. The fear of takeover from an outsider with no background in the nurturing of players from the cradle to representative level had simply not been contemplated before. The sheer size of this dispute and the fact that it involved one of Australia's most successful sports meant that the problem could not be ignored.

During the early 1990s there had been a slow but increasing recognition that sport was moving into the business arena but that the changes to the style of management and administration within sporting bodies had been slow to catch up. More importantly, sport had been slow to really appreciate the fundamental differences between a sporting person playing for fun and one whose livelihood was based on it. Together, sponsorship and professional sport have been responsible for changing forever, many of the traditions and philosophical underpinnings of what the community believed form the essence of sport.

Once participation for the sake of comradeship and self satisfaction was the cornerstone of sport which was played for fun and relaxation. Suddenly sport was a career, and the incentive to play became more driven by the generation of income than ideology. Players like Alan Border and Laurie Daly are the first real generation of sportsmen who have no training for any other form of employment. Increasingly, we also have professional sportsmen who leave school at 15-16 years of age with only their sport as a future.

The business of running a sport is really no different from the operation of any other business activity. It is essentially a service industry supplying services to athletes, sponsors and the public. Like all service

industries, competition is constantly based on the ability to deliver a high quality, efficient and competitive service. Increased regulation, government policy and competition for the limited dollar means that business and risk oriented sports will compete more successfully and more effectively than those who do not embrace a business like approach.

Most sporting associations are shocked at the amount of law which impacts on their day-to-day activities. In the past, many found comfort in their lack of knowledge and assumed that the law, courts and government would leave them to run sporting activities in a way which isolated them from the risks of everyday life. Many developments over the last five years have pointed to the fact that this philosophy can only lead to harm for the sport, the athlete and the organisers. Changes to the law are now evident throughout all aspects of sport from the changes to the Companies Code which impacts on directors of Associations through to sponsorship contracts and duties on organisers of sporting events for spectator and infectious diseases controls.

With the movement of sport into new areas has come the growth of a sports advice industry. Sports medicine and sports physicians are an obvious off shoot but there has also been expansion into new employment areas such as exercise specialists, sport trainers, nutritionists and even specialist podiatrists, health screeners and fitness assessors. In many instances the standards of expertise in these areas are still being established and insurance covers are not yet available. There are now over 112,000 Australians presently employed in sports related jobs. Many of these are employed in the capacity of sports adviser.

It was within this context of profound change in the very foundations of sport that the battle for control of Rugby League began. Unlike many I don't believe that the Super League battle was the cause of the change. I believe that is was simply a manifestation of what had started many years before with the introduction of professional sporting players whose salary infrastructure was supported by sponsorship dollars. This was the beginning of the transition of sport as a purely recreational form of individual physical endeavour to sport as a deadly serious form of entertainment where mass participation is reduced to the role of spectator, often in a different country from the players.

The involvement of the law in sport has been one of the side effects of the transition. When sport first started to be organised as a form of entertainment, the involvement of the law was mainly in the intervention by the criminal law. Boxing, and other physical games such as soccer and rugby have long traditions going back to the 1800s where intervention occurred if there was a death or a serious assault. In Canada, for example, two Ottawa players were found guilty in the criminal courts of brutal on field attacks in 1907. In England, the first murder cases for foul play during soccer matches were brought in 1898.

The early sport law cases were to do with either injuries caused by participants to each other or injuries caused to spectators. The control of sport was very much an internal exercise and during the 1900s, up until the 1970s, the administrators of sporting organisations were really not held accountable to anyone. The courts were rarely involved and if they did it was usually over a natural justice type issue.

The most profound change in the sport law focus came about in the 1970s and it was led by America. The rise of the professional athlete and the growing importance of the player unions in baseball, ice hockey and football created such a volatile climate that litigation dealing with the rights of athletes became a commonplace event in the American courts. The trigger in many of these cases was the sale of ownerships of teams, franchises and the relocation of teams from one state to another. Players were bought and sold as commodities with little control over their futures.

In the early 1970s rival leagues were formed and the restrictive work practices were challenged in the courts. The movement spread into Canada where the period 1893-1926 had been a time of enormous contractual fights over rights and monopolies in ice hockey.

These matters had little impact in Australia until the 1970s and the explosion of the cricket war. The changes began when the footballer Dennis Tutty brought his ground breaking case in 1972 where he successfully challenged his Rugby League contract on the grounds of restraint of trade. The World Series Cricket group began to organise "Super Tests" and suddenly the spotlight was on the right of professional players to choose who their employer was and the conditions under which they would play.

In many ways it was inevitable that a case of the Super League proportions would come about. The role of the sponsor, the rights of athletes to market levels of compensation and the rapid advances in technology had been issues which were simmering throughout the 1990s. Players had until this time been regarded as club assets more than as individuals free to negotiate their worth in an open market. In fact the emphasis on the acquisition of players was in many ways dehumanising. Individuals were told how fortunate they were to be selected but when they paid the ultimate price through injury they were simply discarded and replaced by another "fortunate" player. Little thought was given to the long term rehabilitation of players or to the establishment of retirement or education funds to look after players when their careers ended. These are standard types of arrangements which were won by American and Canadian professional players in the 1970s.

The thought of sport as an entrepreneurial investment began with Kerry Packer's cricket series and led to moments like Geoffrey Edelsten's $6.5 million purchase of the Sydney Swans in 1985.

Australian levels of sponsorship have not yet reached that of overseas stars like Michael Jordan and Shaquille O'Neill, who presently earn over $32 million and $15.2 million a year in private sponsorship, although in 1993 Greg Norman was reputed to have earned in excess of $25 million. The first rumblings of problems with sponsors in Australia came from the individual sports like swimming and athletics. In 1994, Australian Swimming Inc became embroiled in a dispute with swimmers like Kieran Perkins over the signing of sponsorship arrangements with Uncle Toby's and Telstra which cut across the rights of the individual to enter into contractual arrangements.

These types of disputes highlight one of the fundamental problems today – how to balance the rights of the individual to private endorsements and payments with that of the sporting club or organisation. In the Rugby League situation this was resolved by putting players under contract and making them employees. A fact which was not finally forced home to many League clubs until 1995 and which in many ways became one of the key parts of the Super League case.

Since the Tutty Case in 1972, the Rugby League had been tinkering with the transfer and retention system. They had been told that the original setup was an illegal restraint of trade even though Tutty had not been a signatory to the contract between the League and his club Balmain. In 1990, the NSW Rugby League established a scheme known as the Draft with a salary cap on player payments. It was found to be an unlawful restraint of trade by the courts which infringed on the basic rights of the players to choose who they would work for and in what location. During the early 1990s the standard player's contract became a three way contract between the player, the club and the League but a case involving a tort of assault, brought against Canterbury Bankstown when a player suffered a broken jaw, led to the League withdrawing from the contract.

By the time the Super League came along, players were clearly employees of their club and only had contracts with those clubs. This basic fact has become a key part of the repositioning of the role of the player and for the first time the focus was on the players themselves. Many had started to hire player agents and lawyers to negotiate on their behalf. The level of dissatisfaction by players with their positions, as well as their relatively low salary packages, fostered the perception by them that everyone was getting rich at their expense. It made them ripe for the type of takeover bid that came from Super League.

Up until Super League there had been a tendency to see players as simply a dispensable part of the equation between sponsors and sporting organisations. The sponsors paid their money over, with increasing demand of what was received in return, and each sport simply delivered the individual sportsmen and women with little input from those individuals. When the Federal Court handed down its

original decision in the Super League case it made interim orders and later injunctive orders against the clubs preventing them from entering into negotiations with Super League.

The players themselves had never been made a party to the court case as they had not signed the Loyalty Agreement with the Rugby League governing body and suddenly the strength of their negotiating position was revealed for the first time. They had no contractual relationship with the Rugby League other than to register each year and uphold the rules of the game when they played. Super League had already signed many of them onto individual contracts which for the first time reflected the true market value of their careers. In many cases, individual yearly salaries tripled or increased by even more. The ARL realising its vulnerability had moved by then to get its loyal players onto contract basis. Now that the main Super League case has been resolved, it is the contractual disputes arising out of the individual player contracts which remain in the courts.

If nothing else this case has put the focus clearly back onto the rights and the position of the players. The fact that they were not joined in the action in many ways sums up how their importance in the game was forgotten. A review of press clippings and media interviews in the two years before the court case indicates how the profile of the games administrators had swamped the role of the players.

Until the Super League case many sports had simply forgotten that without the players there is no game or sport.

The role of the sponsor is intertwined with the evolvement of the ethos which said the amateur should be rewarded for the time and talent spent in pursuit of the sport. This led to a blurring in the distinction between amateur and professional which has remained confused up until now although the admission of Rugby Union into the professional ranks may change that problem area. The high level of sponsorship available in Australia in the 1980s made it possible for someone to become a full time career athlete.

The Super League case has changed forever the role of the sponsor. In the past the sponsor simply provided funds in exchange for the right to advertise. The Rugby League was amongst the first of the sports to feel the impact of sponsors and broadcasters flexing their muscles when they were forced to examine the timing of games to fit in with TV broadcast time. Like the Olympic officials in Barcelona, the Rugby League until a few years before had given no real thought about the arrangements it had made for broadcasters. Instead, it was happy in the knowledge that if sponsors could gain prime time TV spots then they would be happier to continue to sponsor the sport. Past problems such as playing games in the middle of Australia during the hottest part of the day and placing the players at risk, were minor hiccups when compared to the problems which were to emerge.

In the end it was the contractual arrangement with Channel 9 which propelled the Rugby League into the legal battle with Super League. It was this course which has changed forever the role of the sponsor as the aloof investor. When OPTUS took on the role of sponsor for the ARL it took a place on the Board and became an active player in the determination of the future direction of the sporting body. No longer content to merely invest, the way has been opened for sponsors to become full, if not dominant, business partners in the running of a sporting organisation.

In the end, the Super League case is a prime reflection of the profound changes which have taken place in sport over the last ten years and the strain that these changes have placed on the traditional administrative support structure. The old school sporting administrator was a past player who grew up with the sport and who had dedicated hours as a volunteer to seeing their sport grow. Very few of these administrators had any training in business, investments or management and even less in the management of staff. The business deals they were entering into were complex and sophisticated and came as the technological advances were changing forever the delivery of entertainment services. Very few of the high profile sports have managed the challenge successfully. Those that have, such as netball, have done so through the systematic and thorough revision of the very basis of their administrative structures. Rugby League was a multi million dollar business with an administrative system which was dependent on the personalities of individuals and an outdated voting system which few even now actually understand.

In 1994, Richardson pointed out that in the build up to the Atlanta Olympics, Australian corporate sponsors would spend $1.2 billion on the chests, waists, feet and eyes of gold medallists, premiership players and internationals. In 1995, NBC won the deal to the broadcast of the 2000 Olympics and the Salt Lake Winter Olympics in 2002 for a fee of $575 million. These figures say it all – with that much clout in the hands of TV (whether it is free-to-air or Pay TV), the say that sporting organisations are going to have in their sport will continue to diminish.

There is no doubt that commercialism has harmed the traditional sporting ethos and that the emphasis on winning at all costs has changed some of the core values associated with sport. It can also be argued that without money, many sporting organisations, especially in Australia, could not have survived.

The lessons from the Super League dispute must be learnt and they are not necessarily those that the sport itself refers to. The battle is not yet finished but between them the two codes are reputed to have spent $20 million in legal costs – what a loss for their sport and its players. There are some good legacies arising from this court case.

Players now know to read their contracts, to ask questions and to get expert advice so that they understand their contracts before signing them. Clubs and players now know that the employer-employee relationship is a vulnerable one and it must be worked on by both sides if they are to remain wedded together. More importantly they know that there is no such thing as a free lunch and that no one comes and offers a sporting organisation a large sum of money without an equally long list of demands.

The long term effects from this case will be felt in many different ways. Sport is now clearly a manifestation of entertainment and has investment potential because of the way it lends itself to TV. The advent of Pay TV throughout the world has made available capacious amounts of time which has to be filled with relatively low budget entertainment. Technological advances have already made it possible to bet on races and games from the freedom and luxury of the lounge chair. Digital imaging is moving in the direction where it may not even be necessary to have players, just digitally enhanced players, on a computer screen who can play along with you. If you thought the scenes from *Running Man* with the winners basking in luxury whilst they were dead was far fetched then remember that the movie *The Crow* was finished after the death of the star. Digital imaging enabled them to have an actor rise from the grave.

If nothing else, the Super League case should have shown us that nothing is forever. In the period of change which has dominated our lives during the 1990s everything and all our traditional values have been subject to change. The only constraint in many people's lives left was their football club and the security that it offered. Now that too is gone and perhaps this loss of naivety will equip not only sporting clubs but also their supporters to cope with the new millennium and the change that it will inevitably bring.

The professional athlete has contributed a great deal in the world of mass entertainment but also to the true world of commerce. Sporting goods manufacturers are conscious of the significant changes that professional sport is bringing to the world. When Tiger Woods turned professional in 1996 his endorsement contracts totalled over $60 million US. The sporting goods market in the US alone is worth $44 billion dollars just for shoes, apparel and equipment. The clash between the needs of a professional athlete with limited education and a shortened career, seeking to maximise their earnings during the peak of their career, will ultimately bring them constantly into conflict with any club or sporting organisation which seeks to control them. Just look at the Canadian National Hockey League strike in 1994-95 which led to a 103 day lockout but resulted in renegotiated contracts where even rookie salaries start at over $1 million.

Sport law cases reflect the changes in the very foundations of the sporting ethos. They range from the cases of criminal negligence being brought in the US over the allegedly deliberate reduction in heart medication leading to the death of young collegiate basketballers to the international drug testing battles of Katrina Krabbe (who won) and Butch Reynolds (who did not). They include the allegations of bribery and corruption involving the two British soccer stars – Bruce Grobbelaar and John Fashanu and the insurance fraud case brought against boxing promoter Don King in Manhattan which he won. They range from the compensation case in Germany which began last year by the families of the 11 Israeli athletes murdered at the Munich Olympics in 1972 to the 1995 Supreme Court action of North Sydney Cricket Club where it sought to compete in the semi finals round after allegations of snatch fixing to the action by the former East German weightlifter against the German Democratic republic for the side effects to his body from steroids given to him without his knowledge.

Sports law today runs the gamut of the industrial relations court to the defamation court to selection disputes and drug testing slip ups. Many of these cases would never have been brought except for the fact that livelihoods and endorsements were at risk. Money from sponsorship or broadcasting rights was changing the face of sport well before the Super League case and will continue to do so into the future.

My personal favourite sports law cases which indicate the impact of money on sport are very different from the Super League case. The 1995 case of Michael Goldman, the former British National Scrabble Champion suing the Association of Premier Scrabble players after he lost the final match. A convention of cowgirls and cowboys at the Burtsin hotel in Folkestone jammed the toilet during his match break and the delay caused him to lose a vital four minutes of the tournament. He won his case. And finally, in 1996 Denis Roddmen, the flamboyant US basketballer whose dress sense is certainly well-known, successfully sued T-shirt manufacturers for breach of copyright when they copied both the design and the position of his body tattoos.

The only thing of which we can be certain is that unless sporting organisations reform their structures and come to grips with the fundamental relationship between the rights of the individual sportsmen and women to appropriate compensations, then conflict is inevitable with the sporting organisations' role developing and promoting them. There is a fine line between promotion and exploitation but essentially, happy athletes do not defect. If the Rugby League players had been content with their lot and had an avenue in which to raise their grievances, then history may have been very different for Rugby League. The lesson is there for all sporting organisations. The pace of change is inevitable and the Super League case is just another brick in the wall in the natural progression from amateur to professional sport.

Photo – David Karonidis

Frank Brennan SJ

The High Court's decision in the Wik Case, handed down in December 1996, has provoked one of the most significant debates in Australian politics. On Monday 10 March 1997 The Sydney Institute presented the first of two discussions on the fallout over Wik. Frank Brennan SJ addressed a capacity audience on the subject of Native Title after the High Court decision. Discussion was introduced by Rob Ferguson, Chairman of The Sydney Institute. Frank Brennan SJ is an Adjunct Fellow at the Australian National University and Director of Uniya, the Jesuit Social Justice Centre in Sydney.

THE WIK JUDGMENT

– THE CASE FOR NON-EXTINGUISHMENT, NON-DISCRIMINATION AND NEGOTIATION

Frank Brennan SJ

Pastoralists want certainty. Miners want development. Aborigines want native title. Prime Minister Paul Keating spent much of 1993 wrestling with *Mabo*. Now Prime Minister John Howard has to find a way forward with *Wik*. Each time the issues get more complex and confusing. In the search for a just and workable solution, I will present the case for non-extinguishment, non-discrimination and negotiation.

The *Mabo* decision

In 1992, the High Court of Australia decided that Torres Strait Islanders had rights to their land before the arrival of the colonisers. The content of those native title rights depended on the local laws and customs of the people.

Those native title rights could be wiped out (extinguished) at any time by the Crown. This would happen whenever the Crown granted the land to another person who then had the power to exclude native title holders from the land. It would also happen whenever the Crown used the land for some public purpose inconsistent with the native title holders' rights of access and use.

Before 1975, state governments could and did wipe out native title rights without consultation, consent or compensation. In 1975, the Commonwealth parliament passed the *Racial Discrimination Act* which bans state governments and state parliaments from discriminating against property holders on the basis of their race. Since 1975, state governments and state parliaments have had to deal with any remaining native title holders in the same way as they would deal with persons holding crown grants. For example, a person's freehold can only be resumed by the state after due consultation, for a public purpose and on payment of just compensation. Miners can explore and mine on others' lands only once they compensate for disturbance. In some cases, they also have to obtain permission from the land holders.

One of the great unresolved questions in *Mabo* was whether or not the grant of a pastoral lease extinguished native title. There were, of course, no pastoral leases issued in the Torres Strait Islands. However, in the course of *Mabo*, some judges had cause to comment on a lease which had been granted in 1931 for the conduct of a sardine factory. That lease contained a reservation in favour of the natives:[1]

> The Lessees shall not in any way obstruct or interfere with the use by the Murray Island natives of their tribunal [semble tribal] gardens and plantation of the leased land.
>
> The Lessees shall not in any way obstruct or interfere with the operations of the Murray Island natives who fish around the reefs adjacent to the leased land for Beche-de-mer, Trochus, etc.

Brennan J (Mason CJ and McHugh J concurring) concluded that "the limited reservations in the special conditions are not sufficient to avoid the consequence that the traditional rights and interests of the Meriam people were extinguished. By granting the lease, the Crown purported to confer possessory rights on the lessee and to acquire for itself the reversion expectant on the termination of the lease. The sum of those rights would have left no room for the continued existence of rights and interests derived from Meriam laws and customs."[2] Whereas Deane and Gaudron JJ were of the opposite view: "This lease recognised and protected usufructurary rights of the Murray Islanders and was subsequently forfeited. It would seem likely that, if it was valid, it neither extinguished nor had any continuing adverse effect upon any rights of Murray Islanders under common law native title."[3] Toohey J did not find it necessary to proffer a view, simply observing, "Whether that lease was effective to extinguish the traditional title of the Meriam people to Dauer and Waier, again is a question the Court was not asked to answer and no relief is claimed in regard to that transaction. In those circumstances it is unnecessary to say more about the lease."[4]

After *Mabo*, most lawyers (myself included) thought it would be very difficult for Aborigines to establish the co-existence of native title on pastoral leases. For example, this exchange occurred between myself and Senator Chris Ellison, Chair of the Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund at a hearing in Darwin on 28 August 1996:[5]

> CHAIR – Reading between the lines, you are anticipating that the High Court will come down in favour of saying that pastoral leases do not extinguish native title rights.
>
> FATHER BRENNAN – No; I am not anticipating that. The only thing that I have written or said publicly on this was probably prior to reading the transcript of the oral argument, where it seemed to me that in terms of logic it was going to be very difficult for the Aborigines to have a win, and that what was essential was to maintain what was called in the *Mabo* judgment the "skeleton of principle". It seemed to me on my reading of *Mabo* that basically it was only the Crown that could extinguish native title, and the question of whether native title had been extinguished is always a

question of law or fact. If it is a question of a Crown grant, it is a question of law, and you look at the grant to see whether or not there has been a power to exclude the traditional native title holders. If it be not a Crown grant but a Crown use, then it is probably a mixed question of law and fact as to whether there has been that extinction.

It seems to me that, in terms of strict logic, the problem that has confronted the advocates for Aborigines in the *Wik* case has been this: even in the most liberal reservations in the pastoral leases, such as in South Australia, there is the capacity for Aborigines to be excluded, for example, from regions 200 or 500 metres from bores or houses or whatever. What happens is that the only thing the Crown ever does is to grant the lease. The leaseholder later builds a house or a bore. By virtue of having built the house or bore, the leaseholder has for all time excluded Aborigines from access to that land. Given that native title can only be extinguished by the Crown and not by a third party, what did the Crown ever do? All the Crown ever did was to grant the lease in the first instance. That is the conceptual problem which has confronted the Aboriginal groups in relation to the *Wik* case.

We see in the oral argument in the transcript that basically some of the High Court justices – particularly Justice McHugh – are, it seems to me, wrestling with the question of whether a pastoral lease is truly a lease and whether all pastoral leases can be properly categorised in this way. So it is some of those ambiguities which may give a window of opportunity to Aboriginal groups, but there will have to be not only that window of opportunity but something in terms of the "skeleton of principle" whereby there can be certainty.

CHAIR – Thank you.

Father Brennan – Needless to say, I hope I am wrong.

The *Native Title Act* 1993

The *Native Title Act* set up a system for working out who had native title rights and for informing all other persons like miners who may need to deal with native title holders.

The Act cleared up doubts about the validity of land titles granted since 1975. Where land had been granted to other persons without regard for the possible existence of native title, the processes for granting the new titles may have been contrary to the *Racial Discrimination Act.*

The Act gave native title holders a right to negotiate with miners both at the exploration and development phases. If agreement could not be reached, the dispute would be referred to an independent tribunal. But the Minister would always have the power to override the tribunal and allow the mining to proceed.

Over 40 per cent of Australia is covered by pastoral leases. Even more of Australia used to be covered by pastoral leases. Did the grant of a pastoral lease extinguish native title? Did a pastoral lease give the pastoralist power to exclude the native title holders from access to the

land? These questions were not answered in *Mabo* because there were no pastoral leases in the Torres Strait. Pastoralists and miners wanted the parliament to put the matter beyond doubt and extinguish native title on pastoral leases. The parliament refused to do so, leaving the matter to the courts. The parliament acted on the stated assumption that the courts would rule that native title was extinguished on pastoral leases. Parliament provided a land fund for the purchase of properties including pastoral leases by dispossessed Aborigines. Parliament also allowed Aborigines to revive native title on pastoral leases once they had purchased the lease. Parliament guaranteed pastoralists the right to renew their pastoral leases on the same terms and conditions without ever having to negotiate with native title holders.

The *Wik* proceedings

After *Mabo*, Aborigines thought the courts might insist that governments which dealt with their native title lands even before 1975 would be required to take into account their native title rights. In *Wik*, Aborigines tested the validity of the leases granted for major mining projects at Weipa and Aurukun in Cape York before 1975. They claimed that the State had breached its fiduciary duty (a duty of trust) and failed to accord natural justice to the native title holders. All seven judges dismissed this claim of the Aborigines.

Two groups of native title claimants, the *Wik* and Thayorre Peoples, also claimed that their native title had not been extinguished merely by the grant of pastoral leases over their land. By four votes to three, the High Court agreed. The Court found that pastoral leases did not give the lessee a right of exclusive possession. Last century, the colonial authorities had always insisted that pastoralists should permit continued Aboriginal access to the vast undeveloped pastoral leases. The pastoral lease was a peculiar Australian invention for unique Australian circumstances. It was not a "lease" in the usual sense understood by lawyers.

The *Wik* decision

The High Court decided that:

- a pastoral lease does not necessarily confer rights of exclusive possession on the pastoralist
- the rights and obligations of the pastoralist depend on the terms of the lease and the law under which it was granted
- the mere grant of a pastoral lease does not necessarily extinguish any remaining native title rights
- if there is any inconsistency between the rights of the native title holders and the rights of the pastoralist, the rights of the native title holders must yield.

So if there is a conflict of rights, the native title holders come off second best. If there is no conflict, the rights of each co-exist.

The problems since *Wik*

If native title exists on a pastoral lease, a miner may have to identify native title holders and deal with them as well as with the pastoralist. The Aborigines will then have a right to negotiate even at the exploration phase. The pastoralist will only have the right to compensation for disturbance to land.

Native title may be wiped out by developments on a pastoral lease such as the building of houses, dams, fences, roads, and sheds. Can these things now be done without the permission of the native title holders? Will there be a need to negotiate? Will the native title holders be entitled to compensation? Who pays?

If native title holders have a right of access to a pastoral lease, are there any limits on the exercise of that right? Can they come without permission from the pastoralist – in vehicles, with guns, with alcohol, with friends, with miners?

If native title holders have a right to camp, hunt and fish, are there any limits to the exercise of that right? Can they set up camp for a long time? Can they hunt for commercial gain or in a manner which threatens the commercial entitlements of the pastoralist?

Do native title holders have the right to build their own out stations, to run their own pastoral operation, to set up tourist resorts?

Do pastoralists have the right to expand their land use from merely pastoral purposes, requiring a right of exclusive possession? For example if they want to run a major tourist operation, do they have to negotiate their change of tenure with native title holders?

State governments, believing native title to be extinguished on pastoral leases, have issued thousands of new interests in land since the *Native Title Act* without going through the processes for negotiating with native title holders. Those interests may be invalid.

The search for a political solution – the right mix of principle and pragmatism

After the Governor-General informed Parliament that the Howard Government's native title amendments would "honour the basic principles of the *Native Title Act*", John Howard took to distinguishing the High Court's *Mabo* decision from Keating's *Native Title Act* which contained "unwarranted extensions" of *Mabo*. He gave parliament this assessment of *Mabo*: "The substance of that decision, now with the passage of time, seems completely unexceptionable to me. It appears to have been based on a great deal of logic and fairness and proper principle." He was anxious to amend the *Native Title Act* to make it more workable but he made two oft repeated pledges: to legislate "in a

manner that completely respects the provisions of the *Racial Discrimination Act*"; and "to protect the common law rights of the Aboriginal people". As one would expect of a Liberal Prime Minister committed to non-discrimination on the grounds of race, he told parliament prior to *Wik*, "The pastoralists of this country have a legitimate interest in obtaining security, the mining industry has a legitimate interest in obtaining security and the Aboriginal people have a perfect right to see that their common law entitlements are not taken away. In framing our approach, we have regard to all those interests." Prior to *Wik*, Prime Minister Howard was less keen on negotiation with Aboriginal leaders than was Keating.

The unresolved question before the High Court's *Wik* judgment was the extent of common law entitlements on mining leases and pastoral leases. The Aboriginal challenge to the validity of the mining leases failed 7–0 in the High Court decision. The Aborigines were keen to have the High Court give some content to the claimed fiduciary duty owed to native title holders by the Crown. Not all judges addressed the issue but four who did assumed "that there does not exist any fiduciary relationship between them and the State of Queensland." The co-existence of native title on pastoral leases was another matter. The court has not decided that the Aborigines do have co-existing native title rights. But 4–3, the Court has decided that a pastoral lease does not necessarily extinguish native title rights. Nor does the termination of a pastoral lease necessarily result in the Crown assuming full beneficial ownership of the land. Native title may still survive.

Because of Keating's *Native Title Act*, such co-existing rights would not have any adverse impact on a pastoralist's capacity to renew the pastoral lease on identical terms. Nor does it affect the mortgagability of the pastoralist's interest because the High Court has said that the pastoralist's rights prevail. Any conflict of rights is resolved in favour of the pastoralist. The problem of workability ought not confront the pastoralist who simply wants to continue running a pastoral operation. To guarantee certainty for the pastoralist developing land only for pastoral purposes, there may be a need for a technical amendment to the *Native Title Act*. The problem is for the pastoralist who no longer wants to be a pastoralist and who wants to use the land as if it were freehold, excluding others including any native title holders from access.

The biggest problem is for the miners. If native title were extinguished on all pastoral leases, miners had only to deal with the pastoralist compensating only for disturbance to land. If there be native title holders, miners would also have to identify and negotiate with them in accordance with the provisions of the *Native Title Act*. Solving the problem for the miners, Mr Howard, should not abandon his promise that he will completely respect the *Racial Discrimination Act*.

Neither ought he take away Aboriginal common law rights while leaving everyone else's rights in tact.

Maintaining the principles of non-discrimination and negotiation, governments ought be committed to the rule of law for all Australians in a country where we do not single out people for adverse treatment on the basis of their race.

The legal novelty and complexity of *Wik*

Wik is authority for two new propositions of law:

(1) Pastoral leases do not necessarily grant the pastoralist a right of exclusive possession.

(2) Pastoral leases and other statutorily based grants of rights to land once they have expired do not necessarily result in the crown's attainment of the reversionary interest which includes full beneficial ownership and control exclusive of native title. Native title may still exist on such land.

Despite Kirby J's disclaimer, "I forbear, of my own motion, to reagitate the wisdom of the step taken by the court in Mabo (No 2)",6 these new propositions of law give native title far greater scope for present day survival than did the judgments in Mabo (No 2).

(a) *Non-exclusive possession and co-existence of native title rights*

In *Wik* the majority make it clear in the Toohey postscript that "the rights and obligations of each grantee depend upon the terms of the grant of the pastoral lease and upon the statute which authorised it."[7] So a grantee may have both a right and an obligation to develop land in the future. The majority also makes it clear that "there was no necessary extinguishment of (native title) rights by reason of the grant of pastoral leases under the Acts in question".[8] So the grant of a pastoral lease with development conditions attached does not necessarily effect an extinguishment of native title (even if it were to specify the location and area which was to be developed). The majority purports to resolve any conflict by saying, "If inconsistency is held to exist between the rights and interests conferred by native title and the rights conferred under the statutory grants, those rights and interests must yield, to that extent, to the rights of the grantees."[9]

Let's consider a simple case. A pastoralist has a lease with a development condition requiring him to erect a residence within five years. Let's say very hypothetically, it even specifies the area (0.5 ha) and the location (by the creek). The issue of the lease does not extinguish native title over that 0.5ha. The pastoralist hereafter has a bundle of "X" rights. The native title holders have a bundle of "Y" rights. In May 1997, the pastoralist commences construction of the house.

According to Gaudron J: "And to the extent that there is any inconsistency between the satisfaction of conditions and the exercise on

native title rights, it may be that satisfaction of the conditions would, as a matter of fact, but not as a matter of legal necessity, impair or prevent the exercise of native title rights and, to that extent, result in their extinguishment."[10] According to Gummow J, "That would present particular issues of fact for decision. The performance of the conditions, rather than the imposition by the grant, would have brought about the relevant abrogation of native title."[11] This does not sit happily with Gummow J's earlier assertion that "the question of inconsistency between rights" is not answered "by regard, as a matter of fact in a particular case, to activities which are or might be conducted on the land" but by "a comparison between the legal nature and existing incidents of the existing right and the statutory right."[12] Gummow says at another place that it is the statutory authorisation of activities amounting to physical inconsistency with the continued exercise of native title rights which would "manifest, as a matter of necessary implication, the legislative intention to impair or extinguish those rights."[13] Toohey J offers us no guidance.

But Kirby J opines that the leases under consideration in *Wik* were "a far cry from the situation in settled and occupied areas of Australia where the extinguishment of native title has a practical and necessary quality sustaining a legal determination of extinguishment by reference to the legal characteristics of common law or residential leases".[14] He goes on to say: "To suggest that the actual conduct of a pastoralist, under a pastoral lease, could alter the rights which the pastoralist and others enjoyed under the lease, would be tantamount to conferring on the pastoralist a kind of unenacted delegated power to alter rights granted under the Land Acts."[15] What about the lease we are considering at least in relation to the 0.5 ha which is our present concern? Presumably as of May 1997, the native title holder will be possessed of "Y-A" rights and the pastoralist will be possessed of "Y+A" rights if the development is lawful.

By distinguishing the Holroyd and Mitchellton leases, Gummow J indicates that it may be only grants "subject to conditions requiring improvements to the land" which are capable of (fully) abrogating native title over developed areas. He would have to be satisfied that there was "clear, plain and distinct authorisation by the relevant grant of acts necessarily inconsistent with all species of native title which might have existed".[16] If the statutory interests could be enjoyed without full abrogation of native title, then native title is maintained.

(b) *The Operation of the* Racial Discrimination Act *on Subsidiary, Co-existing Native Title*

The development condition is attached to a State lease granted pursuant to a State law which is subject to the *RDA*. On this day, the native title holder's bundle of Y rights is accorded the same Commonwealth protection as the pastoralist's bundle of X rights.

Pursuant to s.10(1) *RDA*, native title holders enjoy their bundle of Y rights "to the same extent" as any other titleholders. Gaudron and Gummow JJ make it clear that it is not the grant of the lease with development conditions which trims back the native title rights. It is the performance of the act, the building of the house. To say there is no problem is to argue that s.10, *RDA* has no application to this issue. The pastoralist can proceed and the native titleholder can be left unconsulted and uncompensated as if the RDA was not on the books.

Brennan CJ (Dawson, McHugh JJ concurring) (and bear in mind that Gaudron and Toohey JJ were joined with Brennan J in *Mabo* (No 1), the definitive judgment on the *RDA*'s operation in this area of law) raises a number of problems with the majority's hypothesis about the continuance and suspension of native title on pastoral leases including, "And, since the *RDA* commenced, would the provisions which annex statutory rights to a pastoral lease (for example, a right to receive an offer of a new lease) be ineffective by reason of s 109 of the Constitution?"[17] There is some doubt about the validity of any pastoral leases renewed between 1975 and 1994. Furthermore, one must at least concede doubt in answering a pastoralist's query whether, since the *RDA*, development conditions in a State granted pastoral lease would be ineffective by reason of s 109. Earlier, Brennan CJ (Dawson, McHugh JJ concurring) observes:[18]

> Third party rights inconsistent with native title can be created by or with the authority of the legislature in exercise of legislative power but, as the power of State and Territory legislatures is now confined by the RDA, a state or territory law made, or executive act done, since that Act came into force cannot effect an extinguishment of native title if the law or executive act would not effect the extinguishment of a title acquired otherwise than as native title.

The Chief Justice refers to the majority judgment in the *Native Title Act* Case as authority for this proposition. So presumably it is a proposition which has unanimous support on the present court, though Kirby J has not commented on the matter. In the *Native Title Act* Case, Mason CJ and Brennan, Deane, Toohey, Gaudron and McHugh JJ said the *RDA* "ensures that Aborigines who are the holders of native title have the same security of enjoyment of their traditional rights over or in respect of land as others who are holders of title granted by the Crown and that a State law which purports to diminish that security of enjoyment is, by virtue of s. 109 of the Constitution inoperative".[19] They went on to say that the *RDA* "is superimposed on the common law and enhances the enjoyment of those human rights which affect native title so that Aboriginal holders are secure in the possession and enjoyment of native title to the same extent as the holders of other forms of title are secure in the possession and enjoyment of those titles."[20] Applying this reasoning to the present issue, a fortiori, a development act by a

pastoralist committed since the *RDA* came into force cannot effect an extinguishment of native title if it would not effect the extinguishment of a title acquired otherwise than as native title. If native title is extinguished on developed land, the title must have been extinguished by the grant or by a development act approved by the grant, the development act having occurred before the passage of the *RDA*.

In *Mabo (No 1)*, Brennan, Toohey and Gaudron JJ said that the *RDA* "clothes the holders of traditional native title . . . with the same immunity from legislative interference with their enjoyment of their human right to own and inherit property as it clothes other persons in the community."[21] In striking down the *Queensland Coastal Islands Declaratory Act* 1985, Deane J said the operation and effect of that Act was "to distinguish between proprietary rights and interests to and in the islands according to whether they are ultimately founded in pre-annexation traditional law and custom or post-annexation European law. It discriminates against the former by singling them out for impairment or extinction while leaving the latter unaffected or enhanced."[22]

Given that pastoral leases are granted subject to State law which since 1975 is subject to the *RDA*, any inconsistency between "rights and interests conferred by native title" which survive the grant of the pastoral lease and "rights conferred under the statutory grant" cannot be any more resolved by asserting that the former must yield than by asserting that the latter must yield. Obviously the former can be limited by the grant of the latter provided the grant occurred prior to the passage of the *RDA*. Can the pastoralist proceed at some time in the future with the building of the house without consulting the native title holders and without compensating them? I think not. In fact, I think under the law as it presently stands, he can only proceed with the development with the consent of the native title holders. If I am wrong, I think it must at least be conceded that there is serious legal doubt, doubt which is not necessarily sown by ideological scare mongering legal advice. At the very least, there will be a need to expand the definition of past acts in s228(3)(b) *Native Title Act 1993* to include development acts consistent with the development conditions in pastoral leases granted before 1 January 1994. There will also be a need for the Commonwealth to commit funds for compensation. There may also be problems such as the relationship between the *RDA* and s. 61 (f) *Land Act* 1962–1988 (Qld) which permits a lessee of a pastoral lease to use the land for pastoralism, agriculture and "for such other purpose as the Minister has first approved in writing".

(c) *The historical revisiting of the self-governing colonies' failure to comply with Earl Grey's wishes*

Three members of the majority detail the communications from Earl Grey, Secretary of State for the Colonies, to Sir Charles FitzRoy,

the newly arrived Governor of New South Wales, in 1847–8 indicating the intentions of the imperial authorities. But they do not follow up the fate of Grey's directions which were unpopular among the power elite in the colony moving towards self-government. For example, Kirby J quotes Despatch No 24, Earl Grey to Sir Charles FitzRoy, 11 February 1848:

> It should be generally understood that Leases granted for this purpose give the grantees only an exclusive right of pasturage for their cattle, and of cultivating such Land as they may require within the large limits thus assigned to them, but that these Leases are not intended to deprive the Natives of their former right to hunt over these Districts, or to wander over them in search of subsistence, in the manner to which they have been heretofore accustomed, from the spontaneous produce of the soil except over land actually cultivated or fenced in for that purpose.[23]

Their Honours do not quote Grey's further instruction to FitzRoy in that despatch:[24]

> If therefore the limitation which I have mentioned above on the right of exclusive occupation granted by Crown Leases is not, in your opinion, fully recognised in the Colony, I think it is advisable that you should enforce it by some public declaration, or if necessary, by passing a declaratory Enactment.

Neither of which was ever done. Gaudron J quoted two other despatches from Earl Grey to similar effect.[25] Her Honour then notes, "No declaration of that kind found its way into the Order in Council which eventually issued."[26] Dr Heather Goodall in her recently published *Invasion to Embassy* explains why:[27]

> Few white groups in the colony were favourably inclined to anything Grey might propose. Despite a depression in the international price for wool, it was clear that the main hope for Australian economic growth in the 1840s was to be its pastoral industry. The squatters were heavily represented on the Legislative Council, and had made substantial gains in the *Waste Lands Act* in 1846, but they felt they had done this against pressure from Grey and others in England. They now saw themselves as aligned strongly with most of the major advocates for self-government in the colony. All these groups had been outraged by Grey's first attempt to devise a constitution for the approaching self-government of the colonies without consulting the colonists. By the time Grey sought to influence the colonies on native title to land there was firm resistance from the squatters against the humanitarian meddling in colonial affairs.

Two Orders in Council under the *Sale of Waste Lands Act Amendment Act* 1846 were issued in 1847 and 1849. According to Kirby J, "These developments provide the common starting point for the evolution of Crown leasehold tenure, including pastoral leases, in what are now the States of New South Wales, Queensland, Victoria and Tasmania."[28] Unlike Western Australia, South Australia and the Northern Territory, these jurisdictions, did not maintain reservations of Aboriginal access rights to pastoral leases. Neither of the Acts (*Land*

Acts 1910 and 1962) and none of leases (1915, 1919, 1945 and 1974) considered in *Wik* contained any reservations. Kirby J lists 19 Queensland Acts "with provisions for, or affecting, pastoral leases". According to Kirby J, "Most of the statutes contained express provisions conferring rights on third parties over a pastoral lease, inconsistent with the submission that the lease conferred rights of exclusive possession upon the lessee."[29] Toohey J says "they reflected a regime designed to meet a situation that was unknown in England, namely the occupation of large tracts of land unsuitable for residential but suitable for pastoral purposes."[30] On the other hand, the minority saw these statutory provisions as legislated exceptions to the right of exclusive possession. No member of the majority turned up any Queensland Act or later lease which contained a provision legislating or stating the Earl Grey understanding of continued Aboriginal access. Gaudron J said, "There is nothing to suggest that a right of exclusive possession was either a necessary or convenient feature of pastoral leases in the conditions of the Colony of New South Wales in 1847. And there is nothing to suggest that subsequent statutory measures culminating in the 1910 Act effected any significant change with respect to the estate or interest which they conferred."[31] But then again, there is nothing to indicate colonial compliance with Earl Grey's fervent wish that the peculiarly Australian pastoral leases explicitly permit continued Aboriginal access.

The majority has it that pastoral leases granted pursuant to statutes passed by the legislatures of the self-governing territories were not leases in the common law sense, there being no clear importation of imperial common law lease notions. Rather, pastoral leases were bundles of statutory rights permitting continued Aboriginal access in accordance with the wishes of the imperial authorities. These findings of the majority are difficult to reconcile with the specific wording and political context of the post-1849 orders in council and later statutory provisions resulting from the first deliberations of the colonial legislatures armed with the power to create these unique bundles of rights known as pastoral leases. An interesting account of the period between Earl Grey's despatches and New South Wales self-government is given by Dr Heather Goodall in *Invasion to Embassy*:[32]

> By late 1849 FitzRoy had his land administrators' support, and the power by Grey's second Order-in-Council to impose limitations on Crown leases. The squatters, however, continued to be bitterly opposed to any form of recognition of Aboriginal rights to land use. FitzRoy was not known for his deep interest in Aboriginal matters, and he came under intense pressure from squatting interests. In 1849 the Legislative Council established a Select Committee to inquire into the Protectorate and the state of Aborigines generally, a body strongly weighted in favour of pastoralists. Reporting in September 1849, it savagely attacked the Protectorate, recommending its cessation, then dismissed the concept of restrictions on

> leases and argued against even the small reserves. Such notifications of reserved land would compete directly with squatters' interests, and the committee argued that "settlers would be ousted of portions of their runs". FitzRoy was clearly in some sympathy with the pastoralists, and wrote with pessimism to Grey in November 1849 that he and the Executive Council agreed with the Select Committee's report that there was unlikely to be any productive outcome from the creation of further reserves.
>
> Yet the governor continued to pursue some elements of Grey's plan. In January 1850 FitzRoy decided with the Executive Council that the creation of around 35 new reserves in pastoral districts would be authorised, and, most disturbingly for squatters, that new lease conditions would be drawn up, "to secure to the Aborigines and others the right to wander over the unimproved portions of the lands demised". Then the will to resist squatter pressure began to evaporate. An important but as yet unanswered question is just why **the new conditions to Crown leases were never drafted.** [emphasis added] It appears that the Executive Council's decision met obstruction in the drafting process and was simply not followed up. This may reflect a fundamental lack of sympathy with the measure, on the part of either the governor or the administrative officers involved, which can be put down to successful pastoralist pressure. It may also, however, reflect the rapid shifts which overtook the issue once gold had been discovered in the colonies in the following year. This generated many changes to Aboriginal-white relations, one of which was the sudden end to conflicts about whether Aborigines could freely come onto pastoral leases.
>
> But the creation of Aboriginal reserves did go ahead. In February 1850 FitzRoy notified Crown Land Commissioners that "a suitable number of Reserves of moderate extent" were to be created for Aborigines in the pastoral districts, following closely the recommendations the commissioners had made in the previous year.

So there we have it. A colonial pastoral lease is not a lease, despite the language of the legislature, because it is a unique statutory instrument, with many variants, to be interpreted according to its terms, not according to preconceptions imported from imperial precedents. But this unique colonial statutory instrument does carry with it a right of Aboriginal access, not because of the language of the instrument (which in all its variants in eastern jurisdictions says nothing of such a right[33]) but because of the fervent imperial desires of Earl Grey. The one member of the majority who did not make use of the historical material up to and including the despatches of Earl Grey was Gummow J who observed:[34]

> There remains lacking, at least in Australia, any established taxonomy to regulate such uses of history in the formulation of legal norms. Rather, lawyers have "been bemused by the apparent continuity of their heritage into a way of thinking which inhibits historical understanding". Even if any such taxonomy were to be devised, it might then be said of it that it was but a rhetorical device devised to render past reality into a form useful to legally principled resolution of present conflicts.

The overturning of recent political and quasi-judicial notions of co-existence and the crown's reversionary interest

During the 1960s, many Aborigines moved from pastoral properties on to missions and Aboriginal reserves. Some also started moving into country towns and on their fringes. From 1964, alcohol was more readily served to Aborigines. On 1 December 1968, the Cattle Industry (Northern Territory) Award was extended to Aborigines employed on pastoral properties. During the hearing of the case three years earlier, all parties said that they were categorically opposed to any discrimination against employees on the basis of race. However, the pastoralists proposed a four-tiered salary and wage structure "based not on racial grounds but on work value". Ruling against the pastoralists, the Commission conceded that the result would be an exodus of Aborigines from pastoral properties to reserves and missions. The pastoralists had relied upon Convention III of the ILO, which provides that "any distinction, exclusion or preference in respect of a particular job based on the inherent requirements thereof, shall not be deemed to be discrimination". While the Commission agreed "that indigenous peoples should not be introduced precipitately to new forms of social and economic organisation", it decided to press ahead with award wage coverage, content with the thought:

> . . . that for the past 50 years or so the assimilation or integration of the Aborigines with whom we are concerned into the white community has been painfully slow. If the same pace were continued into the future, an indefinite time might pass before assimilation or integration took place.[35]

By accepting that many Aborigines would remain on pastoral properties, the Commission and the Australian public presumed that pastoralists had the power to turn off Aborigines from their pastoral leases if that were thought to be in the economic interests of the pastoralists. Aborigines would retain simply a right of access for hunting purposes in accordance with the stated reservations in Northern Territory leases.[36] Over time in the Northern Territory, many Aborigines found that even this limited right was exercisable only with the permission of local pastoral managers, many of whom had to implement the policy of absentee landlords. The Commission accepted the inevitability of Aboriginal dislocation as well as disemployment. But they were satisfied that there would be no abiding injustice to Aboriginal pastoral workers because displacement would assist in achieving the objectives of the policy of assimilation and integration:

> If, therefore, as a result of our decision, substantial numbers of Aborigines move to settlements or missions it is our view that the policy of assimilation and integration will be assisted rather than hindered. Those Aborigines who move will be those who are now having the greatest difficulty in understanding the concept of work and in fitting into our economic community, whilst those who

> remain will be the most advanced and therefore the easier to assimilate on the station properties.
>
> The employers express fear that disemployment would cause Aborigines to move to a life of handouts on the settlements. They emphasised their view that life on government settlements is demoralising and does not adjust or educate aborigines for assimilation into the white economic community. They based this on their own experience of employing aborigines from settlements and also on the view that the life on settlements does not help to make aborigines viable members of the white economic community because it does not teach them the meaning of and necessity for work. We do not agree with this. In our view the less assimilated aborigines may well be able to be assimilated or integrated more readily if they move on to settlements which are run especially for their welfare.[37]

By 1971 the Gibb Committee noted that there had been significant changes in the relationship between pastoralists and Aborigines. In many cases, Aborigines had been replaced with European stockmen. The Whitlam Government then appointed the Woodward Royal Commission into Aboriginal Land Rights. In his first report, Justice Woodward observed in 1973:

> It seems that this right has sometimes been denied, or its exercise discouraged, by property owners or managers fearing interference with livestock.
>
> On this point it seems that there has been concern expressed at times about Aboriginal dogs accompanying their owners and disturbing cattle. Other complaints have related to the indiscriminate use of firearms and to a failure to give any warning or notice of the presence of a hunting or camping party on the land. [38]

Justice Woodward then received detailed submissions from the land councils urging the establishment of a tribunal to determine traditional land claims to pastoral leases and suggesting that the reversionary interest in pastoral leases be granted to the traditional claimants once a pastoral lease had expired. Counsel for the land councils conceded that Aboriginal claimants could expect to receive possession of their land only if the value of improvements to the land were paid from accumulated Aboriginal funds. But the advantages for Aborigines would be receipt of the rent payments and ultimate Aboriginal ownership thereby providing traditional owners with unrestricted occupation once the pastoral lease had run its term. Justice Woodward was not attracted to this proposal. He thought the claims would be complex and lengthy:

> At one extreme there would be close religious and cultural ties with the land, evidenced by a detailed knowledge of myths and ceremonies affecting that land. At the other extreme, persons of mixed descent would assert some tenuous connexion through their mother or grandmother which might amount to little more than another man's saying that he grew up in a particular area and regarded it as his home country.[39]

Given the pastoralists' de facto power and Arbitration Commission authorisation to exclude Aborigines from a free, sustainable life style on pastoral lands over the last 30 years, Aborigines would not have to establish much in the way of ongoing physical connection with land to satisfy the native title test that they have by their laws and customs a connection with the land. Brennan J (Mason CJ and McHugh J concurring) said in *Mabo (No 2)*:[40]

> Where a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence.

Woodward was also troubled that most pastoral leases were not due to expire for another 40 years, and that in the meantime Aborigines could develop false expectations about their capacity for control and ownership of the land. He thought, "this could create a legacy of great trouble for both Aborigines and the wider Australian community in forty years time".[41] He thought that, "claims carrying varying degrees of conviction could and would be brought forward in relation to almost all the pastoral properties of the territory".[42] Woodward was reluctant to make recommendations with regard to the Northern Territory which could not reasonably be expected to be matched in other jurisdictions.

Ultimately he recommended that Aboriginal rights to enter, travel over, and camp on pastoral leases should be strengthened. Making provision for these statutory rights, he thought it difficult to distinguish between those Aborigines having a traditional interest in the land and others. He was agreeable to access rights being restricted in an area one kilometre from each pastoral homestead. He foresaw future problems with co-existence and living together. Somewhat ominously he observed, "If tensions reach a point where the cattle station management and the Aborigines cannot live side by side, it should not be assumed that it must be the Aborigines who have to move".[43] He also recommended community living areas be excised on pastoral leases. Reversing the policy of the Conciliation and Arbitration Commission less than a decade earlier, Justice Woodward recommended the taking of all reasonable steps "to arrest and reverse the drift of Aborigines away from pastoral lease lands and into towns or larger aboriginal communities".[44] He recommended an Aboriginal land commission, which could make recommendations about priorities for the purchase of land for economic development by Aborigines. He placed on hold the land council's suggestion that the reversionary interest in pastoral leases be transferred to traditional owners.

According to Toohey J in *Wik*, "To contend that there is a beneficial reversionary interest in the Crown which ensures that there is no room for the recognition of native title rights, is in my view, to read too

much into the Crown's title."[45] Gaudron J does not countenance the Crown acquiring a reversionary interest whereby its radical title is expanded to full beneficial ownership unless there has been a vesting of a leasehold estate which is not the case with a pastoral lease which simply grants the pastoralist a bundle of statutory rights over land, not an estate in land.[46] Gummow J specifically rejects the notion that the grant of limited interests such as a pastoral lease under the *Queensland Land Act* has as a necessary consequence "the acquisition by the Crown of a reversion expectant on the cesser of that interest, thereby generating for the Crown that full and beneficial ownership which is necessarily inconsistent with subsisting native title".[47] Kirby J is even more dismissive of the previously entertained notion, observing, "To invent the notion, not sustained by the actual language of the Land Acts, that the power conferred on the Crown to grant a pastoral leasehold interest was an indirect way of conferring on the Crown 'ownership' of the land by means of the reversion expectant involves a highly artificial importation of feudal notions into Australian legislation."[48] Rather than piling "fiction upon fiction"[49], he saw no need "to import the paraphernalia of English feudal leasehold notions".[50]

So in *Wik* we have moved well beyond the position of Deane and Gaudron JJ in *Mabo (No 2)* who observed, "If the slate were clean, there would be something to be said for the view that the English system of land law was not, in 1788, appropriate for application to the circumstances of a British penal colony."[51] They went on to say that "the practical effect of the vesting of radical title in the Crown was merely to enable the English system of private ownership of estates held of the Crown to be observed in the Colony." Between *Mabo* and *Wik*, the slate has been wiped clean by a new majority of the court. No good purpose is to be served by down playing the magnitude of the Aboriginal double win confirming the co-existence of Native Title on pastoral leases which do not provide the lessee with a right of exclusive possession and which do not activate a reversion of the beneficial interest to the crown on termination.

The search for solutions

One can still be a strong supporter of Aboriginal rights and an advocate of the political imperative *Wik* provides for land justice while having reservations about the court's judicial method. If ever there was a need for joint judgments, it was in this case. Here we have a 4–3 decision, all four of the majority writing separate judgments. Meanwhile, the minority signed off on one judgment confining judicial method to an assessment only of the statute and legal instrument called a "lease". The majority judges consider a variety of other factors including a distinctive reading of the history up until 1849 which is taken, at least

by Justices Toohey and Kirby, to be foundational, despite the lack of what Justice Gummow describes as an "established taxonomy to regulate such uses of history in the formulation of legal norms".[52] A consensual majority approach to reasoning as well as outcome would have contributed to certainty. The majority's failure to address the relationship between the *RDA* and the co-existence of subsidiary native title rights creates doubt about the effect of the Toohey postscript. The confusion between the law of extinguishment by Crown grant and the fact of extinguishment by action of a lessee renders the decision so uncertain as to be unworkable without complementary legislation. Fortunately, these matters are susceptible of ready parliamentary resolution restoring certainty and consistency to the law. The judgment provides not just the opportunity but the necessity for the Howard government to address the land entitlements of Aborigines on others' pastoral leases. The moral necessity for legislative action is highlighted by the dissenting three judges' observation (Brennan CJ, Dawson and McHugh concurring):[53]

> The principles of the law may thus be thought to reveal "a significant moral shortcoming" which can be rectified only by legislation or by the acquisition of an estate which would allow the traditions and customs of the *Wik* and Thayorre Peoples to be preserved and observed. Those avenues of satisfaction draw on the certainty of proprietary rights created by the sovereign power.

In the *Wik* debate, the principles relating to native title on pastoral leases are clear. Pastoralists and miners who use land for commercial purposes need and deserve certainty. Aborigines who have maintained their connection with their land are as entitled as any other Australian land holders to legal protection of their rights. Extinguishment of private property rights is permitted only in the public interest, not for the private gain of others. In modern Australia, we no longer tolerate discrimination against people on the basis of race. Where the principles conflict, there is a need for negotiated compromise or just legislation in the national interest.

Pastoral leases carry neither a right of exclusive possession for the lessee nor a reversion for the Crown. So native title can still exist on pastoral leases and can continue untrammelled and fully protected by the *RDA* after the lease has run to term. Extinguishment of native title would be financially crippling for the nation. Taking away property rights without compensation is unconstitutional at the Commonwealth level and morally objectionable at the State level even if the Commonwealth had power to pass a law rolling back the protection of the *Native Title Act* and permitting State extinguishment of native title without just terms. Extinguishment (with or without compensation) is not an option.

In the interests of certainty for all parties, there is a strong case for statutory definition of some native title rights and judicial determi-

nation of any outstanding native title rights. Pastoral leases do not carry a right of exclusive possession. Native title holders may have four types of rights:

1. non-access rights
2. access rights
3. rights to perform traditional activities on the land once access is obtained
4. additional usage rights up to and including rights to use and develop the land as if it were their freehold interest

Non-access rights: Non-access rights (such as the right to have a sacred site protected even though they had no right of access to it) need not concern us because they would be exercisable and restricted in the same fashion as pre-*Wik*

Access Rights: Native title claimants should be granted access to pastoral leases within the claim area (but not within 1 km of homesteads or accommodations). Regional agreements should provide for modes of identification and protocols for entry. Access to developments which extinguish or suspend native title including private roads would be possible only with the permission of the pastoralist

Traditional Usage Rights: Prior to *Wik*, some Aborigines and some pastoralists in Cape York agreed to a list of basic native title rights which should be attached to pastoral leases. Clause 10 of the Heads of Agreement of the Cape York Land Agreement to which the Cattlemen's Union of Australia is a party provides: "Pastoralists agree to continuing rights of access for traditional owners to pastoral properties for traditional purposes. These rights are:

- right to hunt, fish and camp
- access to sites of significance
- access for ceremonies under traditional law
- protection and conservation of cultural heritage."

Native title claimants should be guaranteed these rights without the need for the pastoralist's consent on any areas of a pastoral lease to which they have access. There should be no need for the tribunal to establish individually each of these rights. It ought be sufficient for the tribunal to be satisfied that the claimants are native title holders of the area who would then have the same statutory right to negotiate with developers as do native title holders on land which is not subject to pastoral lease. If the tribunal determined that the claimants were not native title holders, these rights would not be exercisable by the claimants until a contrary finding were made by the tribunal or a court.

Additional usage rights: Additional rights would not be exercisable by claimants without the consent of the pastoralist until the tribunal has determined the existence of these rights (eg. the right to build out stations, to conduct commercial operations including pastoral operations). Native title holders denied their additional rights prior to

determination would be entitled to compensation from the Commonwealth or State.

Pastoral leases are not leases but bundles of limited rights to use land for pastoral purposes. Pastoralists need to be certain that they can develop their lands for pastoral purposes whether or not those developments are prescribed conditions for continued enjoyment of the "lease". Pastoral developments, including agricultural operations incidental thereto, should be classed as Category D past acts or permissible future acts under the Native Title Act. This means:

- the development can proceed without the need to negotiate with native title holders
- native title is suspended for the life of the development
- compensation is payable by the Commonwealth or the state

Pastoralists wanting to use their land for non-pastoral purposes, requiring a right of exclusive possession should not be placed in a position superior to the native title holders. They ought to have to negotiate the title change with the native title holders. It would be unacceptable for government to grant pastoralists a blanket right to engage in all manner of primary production without ever having to negotiate with native title holders. On the other hand, pastoralists ought be guaranteed the right to engage in all pastoral, agricultural and incidental activities authorised or permitted under the terms of their existing leases. Given the variety of pastoral leases, there may be a need for a scheme similar to s.26 *Native Title Act* relating to permissible future mining acts whereby some acts can be exempted from the right to negotiate regime. The right to negotiate would not apply to "authorised pastoral acts" which are determined by the Commonwealth Minister to be excluded from the right to negotiate regime. The Commonwealth Minister could not make such a determination about a class of activity on a class of leases unless satisfied that the act is authorised or permitted under the lease, having first notified Aboriginal representative bodies and given them an opportunity to make submissions.

The forfeiture or termination of pastoral leases and other statutory grants of rights to land (other than the grant of a fee simple or a lease which expressly or by necessary implication carries a right of exclusive possession) do not result in the Crown's radical title being transformed into beneficial ownership, there being no reversion. Such grants under state law which have run to term cannot provide for renewals or extensions after 1975 if there be native title holders for the land. Pastoral leases renewed after 1975 and before the *Native Title Act 1994* may (strangely) have been invalid and thereby validated by the *NTA* ensuring extinguishment of native title. Pastoral leases can now be renewed automatically under *NTA*. But there may be compensation payable for the ongoing interference with native title.

There are thousands of leases and statutory rights that have been granted over past or present pastoral lease land since 1 January 1994. Some governments treated these grants as if they were not subject to the *NTA* procedures. Native title claimants did not exercise any election or waiver of their rights. There is no issue of estoppel. In law, native title claimants could now challenge the validity of any of those grants.

The moral and political case for another one-off law validating these grants would be the assertion that since 1994 there has been a national coalition of Aboriginal organisations resourced with native title lawyers none of whom ever took court action challenging the validity of such grants nor invoking the *NTA* procedures. As in 1993, validation with compensation may be a trade-off for some concessions made to Aborigines.

In the post-*Wik* era of co-existence of native title, there will be a need to revisit the threshold test for establishing claims.[54] The Waanyi rationale is unworkable in situations where diverse claimants can lay claim to all pastoral leases in a region. In *North Ganalanja Aboriginal Corporation v Queensland*, Brennan CJ and Dawson, Toohey, Gaudron and Gummow JJ said:[55]

> If it be practicable to resolve an application for determination of native title by negotiation and agreement rather than by the judicial determination of complex issues, the Court and the likely parties to the litigation are saved a great deal in time and resources. Perhaps more importantly, if the persons interested in the determination of those issues negotiate and reach an agreement, they are enabled thereby to establish an amicable relationship between future neighbouring occupiers. To submit a claim for determination of native title to judicial determination before the stage of negotiation is reached is to invert the statutory order of disposing of such claims.

They went on to say:[56]

> If the Registrar or a presidential member were at liberty to receive from a third person and to consider information or material which casts doubts on the prima facie ability of an applicant to make out a claim, the Registrar or the presidential member would be bound to give the applicant an opportunity to answer and then, perhaps, to allow the third person and the applicant further opportunities to reply to each other before the Registrar or the presidential member formed an opinion on the question whether prima facie a claim could be made out. The proceeding which was intended to lead to the formation of a preliminary opinion would become – as happened in the present case – a contest between parties with opposing interests and the controversy would be settled not by agreement between "parties" or by decision of the Federal Court as the Act intends but by a presidential member acting administratively.

Prior to the High Court decision in Waanyi, the Keating Government was already proposing changes to the threshold test.

Under the Keating test, the Registrar could have regard to whatever information in addition to the application was considered appropriate before deciding whether prima facie the claim could be made out. There would be an appeal to the Federal Court if the registrar refused to register a claim.

Not even the Keating Government pressured by a pro-Aboriginal Senate was prepared to contemplate a two fold right to negotiate for native title holders on others' pastoral leases at both the exploration and development phases. Given that pastoral leases cover 42 per cent of the continent and are the locations of the majority of new exploration and mining activities, a once only right to negotiate is inevitable for all native titleholders, especially given the fallout over the Century Zinc negotiations. I appreciate the Howard Government's desire to formulate proposals acceptable to state governments and industry groups. But many of the proposed amendments to the right to negotiate are too restrictive of Aboriginal self-determination, especially given that it will not be exercisable at the exploration phase:

- The reduction of the time for negotiation from six months to four months (s.35)
- The power of the Minister to stop negotiations and authorise an immediate development that will have substantial economic benefit to Australia provided the Minister "considers that there will be significant benefits to native title holders in relation to the land or waters concerned". (s. 34A) As the Australian Catholic Bishops said in their submission to Senator Minchin: "This is legislated paternalism."
- The power of the Minister to cut short consideration of an application by the independent tribunal. (s.36A)
- The proposal to stop a court or tribunal from having regard to the Aboriginal spiritual attachment to land when deciding whether to grant a developer access to the expedited procedure for determining a development application. (s. 237 (a))
- The decision not to permit an independent tribunal to make a determination which included a condition that a payment be made calculated by reference to the profit or income to be derived from the development. (s.38(2)) In its own discussion paper, the government said:

  > As a further encouragement to successful negotiation, . . . this would merely give the arbitral body a discretion to determine such a payment, not oblige it to do so. Such a change could give parties a stronger incentive to reach a negotiated agreement and it would not impact on the obligations of miners to make payments under state and territory royalty regimes. (p.17)

- The decision to allow the Minister to exempt from the right to negotiate an acquisition of land by government for a third party which is privately developing a public infrastructure develop-

ment. (ss.26(2)(d), 214(a), 253) In New Zealand, the privatising of public assets (including the fishing resource) provided the opportunity for the principles of the Treaty of Waitangi to be expanded. Here in Australia, government is anxious to cut back the Aboriginal entitlement to negotiate. There has already been a successful negotiation for the building of a pipeline in South East Queensland.

- The stricter new registration test is now to be applied retrospectively in that applications made before 27 June 1996 (the date of introduction of the first amendment bill) and complying with the existing registration test will be subjected to the new test once a development application is made. (Schedule 3, Part 2, Division 2, s. 7(3))

Conclusion

In answer to a Dorothy Dixer about native title on 23 May 1996, the Prime Minister told parliament: "We are trying to find a solution to a difficult issue. I say to all of the opinion formers in this country, including the leaders of the Aboriginal community, that we want practical reform to make the *Native Title Act* more workable. I want to give certainty to the pastoralists of this country. I want to give certainty to the mining industry and I want to protect the common law rights of the Aboriginal people." The High Court has now spelt out the ambit of those common law rights in the *Wik* case.

Armed with and troubled by the *Wik* decision, Mr Howard now needs to listen to the opinion formers in the country including the leaders of the Aboriginal community. It is nothing to the point that he finds it "a very disappointing judgment". He now needs to treat as closely with Aborigines like Noel Pearson, Mick Dodson, Marcia Langton, Peter Yu, Pat Dodson, the Aboriginal representative bodies and the new ATSIC Board led by Gatjil Djerrkura as did Keating in 1993. Otherwise, he will deliver neither certainty to miners and pastoralists nor protection of the common law rights of Aborigines.

Prior to the *Wik* judgment, the Howard Government could easily parody Keating's co-operation and negotiations with Aborigines as indulgence with the chattering classes and back room deals with self-selecting indigenous leaders. With a strong electoral mandate, Howard has constantly asserted that he harbours "different and strongly held views than the former government in relation to how that co-operation should occur". In the wake of *Wik*, Aborigines now have a bargaining position with the Howard Government which they did not enjoy before *Wik*. Backed by the High Court and the Senate, the Aboriginal leadership yet again will be called upon to negotiate in the national interest for certainty and workability but not at the cost of their

common law rights and not by being told that a High Court decision on property rights has reversed the assumptions of the Coalition's modest election promises.

Mabo was not a vote winner for Keating; neither will *Wik* be one for Howard. *Wik* will test Howard as *Mabo* did Keating. John Howard needs to open his door as Paul Keating did, and Kim Beazley needs to co-operate with government in the national interest in a way that John Howard never permitted John Hewson. The right mix of principle and pragmatism will be found in 1997 only if Aborigines can return to the table as they did in 1993. Then the Prime Minister will be able to table a bill in the parliament restoring certainty and rectifying a significant moral shortcoming in Australian land laws.

Endnotes:

1 (1992) 175 CLR 1 at 72
2 Ibid p. 72–3
3 Ibid p.117
4 Ibid p. 197
5 Hansard, Parliamentary Joint Committee on Native Title and the Aboriginal and Torres Strait Islander Land Fund, 28 August 1996, Darwin, p. NT 2022
6 (1996) 141 ALR 129 at 285; cf. Dawson J at p. 164 in dissent: "In the Native Title Act case, I indicated that I intend to follow the decisions of this court in *Mabo v Queensland* (No 1) and *Mabo v Queensland* (No 2). Following that course, I am able to express my agreement with the judgment of the Chief Justice in these matters."
7 Ibid p. 190
8 Ibid
9 Ibid
10 Ibid p. 218
11 Ibid p. 247
12 Ibid p. 233
13 Ibid p. 233
14 Ibid p. 271
15 Ibid p. 275
16 Ibid p. 275
17 Ibid p. 160
18 Ibid p. 152
19 (1995) 128 ALR 1 at 24
20 Ibid p. 25
21 (1988) 166 CLR at 219
22 Ibid p. 231
23 Despatch No 24, Earl Grey to Sir Charles FitzRoy, 11 February 1848, quoted by Kirby J, (1996) 141 ALR 129 at 267
24 Despatch No 24, Earl Grey to Sir Charles FitzRoy, 11 February 1848, quoted by Kirby J, (1996) 141 ALR 129 at 267
25 11 October 1848 and 6 August 1849, quoted at (1996) 141 ALR 129 at 197
26 (1996) 141 ALR 129 at 197
27 H. Goodall, *Invasion to Embassy, Land in Aboriginal Politics in New South Wales*, 1770–1972, Allen & Unwin, St Leonards, 1996, p. 51
28 (1996) 141 ALR 129 at 267

29 Ibid p. 268
30 Ibid p. 172
31 Ibid p. 207
32 H. Goodall, op. cit. 53. *The Australian Dictionary of Biography* entries on Grey and FitzRoy make two relevant observations. In 1848, Grey who had taken over the Colonial Office in 1846, ordered that new pastoral leases "were not to deprive Aboriginals of their rights to hunt except over land actually fenced or cultivated. He wished also for more reserves, to be held by trustees and used for the Aboriginals' benefit. To Grey, the Crown lands of the empire were a trust on behalf of posterity as well as the present occupants. He was unwilling that colonial legislatures should control lands that the empire as a whole might need in later generations. Nevertheless the Order in Council of 1847 failed, mainly because of the gold discoveries, which delayed the necessary surveys, undermined the bases of classification into districts and enhanced the values of pre-emption." In 1849, FitzRoy "was less able to steer safely between his duty to the Colonial Office and his desire to live at peace with the people of New South Wales. First, he annoyed Grey by failing to take a strong line on the protection of Aboriginals. Grey was zealous in this cause; FitzRoy was not, partly because he was reluctant to quarrel with land holders who found the Aboriginals a nuisance and objected to expenditure on their welfare." (*Australian Dictionary of Biography*, 1788–1850, Volume 1, Melbourne University Press, 1966, pp. 482, 386)
33 Professor Henry Reynolds says that "Queensland leases included such a clause throughout the nineteenth century." ("Sins of the Colonists Repeated", *Courier Mail*, 24 February 1997) But what conclusion should then be drawn by a comparison of 19th and 20th century leases in the same jurisdiction, and by a comparison of eastern jurisdiction leases without reservations and those of the west with reservations? In the same article Reynolds quotes the 1883 *Times* in London declaring none of the colonial governments could be trusted to deal fairly with Aborigines and "in the case of Queensland, a special unfitness for such a task". As Reynolds puts it, "Local attitudes were all summed up by a correspondent in the Brisbane weekly paper *The Queenslander* who wrote in 1880: settlers should come 'into unquestioned possession of the vast area of the colony'," and Aborigines , as Reynolds states it, "should be driven off the face of the earth."
34 (1996) 141 ALR 129 at 231
35 (1966) 113 CAR 651 at 663
36 In the Northern Territory any pastoral lease is subject to a reservation in favour of the Aboriginal inhabitants of the Northern Territory, permitting them to enter and be on the leased land, to take and use the water from the natural waters and springs on the leased land and, subject to any other law in force in the Territory, to take or kill for food or for ceremonial purposes animals ferae naturae, and to take for food or ceremonial purposes vegetable matter growing naturally, on the leased land. Since 1978, only Aborigines who are inhabitants of the leased land and those who, in accordance with Aboriginal tradition, are entitled to inhabit the leased land may avail themselves of the benefit of the reservation. But it does not apply to leased land within two kilometres of a homestead. Justice Toohey when reviewing the *Aboriginal Land Rights (Northern Territory) Act* 1976 in 1983 expressed the view that the right to enter and be on the leased land fell short of "an entitlement to reside or to construct dwellings" but did entitle Aborigines having the benefit of the reservation, to remain on land for any purpose short of residence. Toohey said the Northern Territory reservation provided Aborigines with substantial rights of access. The Aboriginal land councils had been critical of the fact that rights of access were not guaranteed by statutory recognition. While seeing force in such arguments, Toohey concluded that if "all pastoral leases contain the appropriate reservation, the same result is achieved".
South Australian pastoral leases contain a standard form reservation reserving "to Aboriginal inhabitants of the said state and their descendants full and free access into,

upon, over and from the said land except such parts as improvements have been erected upon and in to the springs and surface waters thereon and to make and erect wurleys and other native dwellings and to take and use for food birds and animals ferae naturae as if this lease had not been made". There were moves in 1984 to restrict such broad Aboriginal access to pastoral lands. The government rejected such a proposal and confirmed its policy to "maintain existing Aboriginal rights without either extension or curtailment thereof". In 1989, the reservation in the leases was replaced by s.47, *Pastoral Land Management and Conservation Act* which provides for co-existence of Aboriginal access rights for "following the traditional pursuits of the aboriginal people". The pastoralist can restrict access but the restriction must be "reasonable, must be as limited as practicable and, where appropriate, must be removed as soon as practicable". As Attorney General Griffin says, these rights have existed continuously for more than 140 years. His government "takes the view that if the concentration is shifted onto what the rights are, rather than what process you use to establish those rights or what the source of those rights is, much of the heat can be taken out of the current debate, particularly in respect of pastoral leases". (T. Griffin, "South Australia's Approach to Native Title – A Different Approach", 30 July 1996, p. 20)

In Western Australia, pastoral leases are subject to the "right of any person to pass over any such land which may be unenclosed, or enclosed but otherwise unimproved . . . . on all necessary occasions" and is subject to the further provision that "the Aboriginal natives may at all times enter upon unenclosed and unimproved parts of the land the subject of a pastoral lease to seek their sustenance in their accustomed manner" (s. 106(2) Land Act 1933). The Australian Law Reform Commission opined that, on a liberal interpretation, "use for ceremonial might perhaps be described as sustenance". During the Seaman Aboriginal Land Enquiry, pastoralists and graziers submitted that such a reservation was an anachronism but Mr Seaman, rejecting their submission, recommended that Aboriginal groups "should be able to seek access to pastoral leases by virtue of traditional association with or long association by residents on or use of the land concerned". He also recommended that they should be able to seek access so as to hunt, fish and forage on public lands.

In New South Wales, land councils can apply, under the Aboriginal Land Rights Act, to the Land and Environment Court for a permit to enter land for traditional purposes should the landholder not agree to access.

37 (1966) 113 CAR 651 at 668
38 (1973) Aboriginal Land Rights Commission, First Report, July 1973, p. 24
39 (1974) Aboriginal Land Rights Commission, Second Report, April 1974, p. 34
40 (1992) 175 CLR1 at 59–60
41 (1974) Aboriginal Land Rights Commission, Second Report, April 1974, p. 35
42 Ibid p. 36
43 Ibid p. 39
44 Ibid p. 48
45 (1996) 141 ALR 129 at 187
46 Ibid p. 209
47 Ibid p. 236–7
48 Ibid p. 280
49 Ibid
50 Ibid p. 284
51 (1992) 175 CLR.1 at 81
52 (1996) 141 ALR 129 at 231
53 Ibid p. 162

54 The threshold test in the original *Native Title Bill 1993* (clauses 56 and 57) required the applicant to have conducted searches of all official title registers whereupon the Registrar had power to reject the application if she considered that native title had been extinguished or that "the application does not contain sufficient information about any physical connection, that may be required by the common law concept of native title, to exist, or to have existed, between the applicant....and the land or waters covered by the application". This test was weakened during the Senate negotiations with the WA Greens and Democrats.

55 (1996) 185 CLR 595 at 617

56 Ibid p. 621

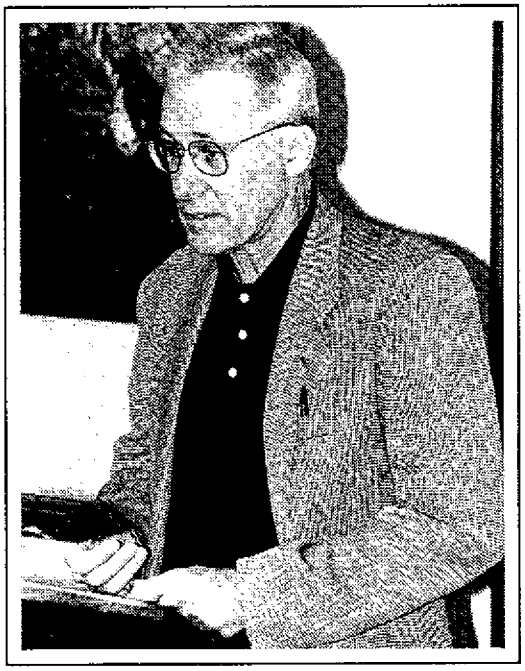

Photo - David Karonidis

Paul Karlstrom

Paul Karlstrom is West Coast Regional Director, of the Smithsonian Institution's Archives of American Art. On Wednesday 12 March 1997, Dr Karlstrom addressed The Sydney Institute on the topic of American popular culture and its impact on the West. Dr Karlstrom is the editor of *On The Edge of America – California Modernist Art 1900–1950.* He is based at the Huntington Library in San Marino, California.

ON THE EDGE OF

AMERICA: CALIFORNIA MODERNIST ART AND CULTURE

Paul Karlstrom

When I was invited to participate in the USIA/Smithsonian international speakers program, I immediately began to think how my topic might best relate to Australia. Most of us in the USA are familiar with your country through the Australian films that provide a refreshing break from most of our Hollywood fare. Among my favourites are *Picnic at Hanging Rock, My Brilliant Career, Priscilla Queen of the Desert, Strictly Ballroom, Muriel's Wedding* (I must confess that I haven't yet seen *Shine*). Some of these have a kind of quirky, off-centre and very appealing quality that has come to be associated with Australian film. Anyway, we "know" Australia in this way, a limited picture. Australia remains exotic, providing glimpses of itself mainly though exported films and Qantas ads featuring unusual flora and fauna.

According to director Craig Rosenberg, quoted in a San Francisco *Examiner/Chronicle* Sunday feature entitled "The Australian Invasion": "We have a shared culture with Americans, but we still seem exotic. It's the same language, but we talk funny." (Well, I expect you think I talk funny. Fair enough). Thirty-one year old Rosenberg, whose *Hotel de Love* is currently playing in major American cities, goes on to acknowledge that his generation has been greatly influenced by American cinema. An even younger member of the Australian "New-Wave", 23 year old director of *Love and Other Catastrophes*, Emma Kate Croghan, said that her contemporaries were the first to be brought up on video: "We had access to all the American films that will mark the difference between my generation and film makers like Peter Weir, who were more influenced by art-house repertory."

This is a very useful starting point for us. First, California, like Australia, remains exotic to much of the rest of the world. It has also to a large degree – again like Australia I suspect – invented itself, creating a culture to match its ambitions and desires. And when one speaks of American culture – especially abroad – one is generally referring to the products of the entertainment industry, most of which are formed,

packaged and distributed (if not always "created") in and around Hollywood. Second, although this is not a talk about films, it seems clear that's an area in which Australia and California are closely linked. I imagine a kind of dialogue involving shared history and immersion in popular culture.

Our subject is, to a large extent, popular culture, its role in creating contemporary art, and its international impact. California – more than any other state – represents popular culture, social innovation and trend setting. I expect we are still viewed in terms of images from the 1960s counter-culture. This no doubt explains why last week I was interviewed by phone on ABC Canberra on the "art of flower power". But now I realise this comes from a perceived capacity of California – perched precariously on the edge of America – to effect social and cultural change.

In just such an environment, physical and psychological, popular culture flourishes and fine art inevitably reflects this dominant presence – now the leading industry of the southern part of the state. In what I'll call a climate of mass desire, there has developed an alternative modernism embracing everyday life and experience, not excluding recreation and entertainment. If the crucial, defining element of recent 20th Century art is a questioning of what in fact is art, and a willingness to narrow the historic divide between high art and mass culture, then California may well be seen as playing a key role.

But before proceeding to the art part, I should make a few random observations – my opinions, really – on the nature of American pop culture and its worldwide impact. The first thing to remember is that pop culture is American culture. It's entirely authentic, growing out of the national experience and self-conception. America didn't lower its sights to mass culture. On the contrary, it sought, often desperately, to achieve high art along the European model. Nonetheless, the peculiar dynamics and opportunities of a democratic, market-driven, consumerist society *generated* a populist, non-elitist culture. America's notion of culture has always been based on entertainment and recreation – as in the *New York Times* section, Arts and Leisure. I suspect that older societies – Great Britain, Japan, much of Europe – have had to choose mass culture against their natural inclinations and traditions. In effect, there seems to be a self-consciousness in these efforts to participate – SONY and others buying into the Hollywood entertainment industry – that may come from an awareness of lowering cultural sights. This is clearly not the case in California and I doubt that it is here in Australia.

I realise that the influence of American popular culture is looked at suspiciously abroad, even while the products are being voraciously consumed. American exports – movies, TV, music, MTV – are often viewed as powerful weapons of cultural imperialism. Their effect, if not

actual intention, is to eliminate national differences and homogenise worldwide experience. This is a legitimate concern. It is, after all, a question of national identity. France is especially prickly on this issue, seeing its culture at risk from the debasing influence of *Bay Watch* and Arnold Schwarzenegger-style action films. Nonetheless, American movies have a far greater share of the market even in France than does the "tonier" local film industry. I expect that the rereleased *Star Wars* trilogy will do exceedingly well in Europe this second time around. And the only reason is that the audiences are there. According to the American view, culture – like everything else – succeeds or fails at the box office.

Many in the US, and virtually all film critics, deplore this situation. Currently there is a nostalgic longing for the art house and an enthusiastic embrace of independent films. The irony is that major Hollywood studios actually own distributors like Miramax (Disney, I believe). And the standard industry mechanism is in place to market "anti-Hollywood" independents. There's even a new cable station – Independent Film Channel – being vigorously promoted. Furthermore, as soon as foreign directors get picked up at Sundance or some other "indie" showcase, they quickly depart for Hollywood. Peter Weir, Mel Gibson, Jane Campion, *Shine*'s Scott Hicks, Nicole Kidman, Judy Davis – all have made the pilgrimage. As Craig Rosenberg, who himself has already moved, says: "The best Australian writers go to Hollywood. . . If you want to make as many films as you can, you need to come where there is the most money." A very practical consideration, even for creative people and artists, at least those involved in entertainment. So, yes, it does usually find its way back to money and the marketplace. And in this respect we mustn't forget Rupert Murdoch, now a major owner of the sources of distribution of American popular culture.

This is a huge topic, one that we can barely touch on in the short time available. I hope that two more observations, one historical and one contemporary, will help put the issue in perspective.

(i) During the 19th Century there was an artistic and cultural tension between France and America, caused in part by a US luxury tariff on various imported goods. At the time, Americans were heavy collectors of French contemporary art, notably impressionism. The tax was a blow to the French market at the time of the 1889 Paris Exposition. As UCLA art historian Albert Boime points out, this was not strictly an economic measure; it reflected a periodic US impulse to resist European "colonialism". From the other side of the Atlantic, America was seen as an outlet for goods, its consumerism actively cultivated.

(ii) Currently, there is a struggle between the World Trade Organisation and Canada over the heavy tariff imposed upon US magazines, notably *Sports Illustrated*. WTO says it's illegal, but Canada

responds that its magazines would quickly vanish without protection. Their view is that culture is just another business venture for the US while for Canada it is tied to a sense of identity and history. Ironically, Canada has $2 billion in cultural exports, including Alanis Morisette, the all-time top female artist in sales – $20 million worldwide, $13 million in the States. Nonetheless, the American position is to maintain free trade, including that involving cultural "instruments". According to National Public Radio (my source for these figures), the WTO ruling against Canada is against appeal.

The ideas that I want to share today have a close connection to a book that has just been published by the University of Canada Press. *On the Edge of America: California Modernist Art, 1900–1950* is an anthology consisting of eleven essays addressing different aspects of California art and culture. As editor, I came to see a point of view that ran throughout most of the essays – that California, in response to its own social and cultural needs, constructed an alternative modernism that operated with an awareness of developments elsewhere, but outside the mainstream. In effect, this is a challenge to the idea that cultural significance is determined by a critical/historical apparatus centred in New York. The book argues that regional phenomena – and I would think this applies to Australia as well as other sections of the US – must be dealt with on their own terms and with reference to the circumstances in which they develop. Such an approach greatly expands our understanding of what modern culture – and art – can be.

In California, this involves the entertainment industry, a difficult cultural leap for the more staid eastern seaboard. Nonetheless, let's quickly look at a few artists for possible connections with Hollywood – some *rapprochement* between high art and popular culture that may suggest what is truly distinctive about California modernist art. Answering the common critique from the east, historian Carey McWilliams attributed the region's artificiality instead to "highly imperfect cultural adaptation, the general unrelatedness of things, the ever present incongruity, and the odd sense of display". For example, Disneyland and the new Getty Centre: the entertainment industry and the culture industry.

Above all, it is the very lack of cultural "baggage" – traditions and institutions – that provided an unusually open, creative environment, one in which artists of imagination were at liberty to invent and experiment with more than were their colleagues in the east. This youthful openness, and sense of "frontier", of a society uniquely attuned to the present and highly receptive to popular culture, has attracted European intellectuals such as Jean Beaudrillard. Embracing a "reality" created from popular culture, Beaudrillard claimed that, "Today, when the real and imaginary are confused in the same operational totality, the aesthetic fascination is everywhere . . . and so

art is everywhere, since *artifice is at the very heart of reality.*" In short, understood properly, apparent liabilities may be converted – through imagination and creative opportunism – into cultural opportunities.

Such was the case with Richard Diebenkorn, the subject of an admiring *New York Times* profile several months before his death. A main point of the article by critic Michael Kimmelman was, for him, the extraordinary discovery that art of the highest order could be produced outside New York. Diebenkorn saw it differently, crediting that distance for the development of his art. In fact, Diebenkorn's modernism is based firmly on European sources, notably Matisse, but it evolved to the Ocean Park abstractions in an individual and personal way.

Similarly, Peter Alexander is convinced that his art could only develop as it has in his hometown Los Angeles, where he's chosen to live and work. In his view, place and one's experience of it play determining roles in the look of the art created there. His Sunset series supports this belief – the unembarrassed sensual glamour of these images assumes a very specific significance when the subject is recognised as a discredited (in terms of high modern art) cliché from 19th-century romantic landscape paintings. By his use of "debased" imagery and style (velvet paintings), Alexander is consciously defying what he views as the restrictive authority of the east. He is among those artists who continue to push their work to test limits. For example, his most recent – very elegant – drawings are (perhaps incongruously) based on images from erotic videos. It may be too much to say that these artists are enjoying the liberating agency of flower power. But, there is no question that California has fostered a willingness to fully examine and explore human experience.

Another aspect of proximity to the entertainment industry is the celebrity "filmstar" image appropriated by the Venice Bohemia that grew up around the Ferus gallery. Increasingly there was a notion that little separated life and art; behaviour and image were seen as legitimate aspects of the artlife. One of the great sources of such ideas was Marcel Duchamp, who was given his first retrospective at the Pasadena Museum of Art, near where I work. None of this should be surprising. After all, cinema is the main cultural expression in LA and it is also *the* new modern art form of the 20th Century. Part of its "modernity" lies in its democratic qualities, broad audience, and ties to consumer society. Geographically removed from prevalent ideas of the *obligations* of high art, these new-breed art makers felt more comfortable in this *low* art ambience. The result is that they felt free to rummage around for materials and subjects, usually choosing those close at hand and familiar from everyday experience – important examples being mass advertising, entertainment, aero-space, surfboards and cars. Michael McMillen displays the compelling influence of car culture. This same interest is seen in *Star Wars* and *Road Warrior*, films that emerge directly out of the

California hot rod experience. For all its futurism and special effects, George Lucas's trilogy reflects his experience of hot rod culture growing up in California's central valley (recall *American Graffiti*).

An artist who brought impeccable modernist credentials to California was Man Ray, who spent the entire 1940s in Hollywood as a refugee from occupied Paris. The surrealist quest for personal (and societal) liberation through sexuality are distinct features of the California counter-culture of which Henry Miller may be regarded as an antecedent and which informed the work of artists such as the Bay Area's own Mel Ramos. A work like Miss Grapefruit Festival (1964) literally luxuriates in California iconography, particularly of the "flower power" 1960s. Here we must acknowledge another California paradox. In what is billed as one of the most permissive spots on earth, there was until this year a statute against breast feeding in public. (I must say I was grateful my wife was never arrested). And not too many years ago one of LA's major urban beaches, Venice, was swimsuits optional.

Many were indeed attracted to California by the myth attached to movies, stardom, popular culture, lifestyle and, frankly admitted in some cases, hedonism. Among them were two of our most prominent artists: David Hockney and Ed Ruscha. As we try to construct a California art history, this erasure of the once clear boundaries between high and low – the refusal to exclude that which heretofore was deemed as outside the realm of art – is regarded as a key feature of both conceptual and postmodernist art.

Ironically, one of the greatest exemplars of this "fusion" was a German emigre, Oskar Fischinger, the film avant-gardist who came to Hollywood to work on animation for Disney's *Fantasia*. In fact, abstract film accounted for some of the area's most important visual activity and Fischinger's achievement was especially distinguished. Artists moved back and forth between animation and painting. "Motion Painting #1" is a major work about motion and change which literally fuses painting and film. Fischinger was among a handful of artists who took full advantage of a creative climate conducive to the breaking of barriers. Another was Irving Block, a matte-shot artist at 20th Century Fox who co-wrote the story for the science-fiction classic *Forbidden Planet* (1956) and designed Robby the Robot. His work in low-budget horror and sci-fi included earlier films such as *Rocket Ship X-M* (1950). Block was also an accomplished painter whose works are in collections such as the Smithsonian's Hirshhorn Museum.

The idea of fluidity, of "crossover", is very important to an understanding of modern contemporary art in California. Terry Allen stands outside conventional art activity. A critically acclaimed country-rock composer and singer, he incorporates his music into conceptual art works. Now living in Santa Fe, he started his career in LA and his aesthetic and creative sensibility were undoubtedly formed in California – as was that of

fellow New Mexico resident Bruce Nauman – encouraging him to roam widely in the shared world of art and popular culture. As with Nauman and a host of artists of our time, Allen's art is in the service of ideas – reminding us of the California legacy of Marcel Duchamp.

Like Terry Allen, Llyn Foulkes has immersed himself in the realm of popular culture. But Foulkes has ended up taking an antagonistic position, using the most familiar signs of mass culture to attack what he sees as the dehumanising effects of consumerism, typified by the corporate power of Disney. Michael McMillen, who loves Australia and wanted to join me on this visit, draws as heavily upon popular culture and the debris of society for his materials and inspiration. But he takes a different view. In fact, he worked for fifteen years as a set-builder for movies in his native Los Angeles. His installations, draw directly upon that craft and ideas of scale and illusion. Playing with the ambiguity of scale is strikingly evident in *Mike's Pool Hall*. The only view possible is through a wide-angle lens, confounding the ability to measure and determine one's place in the room. McMillen describes his work as manufactured realities based on low art and genre, "constructs" that are indebted to surrealism and the California assemblage movement.

Finally, let's look at another – more recent – European emigré who has adopted Los Angeles as his home – David Hockney. Internationally famous, Hockney nonetheless has more than any other artist adjusted his modernism to capture the character and spirit of place, Southern California. Like Ruscha and John Baldessari, Hockney is discussed in terms of internationalism and mainstream movements, in this case POP art. However, the true character and meaning of his work emerges in its *transformation* of style and its subordination to the requirements of subject and even personal interests. A long time LA resident, his art has become a celebration of his adopted home.

I'd like to leave you with the idea of transformation as a key term in connection with California art – taking traditions and imported movements and adapting them to new and *alternative* regional society and culture. At the same time there's a deep need to recreate cultural identity lost by the move west. The story of California, then, is one of a dynamic between freedom and invention and a nostalgic longing for the solidity of a society left behind.

Insecurity and the heady confidence of independence are both part of the creative profile. This phenomenon is seen clearly in Hollywood, with its attempt to import "high culture" to give respectability to a low-brown art form. To a large extent, entertainment became the operative culture. Southern California society and art merge in a way that distinguishes much of the cultural production while suggesting a regional modernism that expands our notion of the term, more significantly, our understanding of the forces that have shaped the cultural landscape of our time.

Photo – David Karonidis

Jenny Brockie

Well known to Sydney as the presenter of Radio 2BL's prime morning slot in 1995 and 1996, Jenny Brockie has spent 20 years as a broadcaster and program manager. She's been a political reporter, worked on ABC's *Four Corners* and made the documentary films *The Devil You Know* and *Cop It Sweet*. Jenny Brockie spoke for The Sydney Institute on Tuesday 18 March 1997.

HEART VERSUS
HEAD: JOURNALISM AND THE AUDIENCE

Jenny Brockie

I'd like to begin tonight with a quote from James T Aubrey, a man who was president of America's CBS television network in the early sixties. Aubrey was, even by American network standards, a most unappealing media beast. According to writer David Halberstam, the CBS president was rapacious and shameless, with a killer instinct for the lowest common denominator, or as Aubrey himself rather succinctly puts it, "broads, boobs and busts".

He wanted no old people on his network , no physical infirmities, no social issues and no maids (people, he said, didn't identify with servants). He called for lots of action in CBS programs, as little thinking as possible. In one memorable outburst the CBS president, who, uniquely it seems, believed American network TV was too highbrow, declared:

> I can't communicate with the creative people, they just won't listen. The trouble with creative people is that they don't know the public. The people out there don't want to think. I come from out there.

Admittedly James Aubrey was extreme and clearly self-reflection wasn't one of his strong points. But at least he was honest. As David Halberstam points out, it wasn't so much that Aubrey was worse than his fellow hucksters at CBS it was "that he did it with such abandon and so little apology". He was crass and crude and he hated the News Division because it took up too much valuable airtime – time that could be spent on shows like the *Beverley Hillbillies* and *Mr Ed*. In Aubrey's first two years, CBS profits more than doubled though he was eventually fired (but that's another story).

It would be comforting to think times have changed and that Aubrey's stance was uniquely American. That after three decades the people running our media are wiser and more sophisticated about audience tastes and needs than the former CBS president. That his views are those of a dinosaur media age long since past. However, I'd

argue that the Aubrey phenomenon is alive and well. If anything has become more sophisticated, it's the audience, not the people running some of our media.

When I first read about Aubrey in David Halberstam's book *The Power that Be* in 1979, I was a young journalist working in TV current affairs. I'd only been in the media a couple of years and I was wide-eyed, driven and imbued with idealism about the role of the Fourth Estate I was also drawn to journalism because I was nosey and loved story telling. It seemed the perfect profession.

But it wasn't long before versions – albeit tamer versions – of James Aubrey began popping up everywhere. In those days they usually smoked, called you "love" and spoke with breathtaking confidence about the "punters", meaning you, and the audience "out there". I sometimes wondered aloud how they knew what the audience wanted. With a look of barely disguised contempt they'd usually mutter something about years of experience and instinct. It was hard to argue against when you were 23 but it isn't so hard now.

When Gerard Henderson first invited me to give this address I was in the middle of something of a professional maelstrom. My morning radio program on 2BL had been axed and I was struggling to make some sense of the decision. I wanted to know why, even in the context of budget cuts, our show had been one of the first things to go.

One conversation stuck in my mind. A kindly ABC executive had taken me aside towards the end of the year and rather pointedly remarked that "they" meaning my radio bosses, wanted "more heart and less head" on morning metropolitan radio, apparently based on audience research. It rang bells. I'd heard this notion discussed before. Heart versus head – what on earth did they mean? Mood versus content? Feeling versus intellect? I couldn't help but find it a touch self-defeating, in analysing anything, to be pitting one vital body part against another.

I have no interest in lingering on the internal politics of the ABC, but the experience has caused me to reflect more broadly on my profession, perceived audience needs and the philosophies driving our broadcast media. And that's what I'd like to talk about tonight. In doing so I'm confining my remarks to television and radio because they're what I know.

I have heard versions of the heart versus head argument many times in my 20 years or so as a journalist. The dichotomy comes in various guises: light versus heavy, serious versus popular. According to this model, all broadcasting can be reduced to two essential types, each mutually exclusive. You're either one or the other. For heart, read popular, trivial, quirky, feel good, in touch with real people (just like the commercial media). And for head, read intellectual, serious, respectable and boring, aimed at an elite (just like the ABC).

It is, in my view, a false and simplistic dichotomy – a concept as banal as it is dangerous. Never mind that trivial stories can be boring, and serious stories entertaining, that doesn't fit the model. Forget notions of good and bad storytelling, and whatever you do don't challenge media form. If you want audience, go for the heart, if you want to be worthy and boring, go for the head.

If you doubt the pervasiveness of this thinking, consider the battle being played out in the state's Industrial Commission in the now infamous Jana versus Channel 7 fiasco. On the surface you'd think it was a simple case of a prominent journalist wanting to be serious and respectable and a network wanting to be trivial and popular. The real story is of course far more complicated – involving personalities, power plays and money. But the more interesting stories often get lost in the application of this simple model.

The model is reinforced by the conventional wisdom of marketing and advertising. Media managers talk, especially in commercial broadcasting, of A/B category audiences – broadly that's educated people with lots of disposable income, good advertising targets but not enough of them – they're the "head" audience. Then they talk of C/D category audiences – less well educated, likely to live in newer suburbs and lots of them – the "heart" audience. The assumption lurking behind all this seems to be that university graduates don't feel and suburban families don't think.

Every few years in radio and television offices across the land, executives lurch from heart to head and back again, depending on which audience they think they want to attract. Program makers follow in their wake.

"We're gong to make a serious respectable program," someone declares, and journalists come on board with a mixture of wide eyed enthusiasm and cynical resignation (depending on how long they've been around). Remember *The Reporters, Page One, The Times*? If it's commercial television a series of weary glances are exchanged between those who know the cycle. Well meaning and talented journalists set about producing the "important" stories. They undertake investigations, analyse, agonise – sometimes successfully, sometimes not. But if, after a few months, the ratings aren't deemed good enough a series of meetings are called. The storytelling is seldom questioned, it's the stories themselves that must be flawed, so there's an executive proclamation "I think we're too serious". Then the lusty lurch towards more human interest or, in the case of radio, more talkback and fun, those "quirky" tales that make people feel good. In television one colleague used to describe them as the "skateboarding duck" stories (born apparently out of his own searing experience). And don't be fooled into thinking this is just a commercial phenomenon. I recall one period in ABC television when a particularly panicky executive

producer, concerned we were getting a bit too worthy, suggested I just pop down to Martin Place to vox pop people about communism – no particular reason, just seemed like a good idea at the time – to get in touch with some *real* people.

"Why don't we do more feel-good stories?" people start to mumble. Then a year or so passes, people start muttering about credibility and it will lurch back again. "We're too trivial, too light, we need more credibility, gravitas, investigative stories" and so on. And then the most dreaded of phrases. "What we need is 'Someone Authoritative' to front the program." Presumably if they introduce the stories on skateboarding ducks it might be okay. And so on and so on. At the heart of it all is the notion that someone knows what they're doing, and that someone somewhere understands what the audience wants. But do they and who are these people?

In a career spanning 20 years I've worked with some of the best and worst media managers in the business. The best have shown a healthy respect for audience diversity, a passion for research and information. They combine good stories with good story telling. The best of programs like *Sunday, Lateline, Four Corners* and *AM* are the product of this kind of thinking. But the worst type of media manager knows he's smarter than *the audience*, and it is the audience, a blob he (and it usually is a he) can reduce to a lowest common denominator symbol.

These people are dangerous. Forget the fact that the population is diverse, forget even the relative complexity of the advertisers' ABCD model. Just think of the typical person you're talking to over the back fence. And just whose back fence might we be leaning on? Don't ask.

I hope you'll excuse me if I insult you when I pass on the way I've heard you, the audience, described over the years: "the punters", "the masses", "the mums and dads", "the oldies", "the great unwashed", "north shore matrons", "eastern suburbs yuppies", "inner city trendies", or the most elusive of characters "the average person in the western suburbs". To be fair, journalists use these terms too, though more often than not we hear them in the context of a knock back for a story idea or criticism of our programs; "the average person in the western suburbs isn't interested in politics", "the punters couldn't care less about corruption", or my all time favourite, "the audience won't understand".

The audience won't understand. It's another way of talking down to you or in some cases not talking to you at all. I've heard executive producers declare, à la *Frontline*, "well I couldn't care less about. . ." (fill in the blank with Bosnia, Rwanda, tax reform and so on) as evidence they have their finger on the pulse of the nation. The decision is made on your behalf.

Even if these stories are done there's often a tendency to assume the audience knows absolutely nothing, thus virtually ensuring the stories are tedious. I'd be the last to suggest we don't have a duty to explain and clarify. But I cringe when I hear the words, "I think we need a user's guide to such and such", which usually means a Romper Room explanation of where Bougainville is, what the Police Royal Commission has been doing for the past two years or that Germaine Greer once wrote a book called *The Female Eunuch.*

A colleague of mine describes the mentality well, he says its end point is that feeling you have when you turn on your radio or television to find you're being told something you already know at half speed. Precious airtime being used to state the obvious, all because of that homogenous blob, you, "the mums and dads", don't really understand.

Of course the people who decide you need to be spoon fed information or in some cases be given no information at all, head off to their middle class homes in their company cars confident they have you pegged. When criticised they point to audience research and ratings as evidence they're right on track and their critics are a bunch of intellectual bores who wouldn't have a clue what "the average person in the western suburbs" wants to watch or hear. In the end, they think they're smarter than you are and they have to compensate for the fact that your tastes are simple. Why feed you filet mignon when there are plenty of hamburgers around, and the audience research shows people just love McDonalds.

As a result much of the mainstream media feeds you a predictable diet of crime stories, disasters, quirky "fun" tales, meaningless talkback, and the occasional grab from the prime minister or opposition leader.

American news anchor Linda Ellerbee wrote about it in her book *"And So It Goes" Adventures in Television.* She described the way American television news producers would turn down certain stories because they were too dull or complicated to be understood by "the plumber from Albuquerque". The examples at the time were stories about starving people in Ethiopia which when they eventually did make it to air resulted in a swift and generous reaction from a caring American public. Getting the stories to air (it should be noted that they were filed by the BBC correspondent) required people like Ellerbee to take on her network bosses. She quoted one executive of a network newscast as saying he began each night with the assumption that the viewer had never heard of Lebanon. As she points out in the book, he didn't seem to see the irony here, if people hadn't heard of Lebanon perhaps it was time for him to get another job.

This syndrome is played out in our media day after day – for the plumber from Albuquerque just substitute the average person in the western suburbs. For Ethiopia, Rwanda, for Lebanon, Bosnia. The ABC is certainly less of an offender than the commercial stations, but

believe me the syndrome is alive and well in pockets of the national broadcaster too. And I sometimes wonder whether what these executives should really be saying is what James Aubrey had the guts to say: "The people out there don't want to think. I come from out there". Linda Ellerbee put it well:

> Imagine, if you will, the arrogance of some producer who is too scared to ride the subway after dark, too lazy to start a fire in his fireplace without a fake, self starting log, too ignorant to change a tire, and too confused to do his own tax return making fun of the plumber from Albuquerque just because he's a plumber, he lives in Albuquerque and he watches television news.

It's probably important to pause and say that many of the people I've worked with – especially in ABC television – have a genuine commitment to and respect for research, good storytelling and the audience, but we all have our horror stories. *Frontline* is a hit comedy, particularly loved by journalists, for good reasons.

Audience research is a notoriously inexact science but in the 1980s John Henningham from the University of Queensland set out to try to find out what audiences really wanted from television news, where the high levels of interest were, and how that stacked against journalists' perception of what they wanted. The results are worth noting.

ABC and commercial television news viewers predictably had different interests. But the research does tend to defy some of the newsroom cliches about what people are interested in. Topping the lists of strong interests for both commercial and ABC viewers, at nearly 80 per cent, was science and medicine. Nearly 70 per cent of ABC television news viewers showed a strong interest in industry, agriculture and the economy. But so did nearly 60 per cent of commercial viewers. More commercial viewers were interested in the economy than they were in crime or sport. ABC viewers were more interested in politics and foreign news, though nearly 60 per cent of commercial viewers declared a strong interest in foreign stories. What might come as news to some news editors is that only 35 per cent of commercial viewers were interested in stories about famous people, even fewer were interested in what were described as light and entertaining stories. ABC viewers' interest in the famous and frivolous was lower still.

Henningham also looked into the attitude of journalists towards their perceived audience. According to the survey, most journalists felt they had a good understanding of the audience, only 9 per cent declaring it very low. But when asked *how* they knew their audience, more than 4 out of 10 through intuition, gut feeling. This was almost twice the number who claimed to know their audience through direct contact.

Journalists rated the second highest source of information about audience as being from discussions with colleagues, in other words

reporters re-inforcing each other's stereotypes. Third came discussions with news sources, presumably politicians and opinion leaders. The viewers themselves, in the form of phone calls, were ranked fourth, alongside "discussions with friends" and a lowly sixth was letters from viewers. In their defence, journalists complained that their employers often withheld audience research, and that ratings alone weren't an adequate indicator.

Henningham also found that journalists tended to underestimate viewers' interests in scientific, economic and cultural news and to overestimate their interest in crime, famous people, tragic events and scandals. Television journalists believe on average that people are far more interested in human interest news than in so called "serious" news, a view Henningham's survey disputes.

There were differences between commercial journalists and journalists from the ABC but the message seems to be that we don't know our audience as well as we think we do.

Henningham comments that journalists with a high opinion of their audiences are more likely to know what they're interested in. Journalists with a low opinion of their audiences are generally confident that they understand audience interests but in reality are less able to accurately predict them. Researcher Hugh Mackay's more recent work with focus groups suggests audiences are developing sophisticated responses to the media. In his report "Media Credibility" Mackay says:

> Credibility is much less of an issue than it appeared to be even five years ago. It's not as if consumers have decided that the media have become more credible: on the contrary, they continue to complain about the "unreliability" of media stories, but their complaints have lost the hard edge they used to have. Today consumers are more likely to say "of course media stories are unreliable . . . oh well".

Mackay argues that people use the media in a variety of ways to help them position themselves in an uncertain world. He cites a range of needs – information, stimulation, tranquillisation, entertainment, distraction. But what comes through is that people don't take what they're delivered at face value, they are both cynical and accepting of the media reality.

I can't help but feel this is not necessarily the audience the average executive producer imagines when making programming decisions.

In my view, our audiences are increasingly media literate and we ignore their sophisticated responses to what we do at our own peril. People watch and listen to what we broadcast with a healthy scepticism. They don't necessarily take what we tell them at face value, they sift and discard, and while we're inclined to take ourselves terribly seriously, the audience can be cynical, amused, detached or moved. These people might show up in the ratings as watching or listening, but it doesn't necessarily mean they respect what we do or are satisfied with

the programs we're making. If we're on the right track, why are we ranked so low in opinion polls on professional status, and why have programs like *Frontline* and *Media Watch* developed such loyal followings?

I think we've missed the mark on several levels. We consistently underestimate the taste, intelligence and diversity of our audience, and we're stuck in a formula which precludes interesting and innovative storytelling.

Hugh Mackay puts forward the theory that the people who took control of the media in the 1960s and 1970s were essentially young Turks, iconoclasts who threw out their parents' values, opposed the Vietnam war and saw the need to take on authority. Out of that culture grew the current affairs model we maintain today: an essentially adversarial model where stories must have a point and counterpoint, where there is right and wrong, good and bad, black and white. It's a model driven by the notion of conflict, if there isn't conflict there isn't a story. Balance is perceived as putting one view against an opposing view, somehow positioning yourself in between. Giving voice to complexity just doesn't fit the model.

But as a community we've become increasingly disillusioned with adversarial models – in politics, our courts and the media. Politicians, lawyers and journalists aren't all that popular. How many times have you rolled your eyes as you've heard the opposition leader, whoever he is, take a predictable position against the government on anything and vice versa? How many times do you hear people who've been to court complain that the truth never had a chance, it didn't fit the brief of the prosecution or the defence, that the victim or victims were lost in the system? And how many times do you turn on your TV or radio, knowing you could almost write the script for the next speaker – if she said X, he'll say Y?

We all know the reality of our lives is more complex than that. In real life we have to distinguish shades of grey, political decisions aren't always simple, notions of innocence of guilt can be complicated. It's seldom as simple as heart versus head, or point versus counterpoint.

The adversarial model of current affairs has, in my view, become a straitjacket which precludes innovative and exciting storytelling. In the end I fear it neither satisfies the audience nor the participants. Subtle argument is left on the cutting room floor. Programs which do try to break the mould tend to be broadcast outside prime time or on the ABC. Mainstream commercial media and some ABC programs are simplistic and predictable. And if you combine the lack of subtlety with a tendency to talk down to the audience, to go for "heart" at the expense of "head", you're left with a media which suggests, with feeling, and in simple sentences, that most things in this world are pretty black and white.

I think you, the audience probably recognised all this long ago. But as we battle on with our outdated models, you tune in because it's all there is. It doesn't mean however that you respect us. It goes without saying that the lines separating television current affairs from *Frontline* are increasingly blurred and I suppose that's where I see some hope on the horizon.

It would be encouraging to think media organisations were truly committed to finding out what you'd really like to see and hear on television and radio, to feeding you those special meals, rather than pumping out an endless diet of junkfood they know will be eaten because it's there.

But in the end I suspect shaming is the truly effective instrument of media reform. Serious humiliation and public shaming of the type exercised by programs like *Frontline* and *Media Watch*. I think we're fast approaching the point where *Frontline* is so indistinguishable from television current affairs that something will have to give, at least I hope we are. The current affairs form will simply have to change because it's become too much of a bad joke.

I should finish on an optimistic note. There are broadcasters committed to treating you with the respect you deserve, journalists committed to accountability, creative people wrestling with new forms of storytelling.

I even heard recently that the BBC was reviewing the use of "sound bites" – those highly edited snippets you hear from politicians which reduce an argument to anything from 7 to 30 seconds. There are concerns they limit the information available to the public (what a startling thought). At least they're thinking about change.

I heard actor Bryan Brown speak recently of the process involved in getting his half hour drama series *Twisted Tales* onto commercial television. The network liked the idea but was worried that half hour drama wouldn't work on commercial TV. But had they tried it, Brown asked. No, but they knew it wouldn't work and that was why they hadn't tried it. To the network's credit they did give it a go and a series which showcased new talent did make it to air.

And there was my own experience on 2BL at the end of last year when I spoke to historian Sandra Holmes about Aboriginal massacres. The station was flooded with more than two hundred calls in two hours from listeners wanting repeats and more information. It wasn't one of those stories "the punters" are supposed to be interested in.

When I left 2BL, at the end of last year I received many hundreds of letters from listeners. It was the most extensive contact I've had with the audience. They came from Killara and Bexley, St Marys and Mt Colah. They were intelligent and thoughtful letters full of valuable observations about broadcasting. It made me realise that even given the immediacy of talkback radio, we seldom have much direct contact with our customers.

Every day we pump out information to people of all ages, in different towns, cities and regions, from diverse cultural backgrounds with varied experience. These people aren't necessarily using their radios or TVs in the same way each hour or each day. It's an enormous challenge for broadcasters and not one to be met with outdated and simplistic dichotomies, goodies versus badies, light versus heavy, heart versus head. In the end it's a challenge that deserves to be met with innovation. We need not only to rethink our story telling but to develop a new measure of respect for you, the listeners and viewers.

Bibliography

Ellerbee, Linda *"And So It Goes" Adventures in Television* New York, G.P. Putman's Sons 1986.

Halberstam, David *The Powers That Be* New York, Alfred A Knopf 1979

Henningham, John *Looking at Television News* Melbourne, Longman Cheshire 1988

Mackay, Hugh *The Mackay Report, Media Credibility* November 1995, Mackay Research Pty Ltd.

Photo – David Karonidis

John Ralston Saul

As Canada's 1995 Massey Lecturer, John Ralston Saul argues that society is only superficially based on the individual and democracy. Increasingly it is conformist and corporatist – and knowledge has not made us conscious. John Ralston Saul is the author of *Voltaire's Bastards, The Doubter's Companion and The Unconscious Civilization* (Penguin 1997). He addressed The Sydney Institute on Thursday 20 March 1997.

POWER IN THE

MODERN STATE : CORPORATION OVER DEMOCRACY

John Ralston Saul

As a writer I'm also a novelist and novelists are used to the tough job of trying to link fiction with the reality of ideas and emotions with reality. Actually fiction is a desperate attempt to embrace reality in a much more complicated way than what they call non-fiction. So it's always a relief to be asked to speak on a subject in which there doesn't seem to be any relationship between the subject and reality. Where reality is irrelevant. And so that's why I was quite eager to come and talk about modern economic theory.

Modern economic theory contains a remarkable number of today's great truisms. When you stand back from the truisms and listen to the form in which they are presented – listen to where the nouns and adjectives sit in the sentences and what the sentences and paragraphs look like – you ask yourself, "Why does that sound familiar?" If you put them in an historical context, what you discover is that these are the traditional forms and structures of absolute religions and ideology. In other words modern economic theory is constructed out of superstition. The arguments are superstition. Or, to take a leap, they are essentially constructed in the form of the old Homeric myths in which the gods and destiny determined the outcome of human activity even though some of us were extremely smart, beautiful and could throw spears better than anyone else. But in the final analysis the great gods and destiny would decide. Later on these arguments of inevitability, and therefore of basic human passivity, were transformed into mediaeval religious ideology, then into modern ideology and then economic theory. They have all been constructed in the same way.

I want to begin with reality, with practicalities. I've always been obsessed by practicalities. I'm not a romantic person. I'm a very practical person. Now philosophy is supposed to encourage us to think about how ideas apply to reality. Most of the great economic truths of our day are not about what they say they are about. They are not really about the market place, or competition, or the revival of capitalism,

even though that's what they announce that they're about. They seem to be saying, if only we made a series of important changes we would revive the market place, produce a wave of growth and prosperity (which I would argue we haven't seen since the crisis of 1973) and the problems of debt, unemployment, etc., would all disappear. You know all this because it fills in large spaces in opinion pieces and newspaper editorials and so on.

Most of the great economic truths of our day announce one thing and actually are intended to serve almost the opposite of what they announce. The opposite of the market place incidentally, is not socialism. Current economic theories do not produce growth and they don't produce Research and Development, which is the root of real growth. They don't encourage risk which is at the heart of a healthy market place. They don't produce jobs. And they discourage all of the things which are essential to producing the things that I've just described. Remember that the great capitalists are what they have always been – essentially men or women of intuition, people with creative instincts who are risk oriented. They are rarely interested in things like management, rationality and structure. Those are the sorts of things you hire lower-level people to do afterwards – maybe you or me.

The real system which is being served by the modern ideology of economic theory is what I call corporatism. For several years as I talked, I would throw in corporatism. I realised after a while that nobody really knew what I was talking about. We had forgotten what corporatism was. We sort of thought it has to do with business. We'd forgotten something which, after all, is not that far away in our history.

Modern corporatism started to take form in the second half of the 19th Century when the new and old elites in mainland Europe began to get nervous about the rise of citizen-based individualism, or individualism as the obligation to participate as a citizen. These elites were increasingly nervous about that, and they were also increasingly uncomfortable with the arrival across the channel of the Industrial Revolution. The process of transforming this nervousness into reaction, into action, unfolded at high speed – in about three decades. These elites came to an almost unspoken understanding that they would accept the Industrial Revolution. If you had sheep you could have factories. Adjust yourself and you'll do quite well out of it. On the other hand there was no acceptance that legitimacy could lie with individuals acting together as citizens.

In 2,500 years of Western civilisation we've only come up with essentially four options of where to place legitimacy. This is not a matter of vague intellectual abstraction. Where you choose to place legitimacy will determine everything else you do in your society. Everything else will flow from it even though it's never really discussed. We have come up with god of gods, kings (who tend to work with

gods), and groups (who sometimes work with kings and gods). The fourth – believing that legitimacy lies with other individuals in something called citizen activity – is the most peculiar. However, if you go back I think you'll find it in Athens, you'll find it in Renaissance Italy. It isn't a new idea.

The idea that legitimacy actually lay with groups, what we call corporatism, was reconstructed – because it also is an old idea – between about 1850 and 1880. And it very quickly took on an intellectual form thanks to people like Durkheim and Weber, the fathers of sociology, who also gave us the words and the arguments of modern corporatism. So let me just quote you one paragraph from Durkheim :

> The corporations are to become the elementary divisions of the State. The fundamental political unit. They will efface the distinction between public and private, and dissect the democratic citizenry into discrete functional groupings which will no longer be capable of joint political action.

I think that's a fairly accurate description of our society today.

Corporatism believes primarily that we do not exist as individuals. We primarily exist as members of a group – interest groups, specialist groups, all sort of groups. Today it's thousands of groups – orthopaedic surgeons, heart surgeons, post-modern novelists, economists, managers and so on. We exist in society through our membership in our groups. This is particularly true of the elites, which now represent – in the developed world – between a quarter and a third of the population. The largest elites in our history.

The end result of a corporatist society is a civilisation of structure. The civilisation is run on the basis of constant negotiations between the groups over how to make their interests sit with each other. Because corporatism limits civilisation to the question of interests, society becomes obsessed by power, pure power as opposed to the purpose of power.

To do well in a corporatist society – in other words to do well inside your corporation – means occupying positions of power in the structure of your corporation. It's a pyramidal society within which there is a myriad of small pyramids. You're no longer judged in a corporatist society on the basis of whether you succeed at doing anything. Actual existential activity, delivering on the goods, isn't rewarded. In fact it's very often punished because it demonstrates that the others aren't doing well. Go back to the First World War and look at the birth of the understsanding that you must punish concrete success in order to maintain a proper level of administrative solidarity. Almost every general in the First World War who actually said and did the right thing was very shortly thereafter fired or moved to the side. It's very carefully described, by the way, in Basil Liddell Hart's *The History of The First World War.*

Corporatism is a civilisation of form over content. It's a civilisation which is reduced to the idea that – since it is all about interests and groups which have interests – civilisation must shrink to "the sum of the groups" and the relationship between the groups. This eliminates what makes civilisation interesting.

The elite – 25 to 33 per cent of the population – live a frustrated life. To everybody outside their group they are the villains but as individuals they are the victims. So you have a very peculiar, enormous, highly sophisticated, well-educated elite which is both a villain and a victim at the same time. This creates incredibly complex emotions inside the interest groups and the elites. It's a bit like living in a one party state where you have everybody on the inside of power – both the interesting people and the uninteresting people. The interesting people are there because they have to be somewhere if they want to exercise their activity or expertise but they are very uncomfortable with what the system requires of them.

The higher you rise inside your corporation the more you are obliged to act as a courtier in 17th-18th Century terms of the word. One of the most interesting things about our modern elites is that we went through a lot of trouble to create them, to educate them, to set them up in these structures. Our intention over the last few centuries has been that they would become a permanent conduit between the citizenry and their particular area of expertise. They would therefore help us to understand questions as they arise. We could therefore talk about these questions – have intelligent public debates over them. What we discovered instead is that if, for example, there's a debate about nuclear energy, the only people who are absent from the public debate are the nuclear experts. Why? Because they belong to the relevant nuclear corporations – public/private, for/against, etc. So they only speak out as spokespeople on one side or the other. That's not intelligence, that's not thinking, that's not what we created them for. That's public relations and press releases. That's interest representation. Interest mediation. So we, in effect, have cut ourselves off from our own intelligence through our acceptance of the corporatist system.

When it comes down to important public policy, there is a great silence of disinterested discourse from those who actually know. What we get instead is an imitation of public debate. An imitation of intelligence. We are constantly bombarded with answers to our problems. Absolute answers to our problems.

If you have an interest-based corporation which specialises in a specific area they know what you ought to do in that area. They know where you ought to build that bridge and what it ought to look like. So instead of engaging in a debate with you about it they tell you what the answer is to the building of the bridge. Each of these answers could be called minor ideology if you like. That's the way corporatism lives –

through the assertion of absolute answers and the denial of the thing that makes human beings interesting, which is debate, doubt, uncertainty. Again and again in our society we're presented with inevitabilities. Almost everything which is under debate is "inevitable". Globalisation – it's inevitable. Free trade – it's inevitable. Everything is inevitable. What was the point in spending a thousand years creating the largest, most knowledgeable, most sophisticated elite in the history of the world, if all it can do is turn around and say to us, "Well it's all inevitable"? If it's all inevitable we don't need them. They're very expensive. We could do with a much smaller elite to tell us there is nothing to be done except tinker with details.

One of the effects of a corporatist system is that people feel castrated inside their corporations. One of the few ways they can make themselves feel that they have power is to refuse to communicate. Information comes in and out through various doors. Comes in through one door and goes out through another. One of the few moments of power many people have comes when they receive information or when a process reaches the stage over which they have come control. At that moment they – you – can prevent it moving on or alter it before it goes out another door. This is a moment of control. It also represents the creation of a civilisation of the constipated intellect. And it's very important to use words like these because they allow us to understand what the nature of society is.

A related element is what I call dialects – specialist dialects. Language is no longer admired for communication. Language is admired because it is impenetrable. You can identify an expert who has the answer because you don't understand what they're talking about, except when they get around to telling you what is going to be done, what the absolute answer is. The explanation is in the corporation's dialect, the purpose of which is the retention of power through non-communication. But the purpose of language is communication. These dialects are therefore non languages or anti-language.

It isn't surprising in this context that everything from school education to public service is gradually being restructured at various speeds throughout the West on the self-destructive basis of self-interest. Self-interest is a necessary but very low level of human intelligence. It uses very little of human intelligence. It denies everthing which unlocks the genius of a civilisation.

There is a school of neo-corporatists spread through many universities in the developed world. They are trying to clean up the intellectual act of corporatism. As you know, corporatism came to its height with the thinkers behind Mussolini and Hitler. They brought corporatism to power in the 1930s. And we went to war to fight the goose-stepping, uniforms, violence, invasions, anti-Semitism and so on. Unfortunately we didn't really go to war to fight anti-Semitism. We

only claimed it afterwards. But if you strip away all of the fascist elements which we have demonised quite rightly since the war, what you find underneath, at the core of the Mussolinian model – which was also the Salazarian and Francoist model – is corporatism. The new intellectual corporatists – the neo corporatists – are today trying to sort of say "well, some things about the fascists are actually not bad. Some were even good". Take away all the terrible stuff and here's what's good. Here's what we can and should imitate.

Let me quote from what one of those neo-corporatists has written about the strong points of the 1930s corporatism:

(i) Shift power directly to economic and social interest groups;
(ii) Push entrepreneurial initiative in areas normally reserved for public bodies;
(iii) Obliterate the boundaries between public and private interests, i.e. challenge the idea of the public interest.

And this may sound vaguely familiar to you.

This may sound almost like the policy of any political party in the world today from the left wing to the right wing. In other words what I'm really saying to you, if you will forgive the sentence, is that Mussolini won the Second World War. It just had to be dressed up differently. In effect, corporatism is a very powerful, very long-term option with deep roots in Western civilisation. Again and again it surfaces and we batter it down and it re-surfaces dressed up differently, looking more sophisticated or more original or more amusing – in some way more attractive or inevitable. Then it takes us 10, 20 or 30 years to just recognise that it's the same as the last time.

One of the reasons that Pétain came to power in France in 1940, was that the new cutting edge of the technocracy was anti-democratic. They loved the idea of the efficient delivery of services without the inefficient complexity of democracy. Pétain was seen as an opportunity to put corporatism in place. The intent of corporatism was much more visible in Pétain's France than it was in Germany, because Pétain was a tired general who created less of an obscuring surface mythology. As you know, one of the details of the Pétainist regime was its removal of the words summarising the state – words which appeared like a statement of intent over every important doorway – "*Liberté, Egalitére, Fraternité*". They were embarrassing for corporatists. Something corporatists had to put in their place. They came up with "*Familie, Patrie, Travaille*" – "Family, Nation and Work". And that's really the summary of how the corporatist group sees things.

Newt Gingrich, the second most powerful person in the world today, has written endlessly about what he considers are the key core values of American society. In his list of the "seven essential personal strengths for Americans", you find that four are family related, one is nation related and one is work related. Six out of seven isn't bad! There

is, however, no mention of life, liberty and the pursuit of happiness. There is no mention of individualism and democracy. It's all corporatist values. He has drawn up a number of other core lists for citizens. You can go through them all and you'll find the same underpinnings. Am I exaggerating? I think that if you look at Mussolini, who was a much more interesting figure than the other dictators of the 1930s because he was much more conscious of the corporatist agenda, you will find that the underlying message of his system was efficiency, professionalism, management by experts and social order through on-going group negotiations – what today's neo-corporatists call interest mediation. And all of that in a society balanced by market forces and heroic leadership or heroic truisms. These three elements were intended to distract people from the grinding inevitabilities of corporatism.

Corporatism is about control. It's about management. It's not about thought or doubt. It's not about the creative disorder of democracy because the great creative disorder of democracy is based on the idea of inefficiency. The glory of democracy is that it slows down those people who say they have the absolute answers. But nor is corporatism about the doubting, creative disorder of capitalists either. It's about management, control and instruction.

Look at the confusion in today's language. Efficiency has become the justificatory noun we drop into sentences in place of "by the grace of God". "Rational" is another word you can drop into a sentence with the hope that it will silence the other side. The more irrational the act, the more certain you are that the word "rational" is there.

But efficiency is the great invocation of our time. Interestingly enough, it was also the key term in the public selling of corporatism in the 1920s and 1930s. You'll notice that the word is never "effectiveness". That would actually mean doing something. In truth, efficiency is a very low-level but useful activity. In other words, when you think about what you want to do, you get everybody to agree, you organise to do it, you put it in place and then you get a "fact-checker" in to make sure that it's efficient. This is a shop floor activity. The last thing you check. But you don't build your civilisation on the basis of whether it is going to be or not going to be efficient. The glory of all great civilisations is their ability to embrace inefficiency as a strength at the levels of conception and consideration.

Yet almost all of our education today is directly about creating managers or turning things like knowledge of the arts into arts management. The word manager comes from the French "*faire le menagé*" which means "do housekeeping". We spend 2,500 years struggling to create astonishing education systems, the largest elite in the history of the world and then we say that their principal quality is housekeeping.

Let me end with two illustrations. Privatisation versus nationalisation. These are very interesting tools. Neither of these is a religion. Neither of these is going to solve all of our problems. Today, as you know, privatisation is treated as if it were a religion. If we can only privatise we will release the marketplace forces and create prosperity, growth, etc. It's a religious approach towards what is in effect a mechanism – a tertiary-level mechanism. A little bit of privatisation, a little bit of government control. Move it around all the time. Think about what's good in what place, what is an effective wroking equilibrium. It's a very useful tool. That's all it is.

Instead of that, it's sold to us today as a religion. Particularly the privatisation of basic infrastructures. Yet the demand from the private sector for the privatisation of basic infrastructures is an admission of failure by the manager-dominated market place. After all, it means that the private-sector managers can't deal with capitalism, with the difficulties of the open and real market place, with risk, with investment in new ideas. Water, electricity, mail, transportation, there's a long list of these basic infrastructures. These are things which are fully developed. They are not very flexible. Most of the investment – the long term investment – has already gone in and any future long-term investment will be far too expensive for any profits to be made.

These are very conservative slow-moving areas – areas where you know the water is going to flow, the electricity is on and it works quite well. I just washed my hands downstairs, I got water. It's all there. From a business point of view it's solid, risk-free enterprise. What happens when you privatise these sectors is that you do enormous damage to the agility of the market place. The market place has a limited amount of real investment capital. There's lots of speculation capital. That's endless because that's imaginary. But real investment capital is limited. And so are the real structures of capitalist investment and risk taking. Not everybody can do that. Not all structures can do that. So it's very important to concentrate the structures of your market place on things like R&D, new growth, long term investment, risk. That is the glory of capitalism. That's what made capitalism useful to us in the West.

But when you privatise things like water, what you're doing is you are bleeding large sections of this invaluable investment capital and using up enormous amounts of the time of the very limited real doers in the market place. You are slowing down your economy. You're inviting your capitalists not to take risks, not to look towards the future but to look towards the past. You are encouraging them to become coupon-clippers. The privatisation of basic infrastructures is an invitation to, by their own definition, inefficiency and waste. And it isn't surprising that, wherever you see that done, it does not cause the market place to take off. It in effect slows the market place down without people under-

standing why it has happened. It rewards laziness in the private-sector managerial class. Not something to be encouraged in the market place.

The second example – free trade versus protectionism. These, like nationalisation and privatisation, are mechanisms. They are interesting mechanisms. Protectionism can be very useful. Free trade can be very useful. Our authorities think about these things on a daily basis. Where is it useful to do this? Where is it useful to do that? We should put this up a bit. We should put this down a bit. It's a mechanism. That's all there is. Instead, free trade is treated as one of the great, great religions of the late 20th Century.

Now the funny thing in this debate, is that nobody ever talks about the last time we did free trade as a religion. After all, we have done this before. Remember the repeal of the Corn Laws? The great empire of the day led the developed and developing world into free trade in the second half of the19th Century and the first part of the 20th Century. What was the result? Britain had a 20-year boom, followed by a flattening out and, just after the turn of the 20th Century, a decline from which it never recovered. It's still in decline in spite of the wonderful PR that comes out of London. You only have to sit in Paris or Berlin or Milan and then take the plane over to London to see who's in decline and who isn't. The resulting economic disorder in Japan ended up in a *coup d'état* which led eventually to their involvement in the Second World War on the wrong side. In Russia, free trade was one of the prime factors in the undermining of the Czar. It was one of the prime factors enabling Kaiser Wilhelm to take power away from Germany's nascent democratic structures. If you will forgive a simplification, the last time around free trade was one of the principal causes of the First World War and of the disorder that led on into the Second World War.

Today what free trade does, when dealt with as a religion, is unleash the sorts of social disorder which makes democracy problematic. Today it transfers power not to the market place but to the larger corporations. It transfers power to the private sector. And it gives them the power essentially to shape society. This is justified to us on the basis of capitalism and the inevitable forces of the market place. However, whatever one thinks of this argument, power is not being transferred to capitalist organisations. Last joint stock companies and transnationals are not capitalist organisations. They are principally owned by two groups. First by speculators in the market place. Why not if you can make a few bucks out of it. But these share-owners are not interested in acting as owners of the corporations. They are not capitalist owners of the means of producation. Their role has nothing to do with capitalism. Second, these corporations are owned by large pension funds which are essentially managerial tools. Again, they are neither real nor effective owners.

These large corporations are, in the real terms of capitalism, not owned at all. They are merely managed. And the managers are under no real, long term market place control. They are out of control. These corporations are not, in any real sense, owned. They are essentially bureaucratic structures without the purpose which solid ownership might give. It is as if, in the public sector, the bureaucracy was not responsible to an elected government. These large corporations are, in effect, headless. That is why they are not risk-oriented. Are directionless. The best these large organisations can manage is short-term capitalism. They prefer to do things like mergers and acquisitions which is fiddling around. It's a form of speculation that looks like capitalism. It's fun. But it's not capitalism. And the only way in which they can reward creativity, i.e. real capitalist activity, since they can do it from within is, on a regular basis, to buy small companies which have real owners, are real capitalist operations and therefore built upon risk. And like a Dracula, they can then suck this blood out over a period of two to three years. Then they have to buy another one or buy several.

The more power that goes in these large operations the more the market place slows down and become ineffective. All the statistics show that these large corporations engage in the least risk activity, the least investment in R&D and new growth. They are very conservative and directionless.

I began by talking about the difficulties of linking ideas and reality. The neo-conservative movement reflecting the Chicago School of Economics, is not really talking about what it is that will be done if its advice is followed. It is essentially playing the same role as the amusing courtiers of the 17th and 18th Centuries. They distract us so that we won't notice how the structure really works.

Corporatism is about control and structure. It fears the disorder of democracy. It fears the disorder of the participating citizen, it fears the larger view of society. And the genius of the West – in particular countries like Australia and Canada – has been our ability to recognise that the key to our civilisation does not lie within the structured elites but actually lies within that much larger idea of legitimacy which is embedded in individuals who act together as the citizenry.

In fact, Australia and Canada, however flawed, are good examples of this form of legitimacy. The people who came to our countries were not the structured elites who understood how power "should" work. The very rapid creation of these two countries is a living example of the genius of the civilisation as a whole versus the corporatist idea of a civilisation led by small interest groups.

Photo – David Karonidis

Oleh Butchatsky

After an extensive in-depth survey of 24 top Australian executives, James Sarros and Oleh Butchatsky produced *Leadership* (HarperCollins 1997). To review what they found, and what makes a successful executive in the 1990s, Oleh Butchatsky spoke for The Sydney Institute on Tuesday 25 March 1997. Oleh Butchatsky is a Director with Ward Howell International.

AUSTRALIAN

BUSINESS LEADERSHIP – A NEW AGE?

Oleh Butchatsky

After we had completed the study which led to the publication of my book *Leadership, Australia's Best CEOs*, my co-author James Sarros and I thought of re-titling the book to: *Leadership, The Bonobo Method.* No, Bonobo is not a Professor of Harvard but a rather special animal, in fact a chimpanzee-like creature and the subject of extensive research. The Bonobo was thought to be a chimpanzee until relatively recently when not only physical differences were identified but, more importantly, behavioural differences were understood. In the Bonobo culture, unlike chimp, males are not the dominant gender. With female dominance of the Bonobo species comes a society and culture which is caring, inclusive, rewards lifelong relationships and rejects aggression for its own sake. In contrast to gorillas or chimpanzees, where male aggression is the order of the day, the Bonobo society is one in which behavioural limits are set, the peace is generally kept and aggressors are quickly marginalised.

Are there lessons for the business community in this and is Australian business approaching a Bonobo like society? Maybe, maybe not.

Before addressing the central theme of this address: "Is Australian business leadership entering the New Age" – it is worthwhile to outline the background to the research for the book *Leadership*. It was our intention to identify qualities and attributes which characterise Australia's best Chief Executives. We wished to explore the values that they shared, the formative influences on their business success and their leadership styles. We wished to draw the distinction between leadership and management and to assess whether there had been any fundamental change in leadership styles in recent times.

An underlying motivation for conducting this study was to redress the balance in terms of the public perception of Australian business leadership as often portrayed in the press. At best there has seemed to be an absence of recognition of the formidable qualities and strengths

of Australian businessmen and at worst a tendency towards the "tall poppy syndrome" and an over-emphasis on business failures, particularly in the now famous 1980s. We continue to be bombarded with images and stories of business heroes from overseas, particularly the USA, often with the implied conclusion that Australian Chief Executives are somehow inferior to their peers in other countries. It was our belief, based on years of day to day experience in working with them that Australian Chief Executives more than matched their overseas peers and displayed qualities that would ensure their success in an increasingly international framework. So, in many ways, *Leadership* is there to celebrate the outstanding qualities of many Australian leaders and give them a rightful place in the sun.

We did not particularly intend to discover or devise a new model of leadership, rather we wished to return to first principles and to explore what values, styles and approaches were fundamental to the successful exercise of business management in Australia. Even though we have tentatively put forward a model of leadership, called "Breakthrough Leadership", we readily admit that this is an eclectic approach and that no one particular style is appropriate in all cases. In this, we are in accord with our learned colleague Professor Fred Hilmer in the recently published *Management Redeemed*, where he argues that there is no universal model and management fads should be treated as such. He and Lex Donaldson also argue that critical foundations for successful leadership today are adherence to high ethical standards and a stronger dedication to lofty ideals based on building and sustaining large corporations as socially important and socially contributing organisations. In our own leadership study there is ample evidence to support these views. Indeed, if there is one central theme of *Leadership* it is the need for our leaders to truly and deeply respect people.

To address the issue of whether Australian business leadership has entered the New Age it might be useful, in some way, to describe the commercial environment of today and in what ways it might differ from previous times. Is Australian business a New Age environment? Is it fundamentally different from its formative years and, if so, is a fundamentally different leadership style appropriate?

It seems that the industrial revolution set the tone for a framework for business which was characterised by efficiency, standardisation and consistency of output, with the primal goal of satisfying the imperative of mass production of standard quality goods. The best way to achieve this was to organise companies from a central point, to adopt a command style of management, to operate a hierarchical organisational structure and to exercise clear, firm and directive control. It seems that this view of management persisted up until very recent times. Those of you who were students, and there were millions of them, of the Louis Allen school of management, will well remember the

four guiding principles of good management with particular emphasis on monitoring and control.

Might this approach now be redundant? The New Age business climate, as defined by future thinkers such as Charles Handy, William Bridges, Stephen Covey and Peter Senge, is an entirely different place. The New Age views organisations as something different from machines. It views them as communities of people, information and talent. With the arrival of the information age, the ease of remote communication, the move towards at-home work, and the remarkable mobility of executives who spend lots of time in aeroplanes, we may be starting to see the emergence of "virtual organisations". How do you manage people you can't see because they are working at home? How, in a much flatter organisation, do you manage vast numbers of people with whom you can only have minimal regular contact? How do you manage an organisation whose products and services change rapidly to meet the increasingly demanding standards of consumers, all of whom want an individual product or service to be delivered rather than a mass produced one? How do you lead an organisation where jobs, in the traditional sense, no longer exist? Rather, people do things in organisations in projects, exercising their knowledge and talent for specific projects and moving on to the next one. So "the job" which was in William Bridge's words "a creation of the need to handle a pile of work", is no longer relevant in the information age where the work is not physical but knowledge based. Moreover you don't need to be in the same place at the same time to do the same job.

Whether the commercial world is quite at the point I have just described is arguable. However there is no doubt that it is moving in that direction and moving fast. Apart from the changing nature of the business environment in the information age, broad societal changes may also be having an influence. It seems to be that leaders are recognising and responding to these societal changes, from what Tony Blair calls "rampant individualism to a strong civic society and a better sense of community". When we start to redefine corporations in terms of citizenship and community a new leadership agenda emerges. Professor Bob Baxt is quoted in the recently published Australian Institute of Company directors study, *The Competitive Board*:

> Traditionally the courts have treated the company as being the shareholders – the members. . . Employees are not generally regarded as part of the company. Then there are the trading creditors and those who lend money to the company. The law has gradually widened the concept of what the company really is and in certain very special cases the courts have regarded these other groups as being relevant in evaluating what a director can or cannot do. Moreover the company operates in a social and physical environment which introduces the concept of corporate citizenship. . . The company must observe trade practices, environ-

ment, occupational health and safety and a myriad of other laws. Finally, without customers, there is normally no company.

Our business leaders, certainly the ones we studied, are clearly able to articulate the important issues they are facing in the future: the need for an international outlook, a preparedness to get close to customers, the ability to take advantage of new technologies, and the need for investment in management education particularly in "soft skills", the people skills that David Karpin advocates.

So, are Australian leaders responding? Are they flexible, nimble and intelligent enough to see what is going on? The evidence in *Leadership* is that, in many ways, they are. The clues are to be found by exploring the values and leadership styles that the CEO's chosen for this study articulated.

In compiling the data for Leadership, we conducted extensive interviews with 24 prominent Australian Chief Executives. In the main these were identified by their peers as we had previously conducted a survey of the Chief Executives of Australia's top 500 companies to nominate whom they regarded as the best leaders. The interviews were conducted in a structured but flexible way and we were met with a refreshingly open and frank response to the various issues presented.

Some of the participants had moved to more eminent status than Chief Executive, often to the Chairmanship of their respective organisations. Therefore, there is a formidable collection of experience and, hopefully, wisdom amongst the leaders interviewed. The organisations which these leaders represented collectively employ over 500,000 people and are representative of both traditional and emerging markets in Australia. Eight of the companies are in the top 20 in Australia and included are all three of the major building materials companies, the number 1 beverages company, the number 3 and number 6 retail companies, the largest metal manufacturing operation, the largest telecommunications business and four of the largest five banks. Included were several elder statesmen ("old heads" in the vernacular) – Peter Ritchie, Paul Simons, Andrew Turnbull and Dean Wills for example – and those still to fully make their mark – Tony Berg, Anna Booth, John Schubert and Meredith Hellicar for example. And in between, some of the established powerhouses of Australian business – Don Argus, Rob Ferguson, John Cloney and Ross Wilson.

What was perhaps most surprising about the results of the study was the relative consistency emerging from the views and backgrounds of the leaders, irrespective of their age group, industry or career history or whether indeed they were male or female. In particular, there is a significant attraction to "learning organisation" principles and a drift away from heroic, charismatic leadership. The approach of "I'm the boss and make all the decisions and, by the way, all you people below me better not make a mistake" has changed to a more inclusive and

more trusting approach with a greater appeal to the higher order motives of employees, particularly participation, involvement, self fulfilment and independence.

This change in attitude is accompanied by a strong attachment to values of honesty, trustworthiness and team work. Australia's CEOs no longer see themselves as the charismatic motivator, but rather the facilitator and encourager.

In the New Age, being trustworthy and being able to trust are key elements in successful leadership. For people to follow in periods of demanding and de-stabilising change you as a leader need to be credible, believable and straight. Your behaviour needs to be consistent with your word. In the words of Don Argus, Managing Director of National Australia Bank "at the end of the day, integrity is the big one. If people trust you, then you can get where you want to. But if people don't trust you, you have no chance".

Clearly, successful leaders also need to be competent, decisive and self confident. Peter Ritchie of McDonalds describes this as wholeheartedness: "Yes you have to have confidence and I suppose that is really what I am saying about being whole-hearted. Because if you aren't convinced about your own ability you are unlikely to be whole-hearted."

The ability to pass this self confidence and whole-heartedness to the team through coaching and mentoring, through role modelling and through the encouragement of people to take risks and to allow mistakes are key features of the New Age.

Where does this approach spring from? Curiously enough, the backgrounds of the leaders studied were characterised by fairly conventional and predictable pathways. In particular, the influence of the family, whether it was stable or dysfunctional through deaths of parents or other trauma, was extremely strong. The creation and reinforcement of what one would call Protestant work ethic values were major features of the upbringing of most of our sample. Those values of hard work, achievement, sacrifice, honesty and discipline were strong formative influences. Incidentally, many of the Chief Executives went on to say that their own family lives at present were of vital importance in continued success in the business world, as family provides balance and support. I understand a recent US study at Wharton has demonstrated that those who put family ahead of their careers generally do better in life and in their careers.

Our sample was well educated with the majority possessing a degree and of those 60 per cent an MBA, Masters or PhD qualifications. Over 60 per cent had the advantage of private schooling, whether in the Greater Public School system or in Catholic schools. Yet, there was very little evidence of "born to rule", with no sign "of old money" nor of any particularly easy path through the competitive world of business. A more surprising result perhaps but certainly an encouraging

one was that nearly 80 per cent of the sample had significant overseas experience, many spending five years or more in overseas posts. This has been a significant influence on their realisation that Australia's market size has its limitations and that real growth will be dependent on effectively competing on a global scale. Moreover, the need to achieve world's best practice is underlined in this climate. There is also a clear understanding that Asia is an important market but not to the exclusion of other parts of the world. Asia needs to be approached with a long term perspective and with the recognition that there is no single Asian culture nor way of doing business, rather a multiplicity of individual differences from one country to the next.

Role models and mentors also were seen to be powerful formative influences on our leaders even when such role models demonstrated what not to do rather than what to do. In general, role models reveal and remediate weaknesses, keep one on the straight and narrow, provide benchmarks and teach skills in clear and objective thinking.

In some cases the Chief Executives could nominate individual people who were personally and strongly influential, in other cases it was a more studied approach, as with John Cloney of QBE Insurance: "I carefully watched a few of the top people in competitor companies, saw what they were doing, watched their moves and decisions. I learned from that but now I am more confident in my own way of doing things."

For others the absence of role models had an enervating effect. For example Meredith Hellicar, now of TNT, spoke of her previous background:

> There weren't female role models, so I could create my own style. Esso, which I joined straight after OTC, was even then a very enlightened, very progressive company in all its attitudes to women, but it was still a very conventional company. I found a real advantage being one of the senior women, which meant that there was no conventional slot, no behaviour that people could rank you by, and therefore a lot of things I did, I could set precedents rather than worry how other people operated.

So, in approaching the New Age, Australia's business leaders are adopting new approaches to a new environment, yet superimposing those approaches over many tried and true, traditional values. Clearly they are still learning how to achieve this balance and some are more successful than others in doing so, yet they can take heart from the fact that those tried and true values remain relevant and appropriate.

I return to the key value of trust. A recent study by Cultural Imprint Pty Ltd is very revealing of characteristic values and behaviours of Australians in the commercial world – "Australians expect to be told the truth and are generally prepared to face it, but they also have well developed senses for detecting when someone is trying to pull the wool over their eyes. They have finely tuned 'bullshit detectors'".

This value of honesty and openness has a further dimension. For, to be truly believable, a leader needs to be real and whole-hearted. In other words, he or she needs to be a real human being you can warm to, laugh with, relate to and admire. To quote again from the Cultural Imprint study:

> Perhaps the most significant single observation from the study is that leaders care for their followers. Within that context the leader's role is to build bridges between now and the future – bridges that allow followers to move from their present identity, within comfortable and familiar relationships to a new identity in a different situation that initially threatens insecurity and the need to establish new relationships. Success in building these bridges for the transition is heavily dependent on a leader's capacity to be seen to identify with, and respond to, the emotional needs of his or her followers. To do this leaders must be prepared to show something of their own emotions and the depth of the care they have for their followers' well being. Followers learn more readily, accept directions, and at the same time feel more secure, when their leader displays this concern and commitment.

This sounds a lot like the realm of the Bonobo does it not? Charles Handy's memorable metaphor of the "Empty Raincoat" is relevant here – the bright, shiny, perhaps opulent facade which many leaders become. Yet to fully succeed in the leadership challenge, to truly inspire followers, the raincoat needs to be occupied by a person who has gone beyond the stages of Survival and Achievement and has the confidence of Self-Expression and of being one's self.

Before concluding I leave you with two further considerations. Firstly, there is one school of thought which suggests that leaders in themselves are not all that important anyway. In the US study, which led to the publication of *Built to Last*, it was found that those companies that did last, and stood the test of time (in many cases for a century or more) were characterised by well defined cultures, almost cults, within which the leader's role was simply to preserve that culture. Those leaders were described as being good listeners, quiet, a bit shy and thoughtful. Those leaders were simply the safe-keepers of the organisation culture and values rather than dragon-slaying heroes.

My last thought is to read my favourite quote from *Leadership*. You will find it in the very first pages: "A leader is best when people barely know he exists, not so good when people obey and acclaim him, worse when they despise him. But of a good leader, who talks little, when his work is done, his aim fulfilled, they will say we did it ourselves."

A New Age thinker? Possibly. This is a quote from Lao-Tzu, a Chinese philosopher of the 6th Century.

Photo – David Karonidis

Geoffrey Lehmann

Prize winning poet and tax lawyer Geoffrey Lehmann has released an anthology of revised poems – *Collected Poems* (Heinemann 1997). According to Geoffrey Lehmann, as we grow older we come to appreciate more complex art or "art that is drier and more restrained". In an address to The Sydney Institute on Wednesday 2 April 1997, Geoffrey Lehmann expanded on this theme, and gave an entertaining insight into how poets can revise their work.

INSIDE THE POEM

Geoffrey Lehmann

The Australian painter Godfrey Miller was an obsessive reviser of his paintings, which were often completed over many years, and were still incomplete – in his mind – when he sold them. There is a story that security guards at the Art Gallery of New South Wales had instructions to shadow him if he arrived, and escort him from the gallery when he paused in front of one of his paintings and a paintbrush and pigment appeared from beneath his coat.

I was talking to a literary critic. I mentioned that I did not have many new poems, but I had written quite a lot of new poetry – which I had included in old poems, many of them 30 years old – while editing and revising them. This confession provoked a mildly dismissive comment and a look that implied this was an illegitimate activity – that I was a Godfrey Miller who needed a security guard. The editor of my collected poems, Jamie Grant, had a similar reaction until he began comparing the revisions with the earlier versions. Somewhat to my regret, he decided fairly quickly that my revisions were all improvements, and that he only had to edit the current versions. I was regretful, because not all revisions may be improvements.

We live in a slightly unusual era, as relativism rather than a notion of a golden mean is dominant. A crude form of relativism says that all experiences and art are equally valid and we cannot rank any work of art against any other. A more sophisticated form of relativism tries to distinguish the authentic from the unauthentic – was the orgasm fake or not – but does not try to rank one orgasm against another, where both are assessed as genuine.

The hand of the security guard on Godfrey Miller's shoulder and the rebuke in the eye of my literary critic are both products of this more sophisticated form of relativism. The sophisticated relativist believes that if art is to be authentic, it has to be the product of a whole personality at a concentrated moment of time. Personalities change as people age, and a work of art formed over many years by a process of

accretion, with revisions being built upon earlier revisions, will lack the spontaneity of art that is the product of a moment of time.

Many artists on the other hand believe they are discovering through their work refractions of an aesthetic principle which exists quite independently of themselves – a golden mean. They see themselves as discovering some objective reality. Historically the golden mean – notions of an objective good taste – seem to have predominated over relativism.

H J Eysenck's *Sense and Nonsense in Psychology*, published in the 1950s, has a chapter, "The Psychology of Aesthetics" which provides support for adherents of the golden mean. Test panels of subjects from a variety of races and cultures were asked to select their preference from colours presented to them. The majority preferred colours at the blue end of the spectrum, being hues with a shorter wave length, and some members of those panels more consistently picked what the majority preferred. We shall label this group "those who had good taste". Test panels were also asked to choose their preference from various combinations of colours. The majority preferred combinations that were spectral complementaries – for example yellow and violet. Those who had previously been identified as having "good taste" consistently preferred what the majority preferred. Test panels were shown artefacts and works of art and asked to rank them. To eliminate cultural conditioning, and so that like was being ranked against like, the works of art were all of similar subjects and in a similar style and period. The works of art had previously been ranked by a unanimous panel of art experts who had excluded work where they could not agree. Again those in the test panel who had "good taste" agreed with the rankings of the experts and were more consistent in this regard than those who had previously diverged from the majoritarian preference. "Good taste" or "aesthetic sense" was independent of race and culture, and was only slightly related to intelligence.

Relativists might find the design of this type of study "elitist" – they could not categorise the findings as elitist, because the facts in themselves cannot be elitist. However, there is nothing elitist about preferring what the majority prefer, independently of race and culture and, to a large extent, intelligence. The realisation that human beings may differ in the acuity of their aesthetic sense adds an extra dimension to our concept of personality. Some who lack outstanding intelligence may have outstanding aesthetic sense, which seems to be hard wired into our brains – although we cannot be sure if the wiring would be similar if another species developed intelligence equivalent to our own. Beauty is dependent on the acuity of our sense organs. A race of intelligent dogs might rank an olfactory composition as equivalent to Beethoven's *9th Symphony*.

So far I have oversimplified Eysenck's findings. A panel was asked to choose between two short lyric verses – one was simply rhymed with heavily endstopped lines, and the other was of unrhymed enjambed lines – the meaning did not pause at the end of the line breaks. Although the simple endstopped verse was preferred at first, later the majority preferred the more complex unrhymed verse. Eysenck also commented that introverts preferred paintings of previous centuries and extroverts were more receptive to modern art ("modern" at the time of his essay was circa 1950).

If we took the golden mean view to an extreme there could be only one perfect work of art. Instead there are many works of art that we enjoy, depending on our mood, and our taste changes over time. Part of this is linked with ageing – our taste changes as we grow older biologically, because our interests change. And we come to appreciate more complex art, art that is drier and more restrained, as we become more experienced with an art form.

Relativism and the golden mean are both right although they contradict each other – just as particle theory and wave theory are both correct at the level of quantum physics, although they appear to contradict each other. There is an apparent contradiction in the fact that William Shakespeare is objectively a better poet than Ella Wheeler Wilcox, being the golden mean position or Eysenck oversimplified – and the fact that art is a mansion with many rooms, as the relativists claim. What we are describing is a mystery. There is another analogy from quantum physics. This is Heisenberg's uncertainly principle – we can measure either charge or position of fundamental particles, but not both.

I am a poet who revises, because I believe my poems are trying to present truths of a kind – although they may be very elusive truths – and until I have nailed down that golden mean, that aesthetic truth – I have to go on trying, go on revising. I can act on the basis that a poem is an emotional statement of a moment of time. This makes revision a dangerous exercise, because how can the revisionary mood of a later moment in time do anything to improve the emotional statement of an earlier moment? A work of art can be too carefully planned so that the original impulse is lost. This seems to be a disease that afflicted William Dobell. Many of his initial sketches are much fresher than the final work. Examples are the portrait of Mary Gilmore, "The Duchess Disrobes" and his "Young Man in the Bathroom". (I have not checked that these are the correct titles).

The test of the pudding is the eating. The parallel texts of Wordsworth's 1805–6 and 1850 (posthumous) versions of "The Prelude" in the Penguin edition show that an older poet can successfully revise the younger poet's work. Many of the revisions remove awkardnesses and stumbles in the earlier work. An example is the

famous passage about the trip in the stolen rowing boat, starting in line 357 of Book 1. Unfortunately many of the changes also introduce unnecessary additional words to make the text smoother and they lose the spontaneity of the earlier version – take "the disappearing line" of a public road, that in the 1805–6 version "Was like a guide into eternity". In 1850 this "Was like an invitation into space/Boundless or guide into eternity".

In my own case I have often inserted new words in my revisions. Even more often I have just cut away superfluous material to reveal the poem that was hidden in the clutter of words. Perhaps the best example of this is "Water from my Face".

The 1978 version of this, which I published in *Ross' Poems* reads:

Uncle Pat running his finger along
a singing wine glass rim at night
is not what you would predict –
nor as Bridge's husband,
their two heads photographed
side by side on opaline.

My five year-old nephew was scared out-of-doors,
frightened to cross a paddock.

No one thought to ask why,
although he'd mentioned lions
and tigers roaming the bush.

Each year spring occurs
with such vehemence
it's clear the plants don't remember
last summer's dried sticks.

The young discover their bodies
as no one before ever did.
The old say "We remember" and forget.

Nature has no memory
or imagination –

Except here in Spring Forest we have
lions from the scrub of childhood
roam among singing wineglasses
rubbed by uncles –
Or we try to –

But the water falling from my face
into a rusted enamel dish
(washing under a kurrajong tree)
doesn't recall its shape for long.

It is hard to work out what this poem is about. It seems to be saying that people have imagination and surprising quirks, but nature does not – nature washes away and erases memory and individuality. When I came to consider this poem for *Spring Forest*, which is a revised and expanded version of *Ross' Poems*, I was irritated by the slightly affected tone of parts of this poem. I was also dissatisfied with the convolutions and unnecessary complexity of the thin line of logic running through the poem. It tries to be too clever. I was inclined to throw the entire poem out until I realised I could throw out some of the more affected verses. Once these were gone I was startled by the outcome and had the instant shock of recognition, as an entirely new and surprising poem leapt off the page. Yet there was only one new line. The new version reads:

WATER FROM MY FACE
Each year spring occurs
with such vehemence
it's clear the plants don't remember
last summer's dried sticks.

The young discover their bodies
as no one else ever did.
The old say, "We remember"
and forget.

Nature has no memory
and asks no questions.

The water falling from my face
into a rusted enamel dish
(washing under a kurrajong tree)
doesn't recall its shape for long.

This is a poem which affects me deeply in its current form. It says something which for me is quite fundamental, and which I don't think I've managed to say anywhere else in my poetry – certainly not with such economy of words. Usually a poem that expresses strong emotion issues out of a strong emotion. When I wrote the version of this poem published in 1978, I think I had a mixture of emotions, partly caused by the unsatisfactory nature of the material which I have not deleted. It was only when the superfluous material had been stripped away that I was able to experience the emotion that was concealed in the poem.

"Spring" from *Simple Sonnets* was written at about the age of 18, perhaps in 1958, and was first published in the following version in 1972.

SPRING
I blew my flute as she formed in the flowers
My child wife woke. I pelted her with showers

Of pollen, reaching out with half-shut eyes.
She slipped away and uttered extravagant cries

And clutched her blouse, I chasing blindly after,
While she splashed shallow adolescent laughter,

Then vanished. Where she disappeared I saw
A house with her face painted on the door.

I entered and a wind blew off my cloak.
I called her name and my flute dropped and broke.

A burning torch hissed, quenched in a dark stream.
An unlit torch, dipped in, began to gleam

And flared up in the dark and the wind blew
And I cried, "Where are you? Where are you?"

Despite several attempts at revision, this was still a very adolescent poem – an apprentice work. I remember the image of the two torches as coming out of Izaak Walton's *The Compleat Angler*. There were echoes of the Apollo and Daphne legend and French art movies of the 1950s. Cocteau's films were popular then and we would sit for hours submerged in flickering black and white imagining we were moved.

Apart from the rather silly first six lines, there is the clumsiness of the rhyme of "saw" and "door". Although this is a rhyme for Australian speakers, it is not a rhyme if you are Scots or American. Also there is the heavy-handed phallicism of the broken flute, and the last line is weak and does not scan – there are only 9 syllables and there should be 10.

I published a second version of the poem in 1990.

SPRING
I found her sleeping in the grass, her hand
Clasping a doll, and in her hair a band

Of muslin flowers. With tentative lips I blew
A flute. She woke. Her eyes looking coldly through

Me and she ran, I chasing blindly after.
She clutched her blouse, gasping with timid laughter.

Then disappeared. Her face drawn in pale chalk
Stared from a door. Pushing a thistle stalk.

Aside, I entered, shouted out her name
And listened to the echoes. No one came.

A burning torch was quenched in a dark stream.
An unlit torch, dipped in, began to gleam.

I climbed back to the world. Outside the air
Was summer. There was no doll anywhere.

The 1990 version has removed most of the worst infelicities of the 1972 version, apart from the flute. The girl has a bit more reality than she had in 1972, but she is still pathetic. She looks coldly through the young man who is wooing her and then runs away with timid laughter. Why would anyone run after her? The enjambment, to give it its technical name, from the end of the fourth line to the beginning of the fifth is clumsy, and the last couplet is an anticlimax. The 1990 version still reads like a poem that is searching for an ending.

After my book *Spring Forest*, which was heavily revised, was published by Faber in the UK and USA in 1994, I became dissatisfied with the rest of my poetry, and decided that some heavy revisions were needed. I rewrote *Spring* again in 1994. This revision was largely prompted by my concern with the awkward enjambment, and you will notice that the poem has a new title.

THE PURSUIT
I found her sleeping in the grass, her hand
Clasping a doll, and in her hair a band

Of muslin flowers. I bent to touch her cheek.
Her eyelids opened, but she did not speak

And coldly stared at something in the sky.
Clutching her blouse she jumped up with a cry

And barefoot ran and led me through a maze
Of weeds and stones and potholed alleyways

And disappeared. Her face drawn in pale chalk
Gazed from a door. Brushing a thistle stalk

Aside I entered, shouting out her name
And listened to the echoes. No one came.

A burning torch was quenched in a dark stream.
An unlit torch, dipped in, began to gleam.

When I counted up the 14 lines of this final version, I was surprised that I did not have to find a new final couplet. The ending had always been there, the image from Izaak Walton, but concealed in what had been the penultimate couplet. At last after 36 years of pursuing this poem the girl had become a person, and the young lover was engaged in a real pursuit.

The main point of this account is that many of the revisions were prompted by my concern with technical flaws. I distracted myself with technical issues so that I did not have to think too much about the unsatisfactory content of the earlier versions of this poem. While I tinkered with these technical problems the content automatically corrected itself. Fortunately, not all poems are as difficult to write as this poem was for me.

Perhaps the main artifice of the poet is metaphor. Metaphor is not unique to poetry and is basic to human consciousness. Much scientific understanding is metaphor – electron planets revolving around the nucleus sun in the solar system of the atom. I have read about chimpanzees being taught a form of language so that they could communicate with humans – our closest evolutionary cousins immediately used their limited vocabulary to create startling metaphors to express their feelings. Metaphor – the attempt to find similarity between disparities – is at the heart of our search for order in the universe, our search for what physicists call the grand united theory of everything or GUT.

The dense use of metaphor is one of the main distinctions between poetry and prose. A more characteristic distinction is meter – the use of fixed or free rhythms. (In fact rhyme and fixed meter may be seen as forms of auditory metaphor, to create similarity and order out of the irregular cadences of prose). The most commonly used meter in English is the iambic pentameter. This is a line of five feet in which the first syllable of each foot is unstressed and the second syllable is stressed. The line may scan exactly in accordance with the rules as in this line from "The Pursuit":

And COLD/ly STARED/ at SOME/thing IN/ the SKY

However, scanning exactly in accordance with the rules creates tedium, so the following line employs what is known as contrapuntal scansion:

CLUTCHing/ her BLOUSE/ she JUMPED/ UP with/ a CRY

With contrapuntal scansion you can sharply reverse the expected stress in the first foot – reversals later in the line should be less marked. In the line above you could also read the fourth foot as "up WITH" or as having no stress at all on either syllable. Variety can be created within even a regularly scanning iambic pentameter by the fact that some stressed syllables carry more weight than others. For example in the first of the quoted lines above, the stressed "IN" is read almost without a stress, and "STARED" is heavily stressed. Further variety may be created by the use of enjambment, where the sense flows directly from one line to another without a break:

. . .Brushing a thistle stalk
Aside, I entered. . .

In this example, the enjambment is more extreme than might be normally expected in what are known as "heroic couplets" as it jumps the couplet. The opposite of enjambment is the endstopped line. Line 13 of "The Pursuit" is an example. Variety may also be achieved in the pentameter by a feminine ending, which is an eleventh unstressed syllable, as in:

And clutched her blouse, I chasing blindly after

Finally, there is the use of the caesura, which is a distinct pause in the middle of a line:

Her eyelids opened,//but she did not speak.

Somewhat surprisingly more variety is possible in fixed forms than in free verse, because of the tension in fixed forms between the actual meter of the words and the formal meter, and between the actual sense breaks on the page and the breaks imposed by the formal meter. This tension enriches the poem, unless the poet has strayed too far from the chosen form so that the page is a mess.

These are most of the simple tricks of poetry. There are others such as assonance and consonance, but that is basically all there is to it. I once heard James McAuley deliver a lecture along almost identical lines to this when I was 17. A few months later I sent a poem to *Quadrant* which I thought he might like, and attached a covering letter with my telephone number. To my delight, he telephoned and asked me to come in to *Quadrant*'s offices which were then in Albert Street, down by Sydney's Circular Quay. When we met, he told me that I did not seem to understand meter properly and graciously delivered the lecture which I had heard a few months earlier and have in effect repeated for you. I refrained from saying that I had heard it all before.

So far I've talked about the formal devices of poetry. How do you learn to use them?

Poets are largely self-taught, and they have to train themselves so that the use of contrapuntal scansion becomes instinctive – like driving a car or playing a musical instrument. Starting young and plenty of practice during prolific teenage years may be critical in this process – just as the play of young animals develops reflexes. In my own case I started writing poetry when I was 14 and wrote about two or three poems a week until the age of 20. In the years since then I have written progressively fewer and fewer poems each year – until now I might write about two poems a year.

Iambic pentameter – which in its unrhymed form is the blank verse of Shakespeare's plays and Milton's *Paradise Lost* – underlies a lot

of free verse. An apprenticeship in fixed forms helps you to write in free forms.

When the idea for a poem begins to take shape, lines may suggest themselves which will dictate the form of a poem. Often, however, the poet will make a conscious decision about the form – will it be fixed or free, rhymed or unrhymed? A free form may be appropriate if the information in a poem is highly specific, which is the case with many of the narrative poems in the sequence *Spring Forest* form which the poem "Water from my Face" was taken. With many of the poems in *Spring Forest* it would have been impossible to convey the information in rhymed verse – even a fixed line length would have been restrictive. So free verse was chosen. In "The Pursuit" the images and events are fluid and easily adapted to rhyming requirements. Choosing a fixed form helped give focus to the random play of possibilities.

So far I have talked about poetic technique – I have avoided the heart of the matter. What causes the poem? This question is unanswerable except to say that the poem should essentially write itself – you wait, but you have no real control over whether it will come – and when it does, it has its own momentum. Even revisions – major revisions – come in this way. A faulty line or verse may be unresolved for years, and then one day the solution suggests itself – and the poem is fixed. This does not tell us much about what causes a poem, but it tells us what a poem is not.

It cannot be forced into existence, it cannot be simulated. You explore a vein of imagery, a concept, in a number of poems, slowly moving forward, each poem a stepping stone to the next. This is a legitimate way of creating art, the most common in fact. But sometimes you continue with a theme after it is exhausted, and the result is self-parody. Unless you eliminate the simulated poems and lines, they contaminate the real ones. To write a poem or create a work of art, requires passionate engagement. Shakespeare's famous comment in Sonnet 94 about those "Who, moving others, are themselves as stone", which was perhaps intended ironically, is not true of art. If the creator of a work of art is not moved, no one else will be either. This eliminates the possibility of computer-created-art – any art that comes out of a computer will be the result of the human instructions – just as computer chess players are only as good as their program. It hardly seems worthwhile suggesting that the passionate engagement is essential for the creator of a work of art. It is such a truism, but it is a truism that is at present opposed by some who claim that art should be a product of disassociation and indifference. A very small percentage of the art of disassociation is likely to survive and be enjoyed, and it will survive only because it is the product of passionate, if perverse engagement.

Alan Gould's essay on my work in his volume *The Totem Ship* (1996) describes my sequence "Roses" (then in its second published version) as "the spiritual climax of . . . his poetry so far" and as an "enterprise, to discover some transcendent principle which is both a credible basis for belief while not allowing the believer to pretend he can escape the historical process" and also as "a progress from nihilism . . . to an affirming and abiding abstract of regeneration".

Rilke described the poet's role as being to praise or "preisen", but there is a scarcity of poetry in English that affirms. Shakespeare's *The Tempest* is the outstanding example. In our own century there are Eliot's "Four Quarters"; some late W B Yeats – I particularly have in mind "Ribh at the Tomb of Baile and Aillinn" from *Supernatural Songs*; Robert Frost's late and overlooked masterpiece "Directive"; and some of the late poems of Wallace Stevens, in particular "Credences of Summer". This scarcity of affirmation in English poetry contrasts with German music. Almost the entire works of Handel and Bach, then Haydn and Mozart, and much of Beethoven and the chamber of music of Schubert are an affirmation – sometimes a tragic affirmation, but in the end the affirmation wins out. Perhaps the abstract nature of music means that it is easier to affirm – the lack of a logical content frees the composer. With poetry, affirmation is a more dangerous exercise, as in Alexander Pope's audacious lines at the end of the first epistle of his *Essay on Man*:

> All Nature is but art, unknown to thee
> All chance, direction, which thou canst not see;
> All discord, harmony not understood;
> All partial evil, universal good;
> And, spite of pride, in erring reason's spite,
> One truth is clear, Whatever is, is right.

These lines are wonderful because of their sheer audacity – but they lack the tension, the struggle between tragedy and affirmation that characterises the music of Pope's contemporaries – Bach and Handel. We no longer have Pope's confidence in order, and we are repelled by the slightly self-satisfied didacticism. Interestingly in Handel's "Jephtha", Pope's famous phrase "Whatever is, is right" is the climactic statement in a tragic chorus, where Jephtha confronts the fact that he will have to kill his daughter as a sacrifice to keep his vow to Jehovah.

The sequence "Roses" began, as many poems do, quite by accident. My friends, Charles and Barbara Blackman, were holding a large party whose theme would be roses and they asked me to write a poem for the occasion. I did not intend to publish it, and I quickly put together some lines about roses and a war in space – a long narrative in quatrains, that I read from in manuscript at the party.

I have the misfortune to be a collector of things and at about the time I wrote the piece for Charles and Barbara Blackman's party, I caught the rose bug. I ordered 50 or so antique and species roses from a specialist in South Australia and I used to pick these up from the local railway station and plant them in a tennis court. My obsession quickly transferred itself to the poem, which I had originally intended merely as vers d'occasion. So the original narrative of "Roses", which I had read at the party, was cut right back and a dozen or so separate pieces were written about roses to make up the sequence. This was eventually published in a book in 1972 – the first published version. I published a second, heavily rewritten version in 1976, and now a third version with further heavy edits this year.

Nihilism is a more comfortable literary stance than affirmation. My approach to the dangerous exercise of writing an "affirmative" poem was essentially oblique. I don't think I could have tackled such an ambitious subject by a frontal assault. The framework was created accidentally by some vers d'occasion and then my obsession with roses carried me through the rest of the sequence. Revisions over a period of almost 30 years involved fixing flaws that reflected the hasty origin of the work, and removing much of the factual material about roses that had provided the raison d'etre for the poem, but which was no longer necessary now that it was written. Wallace Stevens was a stylistic reference point; also there are minor echoes of the other 20th Century poets whose "affirmative" poems I've mentioned. Although it is intended to be an abstract poem it has been built up out of a large number of personal references. There used to be an old white painted table with a jug at a place called Boat Harbour. The old man on the island is a brief portrait of Robert Graves, whom I met on his tour of Australia. And so on. The personal references, although meaningful to me, are irrelevant to an understanding of the poem.

The bipolarity of "war" and "roses" provided the tension, which was necessary and I may also have had a musical model in mind – baroque music in general and Handel in particular.

At school I fell in love with Virgil's Georgics, and resolved that one day I would buy a farm and write poems about farming life in the style of the Georgics. Some years later I got go know Ross McInerney, a farmer who lives near the small town of Koorawatha and a few miles out of Cowra. Ross is a wonderful raconteur and I wanted to preserve some of his anecdotes as poems. I realised with a twinge of relief that I would not have to buy a farm as Ross could be the narrator of my Australian Georgics. At this stage I had no idea of the scope of the work that would follow. I anticipated there would be about 15 poems and I set about capturing Ross' stories and life. The style made itself up as I composed the poems. What I wrote took me aback. The economy of language and effects, the sheer plainness that was required, because I

was writing through Ross' voice and about a deceptively plain, but in fact quite intricate, landscape, were a complete surprise – and at a far remove from Virgil. Alan Gould in his essay has compared "the quietism of Ross with the vivacity, the imperial assumption of high profile, in Nero's speech". (The Emperor Nero is the other voice through whom I have written a long sequence, called "Nero's Poems".) Gould went on to say: "The tone of Ross' deliberations is unhighlighted, unexcitable, as though in verbal imitation of those low, flowing, interlocking hills of central NSW". After I had recovered from my initial surprise, I realised that here was a style in which I could write about virtually anything – subjects that were usually not suitable for poetry – the poems were so plain, so much part of their landscape and the voice of Ross, that they could become a vehicle for philosophical observations, bits of science, all of the mental bric-a-brac that are collected over a lifetime. They had outgrown their anecdotal origin, but they still required a narrative current to sustain the observations and generalisations.

As with "Roses" where Handel became a musical analogue, there was also a musical analogue underpinning *Ross' Poems* or *Spring Forest* as it later became. This may sound surprising – but the composer I heard in my mind when writing through the voice of Ross was Chopin – the Chopin of the nocturnes and etudes, and his work for solo piano generally. I was impressed by the surprising twists and turns of these short pieces, the unexpected, quiet endings, the sense of intense listening. In the poems I tried to recreate this sense of the unexpected by allowing the narrator to collect mental objects in an apparently random way. In some poems I created deliberately inappropriate juxtapositions, so that there was musically speaking a change in key. One poem began as an elegy for a man dying of cancer and the second half is about the collapse of wool prices. Another begins with an old uncle who gives children holy medals to protect them from perverts and ends with a lament for the loss of species. A long poem about the Lachlan River begins with a theological debate between a Jehovah's witness and Presbyterian minister. In fact the minister is based on my wife's grandfather who was once a Moderator General of the Queensland Presbyterian Church and had no connection with the Lachlan or the landscape of the poem.

I am sometimes asked what Ross McInerney thinks of these poems. I started writing them without consulting him, and I was nervous when I showed him the first 15 or so – as I would have been reluctant to publish them if he had disapproved. Ross was completely supportive and has never queried inaccuracies, as he has treated them as a necessary part of the poem. His comments have been limited to drawing my attention to typos and saying he liked a particular poem – a model of courtesy and tact. When we did a broadcast together for the

ABC about three years ago I realised I had got some important details entirely wrong, but Ross had never pointed out my mistakes.

My other long sequences "Nero's Poems" was begun not long after I started writing through Ross McInerney's voice. Just as I was intrigued with Ross' stories and life, the starting point for "Nero's Poems" was a fascination with the details of his life. As an aside, I believe a novelist must love his characters – in a way that Proust, Tolstoy and Faulkner love theirs, and Patrick White does not, which is why he was not a major novelist. Nero may seem a rather peculiar choice of hero. I was intrigued by his naive desire to be a universal man – poet, opera singer, dancer, organist, wrestler, chariot rider, painter, author of judgments and robber. Most of these things he seems to have done with some degree of proficiency. I also had a musical analogue in mind – a fairly obvious one – Monteverdi's opera, *The Coronation of Poppaea*, which celebrates Nero's love affair and marriage with Poppaea. Monteverdi seems to have had a similar attraction to this unfashionable hero.

Like *Spring Forest, Nero's Poems* is not a continuous narrative. In both sequences my aim was to write poems through the particular voice – a mosaic of narrative and opinion – which forms a whole when you step back from it. The reader constructs the narrative and not the author.

I decided when I embarked on *Nero's Poems* that I would present him warts and all. As the poems were written in the first person this posed two distinct challenges for me. One of the central facts of his life – perhaps the central fact – was that he was a matricide. I had dealt with Nero's murder of his tutor Seneca in a short flippant piece – Seneca lived near a bath house and was a fairly pompous writer, so the poem I wrote about his death was a satirical play on these facts.

But the murder of Nero's mother could not be shrugged off so easily. How could I deal with this sympathetically and give it the weight that it deserved? This remained a problem for some years. Eventually, when I had almost finished the sequence, I tackled the murder of Nero's mother, Agrippina. I had anticipated for so long the difficulty of writing this poem, that I was able to start it on a note of high emotionality. After that, the poem wrote itself quite easily. The shocking facts created their own momentum.

When I was revising "Nero's Poems" for my *Collected* I removed some of the short lighter pieces – there were too many of them – and made an interesting discovery. Nero's most "naive" and optimistic poem, a poem about a goddess given by an unknown admirer, now directly preceded the poem about death of his mother. I realised that I had to write another piece about this turning point in his life – a short poem about the moment when he despatches the assassins.

The second challenge was to deal with Nero's bisexuality. His heterosexual relationships dominate in the accounts of his life, and in my poems about him, but a complete self-portrait of Nero required some mention of his homosexual relationships. I had a personal experience that I was able to use in this regard. Some friends had invited me one night to dinner at their house which faced Anderson Park, near Neutral Bay. As I walked across the park to get to their house I noticed shadowy figures standing under the trees and clicking their fingers and hanging around a public toilet in the middle of the park. I wondered whether to hurry back. I decided the safest course of action was to continue walking briskly across the park to my destination – but it was a long couple of minutes. That experience was the basis of *Nero's On The Beat*, which is written from the viewpoint of one of the shadowy finger-clicking figures. One of Nero's most outrageous acts was to be a bride in a homosexual wedding. This must have required some courage on Nero's part, as it is likely to have been an act of self-humiliation. The short piece I wrote about this event needed more than the bizarre fact of an emperor-bride to turn it into a poem, and I treated this wedding as an example of Nero's compulsion to experience everything, which included becoming a woman. The end of "The Night of the Wedding" which was revised for the *Collected* now reads:

> Suddenly I was
> my mother, little gelded Sporus,
> every girl and widow
> the Ladies' Brigade
> of bleeding and suffering ghosts
> my hymen, just a commodity –
> as fake blood was splashed on the sheets

So far I have not satisfactorily explained why I wrote poems through the voice of Nero – only some of the challenges which I faced when writing half a dozen pieces from a sequence of almost 60 poems. The other poems, which make up the majority of the sequence, range over subjects such as aqueducts, horse racing, dinner parties, gardens and matrimonial quarrels. Why write these poems through Nero's voice? I did consider an alternative voice from time to time – this was Pliny the Younger, author of the famous letters. Pliny was a much nicer person than Nero – the British would have called him a wonderful chap – but I could never bring myself to write a Pliny poem. The flawed personality of Nero gave a tension to the poems, which would have lacked vitality if I had written them through the voice of Pliny. An example is "Gardens". This poem is a celebration of gardens and Nero's love for Poppaea, but it opens with the lines:

Because she coveted his garden
my mother had a man accused.

When you hear Palestrina's polyphonic choral works, the words are insignificant and difficult to distinguish. In 1605 Monterverdi announced a revolution against the polyphonists and claimed that the text was master, and music was the servant of the text. The same I think is true of poetry. The text must come first. If you consider the great poems of the past, they all have an interesting text, the poets were passionate about this subject matter. However, we memorise and recite poems in our mind, not for the subject, which is a necessary distraction, but for their music.

Photo – David Karonidis

Moira Rayner

At a time when Australians are showing disillusionment with politics and politicians, lawyer Moira Rayner has written a new book, *Rooting Democracy – Growing the Society We Want* (Allen & Unwin 1997), which makes a plea for citizens and their governments to enter into a new kind of dialogue. To discuss her vision for civic co-operation, Moira Rayner addressed The Sydney Institute on Tuesday 8 April 1997.

POWER AND THE *JUDICIARY: ALL FOR ONE OR ONE FOR ALL?*

Moira Rayner

Last week I participated – or, more accurately, interjected – in a broadcast conversation about a book I've written.[1] My fellows were small "l" liberals: literate, thoughtful and well-spoken men, the middle-aged products of good education and the post-war welfare state, employed and influential – one was a member of parliament, the other two were newspaper columnists.

The men in the Sydney studio talked mostly to each other, and over the author in her faraway (Brisbane) tardis; and they almost forgot the Democrat, light years away, in Perth. They were also unenthusiastic about the premise of my book: that the legitimacy of our democratic government has been undermined; that its formal structures and constitutional location of power, and the checks and balances on each of its three limbs, do not function as is pretended, and that the expansionist executive overwhelms the parliament. What John Ralston Saul calls the Heroes – the ministers, the technocrats, the back-room number-crunchers and media officers[2] – are disdainful of both the contribution of the people and of the absolute virtue of the principles of justice. As William de Maria has said:

> Under the Westminster system the people are supposed to be at the end of the line of accountability. But in actual fact the "king" (prime minister, premiers, ministers) is still in a position of ultimate power. The English Revolution of 1688 has turned full circle in the Realpolitik of everyday life.[3]

My Sydney colleagues' trust that all was well, in the face of what I suggest is cause for alarm, that we have come to this, mirrored the quality of our conversation that night, and demonstrated quite neatly our different experiences of inclusion and informality. We did not share a crucial experience which, as the American philosopher, Iris Young says, makes the listener sufficiently aware of another person's experience to understand that it cannot be fully shared. It is "the combination of narratives from different perspectives which produces the

collective social wisdom not available from any one position".[4] We are in fact listening to the same, few, almost interchangeable voices talking to each other, and not listening to anyone else, and this is the reason that our democratic system is not working.

Let me tell you a story – someone else's. An American academic, Patricia J Williams, writes about how two academics – a white man and a black woman – negotiated leases for their respective apartments:

> He handed over a sizeable cash deposit to strangers, with whom he had shared a few moments of pleasant conversation. There was no lease, no exchange of keys and no receipt, but he thought the handshake and "good vibes" were enough – indeed necessary – to establish trust. She insisted on signing a lengthy formal contract with the friends who offered her accommodation.[5]

Williams (the black woman in the story) explained that she had learned that:

> No matter what degree of professional or professor I became, people would greet and dismiss my black femaleness as unreliable, untrustworthy, hostile, angry, powerless, irrational and probably destitute. Futility and despair are very real parts of my response. Therefore, it is helpful for me, even essential for me, to clarify boundary; to show that I can speak the language. . . As a black, I have been given by this society a strong sense of myself as already too familiar, too personal, too subordinate.[6]

As I summarised it.

> For her, explicit rules were necessary, because in her experience informal, implicit codes disadvantage her and people like her. Having experienced sex and race discrimination, she knows that she cannot take acceptance for granted, and needs the security of rights protected by law. For him, by contrast, it is easy to be liberal. He has the confidence that comes with the experience of power, and he can dispense with the formalities. Trust is implicit in his relationships.[7]

Someone who isn't in the loop, the metaphorical eavesdropper in the distant tradis: someone who is black, has a disability, is unemployed, lives in a country town, worships the "wrong" god or speaks the "wrong" language – learns quickly not to trust that discretionary power will be properly used, if it is not exercised according to a rule-book. An open rule book, written in her language, that she can enforce.

The role of the courts

Rules that protect individual and minority rights are essential for democratic government, and the rule of law itself, which requires:

- equality before the law;
- uniformity, consistency and certainty in decisions arrived at by a disinterested and impartial application of legal rules;
- the total power must never be concentrated in one place;
- that power may not be arbitrarily exercised, (and that officials should never have broad discretionary powers); and
- respect for basic rights and freedoms

None of the other institutions of our government functions quite as our written Constitution pretends: courts mostly do. Governors have no real power, and Ministers and public servants are not, as the rule book says, accountable to them – nor, largely, to parliament either. Parliament does not determine legislative policy: that is determined by the executive outside its houses, by completely unregulated political parties and often in response to corporate lobbying. As John Ralston Saul says in his Massey lectures, industry, whose purpose is the conversion of elected representatives and senior civil servants to the particular interest of the lobbyist – and away from the common good – has had a long-term undermining effect on the "representative" system.[8] And the public knows it is out of the loop, and this feeds its vast cynicism about "politics" and politicians, matched only by the executive's contempt for what it thinks – except at election time.

It is from this deep sense of disenfranchisement and exploitation that populist nonentities such as Pauline Hansen draw their support. It is from this sense of exclusion that conservative politicians portray themselves as champions of the "silenced majority" and wedge issues that pit the resentful majority against minority interests; that John Howard could say – and be heard – that: "There is a frustrated mainstream in Australia today which sees government decisions increasingly driven by the noisy, self-interested clamour of powerful vested interest groups with scant regard for the national interest. Many Australians in the mainstream feel utterly powerless to compete with such groups. . ."[9]

Yet it was not the feminists, or the blacks, or the gays who excluded them from the political conversation in the first place, but the political parties, the technocrats and the media. The real and present danger with the way wedge issues are being exploited at the moment is that they are building populist support for the erosion of minority rights on a general sense of exclusion from economic, political, and cultural life. It is a clear case of divide and rule, pitting the powerless against the even more powerless, and distracting attention from the real sites of power.

John Howard's promise to open up the debate has only resulted in more voices saying the same thing. We need more of the different: more space in public debate for people to express their own real experiences and needs. Where, for example, is the political voice for the 1.3 million people in this country who are looking after an aged or disabled relative?

The expansionist executive

Power is most efficiently exercised on the quiet: by controlling the flow of information, by setting agendas that restrict discussion and debate; by privileging access to a decision-maker; and by threatening defeat and reprisal and so deterring any challenge. Governments do all of these, all

the time. The executive has vast power, running the machinery of state, controlling and dispensing its resources, and so must never be above the law nor beyond the scrutiny of the people.

This is easier said than done. Ministerial accountability to parliament is a principle more respected by teachers of Legal Studies in schools, than practised. The last time a government was forced to resign because it had lost the support of the majority of its lower house was in Tasmania in 1982, when the Holgate Labor government was forced to an election after some of its own members combined with the Opposition to defeat it over the Franklin River dam. Party discipline usually prevents such treason. Most of the debates in parliament are set-pieces and point-scoring on party-political lines. A "conscience vote" may be permitted on moral issues such as Victoria's "free" vote on the proposed liberalisation of drug laws in 1996, and the euthanasia debates in the parliaments of the Northern Territory (1995) and the Commonwealth (1997). Conscience votes were allowed then because whatever the outcome it could not imaginably bring down a government. One simply could not imagine a free vote on supply, or "important" government policy, such as the introduction of work-for-the-dole, or the sale of public utilities.

Parliaments do not have the time – in Queensland and in Victoria, for example, they sat for less than six weeks during 1996 – to do the jobs "expected" of them.

They do not really:

- determine who will form the government of the day: they rubber stamp the arrangements proposed by the entirely unconstitutional, unregulated party with the majority of seats, decided outside the House;
- provide a platform for debating major public issues: the timetable is set by government, most debates are set-pieces, and subjected to standing orders which guillotine and gag discussion;
- oversee the use of public monies: government business is now so vast and complex that detailed parliamentary scrutiny is virtually impossible;
- provide much of a forum for the ventilation and resolution of individual grievances;
- give the opposition much opportunity to demonstrate its credentials as an alternative government, lacking both control over what goes before the House, and access to the expert advice necessary to design and cost an alternative policy.
- Most of all, parliaments are largely unable to watch over and hold executive government accountable. Party machinery has made government policy planning and implementation much more efficient, at the cost of making the lower houses a "rubber stamp". Where possible, the executive seeks to bypass parlia-

ment (especially hostile upper houses, a Labor plague) entirely. The damaging consequences for executive accountability and public probity were most vividly displayed in the Royal Commission into "WA Inc".

- Even in its law-making function, parliaments' laws seldom originate within parliament, but from government. The Andrews Bill, overriding the Northern Territory's euthanasia legislation, was an exception which proved the general rule that private members' bills are a rarity – until then only likely to be debated with government support.

The fundamental problem facing a democratic system is the excess of executive power, and the failure of our institutions to rein it in.[10] As the executive has gradually taken the ascendancy over parliament, the task of defining the limits of its power has largely fallen to the courts.

The power of one

The rule of law underpins a system of government whose objective is to reconcile majority rule with respect for individual rights and freedoms. Laws, and the courts that interpret and apply them, compensate for the differences in strength between the individual and the group: they create an arena where both must meet on an equal footing.[11]

Courts preserve our faith in justice. Judges do not deal with "policy", but its effect on individual interests. They offer a place to take a stand and make a claim, even if it is in defending a "minor" criminal charge – for "trespassing" on a newly privatised public park, for example – one of many ways to challenge excessive acts by executive government, or the police. Test cases are another. These may be most inconvenient to the achievement of executive will. Nonetheless, a society that values the individual must respect that person's rights – as they must respect them in others.

Faced with practically the only instrument of government that is not now directly dependent on the favour of the party in power, the executive has responded with a determined bid to establish its ascendancy over the courts as well.

Northlands – the power of two

Let me tell you another story, about the executive's crucial failure to appreciate its accountability to the people, between elections, through its relationship with the courts.

In 1992 the Kennett government announced the closure of a number of schools, including Northland Secondary College. The school was internationally and nationally renowned for its innovations in Koori education, which had unprecedented success in encouraging many Aboriginal children to complete their education.

The announcement caused enormous distress, but the government would not negotiate. So two students complained that the closure would indirectly discriminate against them because of their race: they simply could not succeed in an education system which did not take into account their special needs and disadvantages – and the closure breached the Victorian Equal Opportunity Act.

The government's immediate response was to amend the Victorian Constitution so that the Supreme Court – and all courts – were deprived of all jurisdiction to review any future decision to close a school, ever. Its case then rested upon its overall economic priorities – maintenance costs were originally estimated at more than $1million – and their being more important than the children's "right" to a public education. The children's case was that to deprive them, as Aboriginals, of public education was at least as important as the state of the budget and had not been adequately considered.

The Supreme Court finally agreed, after two years of hearings and appeals, and the school was ordered to re-open. As he ordered the final series of appeals Premier Kennett announced that, "beating them" – the two Koori children – was a "crucial test" of his right to govern. In a radio interview on 23 February 1995 he said: "Equal opportunity . . . was always intended to be about the rights of individuals, and not to second-judge government policy".[12] He also announced a review of the powers of the statutory equal opportunity tribunal, saying that:

> It's a matter of whether you have a government or you don't – the Equal Opportunity Board is a function of government – governments are elected to make decisions . . . you may as well get rid of government and let the Board run the show".[13]

By the time the litigation was over the government had spent between $2 and $4 Million on legal costs. The case illustrates two basic issues about democratic government: that majority rule must accommodate and resolve minority rights, and the executive's lack of comprehension of the proper relationship between it and the courts.

How can it rationally be said that a government has been illegitimately frustrated in its "proper" function when its own tribunal, and the Supreme Court, found it had breached its own anti-discrimination laws? Given the public interest in protecting and promoting human rights – the subject of government legislation – the executive must understand that its "right to govern" does not extend to breaking the law.

Indirect discrimination complaints such as this *are* inconvenient. They arise precisely when individuals feel their interests have been sacrificed to achieve majority goals. They arise most acutely when governments define the public interest in exclusively economic terms, and fail to take more than superficial account of the damage to individual interests. In this case, the Supreme Court concluded the harm to these children was nothing short of catastrophic.

Cutting out the courts

I have mentioned that the Victorian government had amended the Constitution to make sure such a challenge could not happen again, within weeks. This was a fairly crude way of asserting dominance. It is not unique to Victoria. Many governments have fallen into the disreputable habit of taking away the right to challenge executive acts, even abolishing the great prerogative writs of the Common Law, developed by judges to review administrative acts done in bad faith, for improper purposes, in breach of natural justice, or beyond the power granted by the legislation.

This has become an art form in Victoria, to such an extent that its Supreme Court has protested about it, in annual reports since 1988. In 1994–95 the Court highlighted two principal areas where its jurisdiction had been lost. Ministers had been given discretion to make decisions affecting rights while the Court's jurisdiction to review them had been removed, and government bodies and proprietary companies doing "government-approved" projects had been routinely exempted (usually on "commercial confidentiality" justifications) from all review.

The Court commented that such legislation "is contrary to our understanding of the rule of law" and that whenever such laws were enacted "it can create arbitrary power, inequality under the law and increase the risk of corruption.

This has cut no ice with the government, which has continued on the course first set for it by the Cain Government, in the 1980s, though at a much greater pace.

Most recently, after the High Court's recent spate of "human rights" cases government leaders have made fatuous propositions designed for its control, slapped down on the table like the proverbial dead cat. Judges should be appointed of a putative political persuasion, for example, according to Deputy Prime Minister Fischer, who also demanded that the next High Court appointment should be a "capital 'C' conservative". Or (from State premiers) that its judges should be appointed for limited terms (lest they become too robustly independent?), or that the Chief Justices of the respective State Supreme Courts should sit in rotation, or that the judges should be nominated by State governments.

These extraordinary demands come after 20 years of sustained assault by the executive on the independence of the judiciary.

Assaults on independence

It began, surreptitiously, with assaults upon the softer targets: abolishing and dismissing the members, of statutory judicial bodies. The litany is well-known now: the Northern Territory's Federal Court judges in 1981, Jim Staples' "disappearance" from the former Conciliation and Arbitration Commission, the NSW government's dis-

appointment of former magistrates to its new Court of Petty Sessions in 1988, 11 judges sacked when the Victorian Accident Compensation Tribunal was abolished in 1992 (they sued), and the abolition and dismissal of members of State industrial relations commissions, threatened in South Australia and doubly executed in Victoria. The failure to reappoint "judges" from restructured or abolished courts has become so common that there was no public outcry when Victoria handed over its industrial relations system to the Commonwealth in 1997 and the President of the Employee Relations Commission and all its commissioners were simply dismissed, just as their predecessors were in 1992.

The fundamental principle of judicial independence is that judges must have security of tenure and be free from direct or indirect pressure in the performance of their duties. If a court is abolished, or restructured, as parliaments may certainly do, its judges must be appointed to judicial office of equivalent status. To provide anything less is to open the way for governments to rid themselves of an inconvenient judge, a threat that, as Justice Michael Kirby has said:

> . . . hangs as a Damoclean sword over all judicial officers in a like position. If judicial officers are repeatedly removed from their offices, and not afforded equivalent or higher appointments, the inference must be drawn that their tenure is, effectively, at the will of the executive government.[14]

This principle has been so thoroughly flouted in Australia over the last 20 years that the continued assertion of the principle of judicial independence probably exists in this country only because of the traditions of the legal profession, and the independence and integrity of judges themselves.

The executive's attitude to judges was perhaps best summed up by Ken Baxter who, as he left his office as head of the Victorian Department of Premier and Cabinet in 1995, told the Melbourne Press Club that:

> Ultimately, bodies like the DPP and the Equal Opportunity Commissioner [that was me: I had been removed in controversial circumstances in 1994] their responsibility is to the Crown, or the government of the day, and you have got to turn around and say how much . . . freedom do you give any institution in the political system. The judiciary has got to be independent and be seen to be independent, but . . . the judiciary also has to have a sense of accountability if one of its members is not performing.

He went on to ask what should be done with a "non-performing" judge:

> Do you leave him there until age 72? Or do you send one of the chaps round to the Melbourne Club to have a chat to him and suggest he dies?[15]

I don't defend lazy or opinionated judges – I, too, criticise their mistakes, those who indulge in facetious banter, or express offensive personal opinions, or otherwise act so that the parties assume they will

not get a fair hearing – but governments have come to assume that they may "dismiss" judicial officers in the same way as any other statutory office-holder, or even a public servant. The courts are the only organ of government which are, and ought to be, absolutely independent of executive control, once appointed.

John Stuart Mill wrote[16] that the effect of the State's diminishment of its citizens "in order that they may be more docile instruments in its hands even for beneficial purposes", would be that:

> . . . with small men no great thing can be really accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine may work more smoothly, it has preferred to banish.

And justice for all

The only way the rights of the Aboriginal students of Northland Secondary College could be heard by the Victorian government was by bellowing through the megaphone of rules establishing formal equality, which applied to government and citizen alike, in the courts.

Courts and judges and magistrates may make mistakes, may be too slow, too expensive and accessible only to those few – too few – who can afford to use them. The many other mechanisms to check the misuse of power – ombudsmen, commissioners, tribunals and statutory reviews, statutes giving rights to freedom of information – do not substitute for the courts' role as the testing ground for society's rules. It was the High Court that prevented the Menzies government from banning the Communist Party in 1950–51 and forced the policy issue back to the people. When the legislation was found to be constitutionally invalid the government took the matter to the electorate by referendum, and the people spoke: the proposal failed.

Courts have acted both to expand Commonwealth power and to contain it, under "conservative" judges, such as Chief Justice Gibbs, when the court was as creative an interpreter of s.92 of the Constitution, which guarantees that trade among the states would be "absolutely free", as it was when it met social and technological development by interpreting the Commonwealth's power over postal and telegraph services to include radio and television. More far-reaching changes have occurred since 1983, with the validation of the Commonwealth's "external affairs" power to implement international agreements relating to human rights, starting with **Koowarta**[17] in 1982 and coming temporarily to rest with **Mabo**[18] and **Wik**[19]

It is in its recent decisions on rights – internationally guaranteed human rights, constitutionally implied rights, and Common Law rights – that the High Court has temporarily outstripped the capacity of the executive to accommodate them and breathe at the same time.

In **Mabo** three members of the High Court – Chief Justice Mason, Justices Brennan and McHugh – all agreed that the court could not perpetuate a view of English Common Law that was unjust, did not respect all Australians as equal before the law, and was out of step with international norms about human rights. In other cases the Court has "found" rights implicit in the nature of constitutional democracy itself – the political free speech cases, for instance,[20] – and sought to balance freedom of political communication with the social interest in protecting individual reputations. In yet others they have done what only courts can do: determined what procedures are necessary to effect a just result. Thus, anyone charged with a serious crime cannot be considered to have been fairly tried unless they are legally represented (**Dietrich**[21]) and vulnerable children should be separately represented in the Family Court (**Re K.**)[22]. This has provoked the Commonwealth Attorney General to criticise the courts' "irresponsibility", because of the cost, though the executive is in a position to address it, if the will be there. Justice is so fine a prize that surely there is no price too high to pay for it.

Yet the gnat at which government strains most is the human rights of children. In **Teoh**[23], the High Court said that people may legitimately expect administrative decision-makers to take their human rights into account. Immigration authorities afflicted by the requirement to be just when deciding to deport someone ran a sustained, successful campaign under both the Keating and Howard administrations, and this cup was taken from them. Each Attorney General announced, in May 1995 and February 1997 respectively, that there should be no such expectation, and that they would legislate to require parliament to pass a law before any international obligation had domestic effect.

Thus, when an Australian ratification of a convention is announced, as the former Chief Justice of the High Court Sir Anthony Mason remarked sardonically:

> . . . they may dance with joy in the Halmaheras, while here, in Australia, we the citizens of Australia, must meekly await a signal from the legislature, a signal that may never come?[24]

All for one, or one for all

The essential value of a civil society is what Ronald Dworkin called "equal concern and respect for persons". This comes down, in the end, to relating to one another according to a kind of moral code. Justice – as Justinian wrote, the perpetual will to render to every one his due – is one of its tenets.

Our courts – elitist, expensive, infuriating, and inaccessible as they are – have nonetheless been a symbolic bulwark against the misuse of power and from time to time, sometimes surprisingly, protected the rights of the least powerful. This function has compensated, to some degree, for the lack of explicit constitutional protection of human rights and civil liberties. Paradoxically, the one arm of government that is not elected nor popularly accountable has assumed a crucial role in protecting democratic principles and individual rights – at least, for now.[25]

Paul Keating frightened the nation, a decade ago, by suggesting we were becoming a "banana republic", but he got it wrong, because he was talking about economics, instead of law. The difference between a democracy and a banana republic lies in the nature of their laws and how they are enforced. In the one, laws are made by and for the powerful and enforced at their discretion: in a democracy, laws are made by the peoples' representatives, respect the rights of the powerless, and are enforced impartially.

Let me tell you a final story. Back in 1891, when the first constitutional convention prepared its draft framework for the Commonwealth of Australia, the proposed constitution included a clause that would have given all citizens equal protection under the law. In the second round of constitutional debates that clause was struck out. Why? Because the delegates realised it would invalidate the frankly racist colonial legislation passed to limit the rights of indigenous people, Chinese immigrants and Melanesian indentured labourers.

So, for the sake of denying the rights of minority groups, the Australian Constitution is silent on the basic human rights of all its citizens. Is this the kind of democracy we need as we head into the 21st Century? As Justice Mary Gaudron said in the **Teoh** case just two years ago:

> Citizenship involves more than obligations on the part of the individual to the community constituting the body politic of which he or she is a member. It involves obligations on the part of the body politic to the individual, especially if the individual is in a position of vulnerability . . . so much was recognised as the duty of king. . . No less is required of a government and the courts of a civilised democratic society.[26]

Endnotes

1 Moira Rayner, *Rooting Democracy: growing the society we want* (1997) Allen & Unwin.

2 John Ralston Saul, *Voltaire's Bastards: The Dictatorship of Reason in the West*, Penguin, 1992.

3 William De Maria, "Quarantining dissent: The Queensland Public Sector Ethics Movement". *Australian Journal of Public Administration*, Vol 54 No. 4, Dec 1995, p.444.

4 Young, Iris, op.cit., p. 148, 142.

5 Williams, Patricia J, "Alchemical Notes: Reconstructing Ideals from Deconstructed Rights", *Harvard Civil Rights – Civil Liberties Law Review*, vol 22, 1987, pp. 401–7.
6 Ubid, p. 407.
7 Rayner, op. cit, p. 248.
8 John Ralston Saul, *The Unconscious Civilisation*, Penguin, 1997, pp. 76–116, 97–98
9 "Headland" speech, 6 June 1995, quoted by Gerard Henderson, *A Howard Government?* 1995, Harper Collins, Sydney, p. 29.
10 Rayner, op. cit., p. 62
11 Rayner, op. cit. p. 64–65
12 Rayner, op. cit. p. 142–143
13 Rayner, op. cit. p 142
14 Justice Michael Kirby, "The Abolition of Courts and Non-Reappointment of Judicial Officers in Australia", Sir Ronald Wilson Lecture, Perth, 28 November 1994.
15 *Herald Sun*, 29 April 1995.
16 J.S. Mill (1859) *On Liberty*, in *Three Essays*, Oxford University Press, Oxford, 1975, p. 141.
17 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
18 *Mabo v Queensland* [no. 2] (1992) 177 CLR 1.
19 (1997)
20 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 106; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 182 CLR 104; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers* (1994) CLR 211.
21 *Dietrich v The Queen* (1992) 177 CLR 292.
22 *Re K* (1994) FLC 92–461).
23 *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 304.
24 Sir Anthony Mason, "The Influence of International and Transnational Law on Australian Municipal Law", *Public Law Review*, vol. 7, no. 1, Mar, 1996, p. 20.
25 *Rooting Democracy*, pp. 146–147.
26 *Teoh v Minister for Immigration and Ethnic Affairs* (1995) 183 CLR 304.

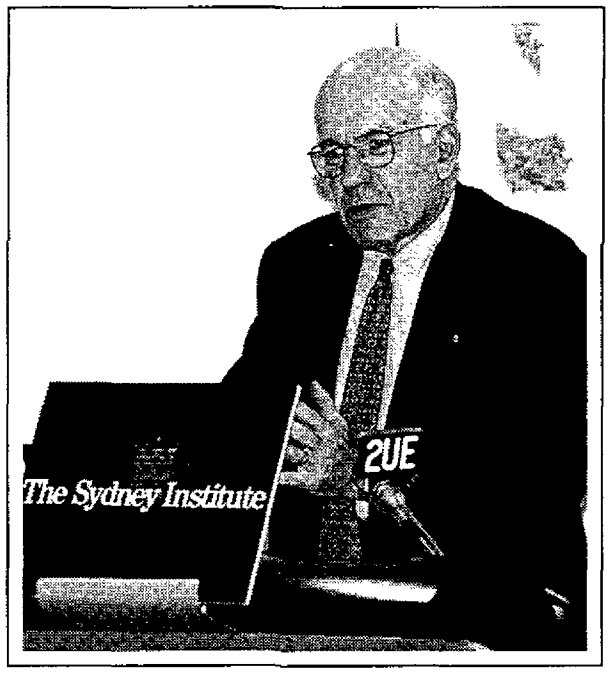

Photo – David Karonidis

Stan Wallis

Stan Wallis, Deputy Chairman of Amcor Limited, headed the Federal Government's Financial System Inquiry – an Inquiry charged with providing a stocktake of the results arising from the deregulation of the Australian Financial System since the early 1980s. Stan Wallis addressed The Sydney Institute on Tuesday 15 April 1997 following the release of the Wallis Report.

THE FUTURE OF
THE AUSTRALIAN FINANCIAL SYSTEM

Stan Wallis

I am very pleased to have this opportunity – thanks to The Sydney Institute – to present an outline of the Financial System Inquiry's Final Report which was released by the Treasurer last Wednesday.

Completion of the Report has been a very challenging, but stimulating, task over the last nine months for all of us on the Committee and in the Secretariat. We have received many high quality submissions and presentations and I thank all those involved.

Terms of reference

In summary the Committee was charged with:

- stocktaking the effects of financial deregulation since the early 1980s;
- analysing the forces for change in the industry; and
- recommending regulatory arrangements which will best ensure an efficient, responsive, competitive and flexible financial system, for the benefit of consumers and users of the system and the economy as a whole.

With over 400 pages of Discussion Paper and nearly 800 pages of Final Report, incorporating 115 recommendations, the Committee is well satisfied that the Treasurer's request has been fulfilled.

Forces for change

To start with, what are the forces driving change in the financial system? We identify three major forces:

(i) Changing customer needs, profiles and work patterns –

- The population is ageing, which will place greater emphasis on savings and its drawdown in retirement;
- Consumers are more aware of value, more willing to shift their business to get a better deal and more ready to use new technology;

- Consumers are increasing both their saving and their borrowing within the financial system and have greater exposure to market movements than in the past.

(ii) Technological innovation is rapidly reshaping the financial landscape and appears likely to continue and accelerate. The key factors are:
- Rapidly declining costs of handling data;
- Emerging open access networks at lower cost and with appropriate security mechanisms in prospect;
- Sophisticated software which can cater to individual preferences in handling inquiries and transactions, in much the same way as staff at counters.

(iii) Government policies to deregulate global trade and capital markets have created new pressures for change. Moreover, Government actions on retirement income, privatisation and taxation have had major impacts on the financial system. These forces for change are causing a range of far-reaching responses in the financial system:
- There is an increasing focus on efficiency and competition.
- Financial markets are rapidly becoming more global.
- There is a continuing shift from intermediaries to markets, widening the range of financial products to which consumers can have direct access.
- Advances in information technology are enabling more niche and specialist players to enter the market, including from overseas.
- New payment instruments are emerging, using new technologies and delivery channels.
- Services are being continuously redesigned and rebundled.
- Large, diversified financial conglomerates have developed, partly in order to compete most effectively with new specialist or niche players. (The middle ground may not be a comfortable base from which to operate in the marketplace).

A vision for the system

There is much debate about the scale and pace of these changes in the financial system. One view is that the change will remain gradual and incremental, with basic functions remaining unchanged and technology moving at a steady pace. The contrasting view is that the financial system is undergoing a "paradigm" shift – a sharp discontinuity from the past. This view emphasises the transforming potential of ultra-low cost information technology and its rapid dissemination into homes and workplaces.

Between these two extremes lie many diverse views. The Inquiry has not attempted to resolve this debate and has not needed to. The marketplace will determine the outcome!

The Inquiry has been convinced that whatever their precise pace and ultimate effects, these changes are sufficiently far-reaching to require that we modernise our regulatory system. This is necessary in order to take advantage of the processes of change, and to ensure that safety and stability are maintained.

Main themes of the Report

Expressed simply, the Inquiry is about achieving competition in more areas of the financial system, more efficient outcomes and lower costs for users, whilst at the same time maintaining or improving the safety and stability of the system. These improvements can be brought about by a thorough modernisation of the regulatory framework.

(i) Competition and contestability

The Committee has placed a very high priority on improving contestability in the system. Contestability is the opportunity for newcomers to challenge the established firms and compete with them wherever they see opportunities to do so. Our recommendations involve opening up access to banking and other financial services (including the payments system) so that new entrants are encouraged at all levels and dimensions of the sector This also involves ensuring that the major participants are not removed from the threat of takeover or acquisition.

(ii) Safety and stability

At the same time the Committee has proposed continuing, in a revised form, the prudential and market integrity regulation which will ensure that the safety of the system is maintained, even as the rate of change accelerates. We have recommended that the key role of the Reserve Bank to preserve systemic stability and supervise the payments system should be upgraded.

(iii) Reducing cost, improving efficiency for consumers/users

Many specific recommendations have been made throughout the Report to reduce cost, to provide major benefits to consumers and to improve the efficiency and competitiveness of financial markets.

Cost of the financial system

The cost to users of the financial system in Australia is about $41 billion each year. This represents a very large cost for the entire economy. For example, it exceeds the cost to users of the retailing sector. About half the cost of the financial system – $22 billion each year – relates to banking.

Major parts of the financial system have not been subjected to continual competitive pressures, as have many other industries in Australia. The Report highlights the potential savings across banking, payments systems, insurance and funds management, if Australia's performance could match best practice overseas, with allowance for the different scale of our financial markets.

These comparisons suggest that annual savings of 5 per cent, 10 per cent and beyond – that is, $4 billion each year or more – are achievable, without jeopardising safety and stability. The achievement of these cost savings would flow through as substantial benefits to all users of the system (consumers, business and government). It would also secure the future viability of our financial institutions and markets in an environment of increasing global competition.

The reforms recommended by the Committee are therefore central to improving the overall economic performance of the Australian economy.

Summary of major recommendations

Many of the Committee's recommendations will have overlapping effects on the main themes described earlier (i.e. improving contestability, ensuring safety and stability, and reducing costs and improving efficiency). I have therefore elected to group our main proposals under the following five headings:

- benefits to consumers and other users
- impacts on financial markets
- a new market integrity and consumer protection regulator
- safety and stability of the system
- ownership and mergers

Benefits to consumers/users

Increased competition will deliver products at lower costs, as existing participants extend their involvement and new players enter the market. A single scheme of licensing and prudential regulation is proposed for all deposit taking institutions (including those currently under State and Territory supervision arrangements). Existing non-bank DTI's, such as credit unions and building societies, will be better able to offer a full range of banking services and to better service rural and regional communities.

Restrictions on mutuals becoming banks will be substantially reduced. Scope for participation in the payments system will be expanded (both in settlement and in clearing). Insurance companies and other financial institutions will be able more easily to offer a full range of financial products and services via conglomerate structures. Shorter but clearer disclosure documents and a single licensing regime for advisers, will be introduced.

Dispute resolution schemes will be extended to small business customers, and to cover finance companies. Small business should also benefit from easier fundraising requirements. Lower pricing should result if financial information on the sector can be made more easily available. Consumers will have greater choice in superannuation arrangements.

The benefits to consumers from competition and lower costs should be considerable. For the most part, they will be felt as enhancements or accelerations of processes which are already underway. We believe that consumers, and governments, should accept a progressive reduction in the cross subsidisation of retail transactions. Even if this means some increases in fees and charges by banks and other financial institutions, it need not mean higher costs for consumers.

Electronic methods of making transactions cost far less than traditional methods which are still widely used – the differences can be a factor of ten or twenty. Making transaction prices more transparent and closer to the patterns of actual costs can help bring about dramatically lower cost structures in the financial system. This will result in lower – I repeat lower – costs for consumers, if they let prices guide their choices into the lower-cost transaction methods, in the same way as for every other kind of service they buy.

The steady growth in those lower cost electronic methods of delivery, from both existing and new participants, plus low-cost delivery mechanisms for government transfer payments, can ensure that financial services remain available and affordable for all consumers in both cities and rural areas.

Impacts on financial markets

The committee has not proposed extension of intrusive forms of prudential regulation into the financial markets – although the possibilities of systemic risk will be monitored as they evolve. Shorter prospectuses should be encouraged (particularly for smaller offerings). Due diligence defences in the Corporations Law should have full effect, notwithstanding existing provisions in the Trade Practices Act.

Financial products, or rather their pricing, reflects degrees of risk. (This is what makes them special). Under Corporations Law for most part, if proper due diligence is carried out (in relation to prospectuses), then a defence is provided – not so under the Trade Practices Act. If risk factors come into play, and providing proper disclosure has occurred, it seems wrong under the Trade Practices Act that due diligence defence is not available.

There are some other considerations involved here – not the least of which is to make the whole process more functional/consumer friendly. Clearly some in the consumer arena will have difficulty with this – but we believe it is a logical course to remove the inconsistency. Another recommendation has been that a generic classification of financial products should replace the existing separate securities and futures laws. This should encourage competition and innovation.

There are other proposals impacting on financial markets. In particular you should note the establishment of a panel for uniform commercial laws as between Federal, State and Territory jurisdictions,

and a Financial Sector Advisory Council to advise the Treasurer on a range of development and regulatory issues, including how the international competitiveness of the financial system can be improved and how Australia can become a preferred location for financial activities in the region.

A new market integrity and consumer protection regulator

We have recommended that at the Commonwealth level a new focussed and responsive market integrity and consumer protection regulator be established. We are suggesting this body be called the "Corporations and Financial Services Commission" (or CFSC). The CFSC would combine the present responsibilities for market integrity and disclosure of the Australian Securities Commission, the Insurance and Superannuation Commission and the Australian Payments System Council.

The new organisation would use both prescriptive and self-regulatory approaches, as appropriate. The Trade Practices Act would remain applicable, but for the financial system would be administered by the new body, the CFSC. Appropriate agreements would be put in place to ensure the ACCC would not act where the CFSC was exercising its responsibilities.

The Committee believes this combined approach, covering both conduct and disclosure, is the best way of delivering consumer protection in Australia's financial system. The proposal to place the ACCC to one side in relation to consumer protection has caused some ripples.

The Committee's logic was straight forward. Once we had decided that the financial system needed a specialised consumer regulator, it followed that we had to give the new body the powers to do the job. The ACCC clearly fills a role at present, due to the disparate/fragmented nature of consumer protection. This doubling up (double jeopardy if you like) is not appropriate under our proposals. You should note, however, we are not removing any of the ACCC's powers.

Safety and stability

We are proposing a substantial reconfiguration of the prudential regulatory agencies. To better accommodate the substantial widening of markets and trend to financial conglomerates, a new over-arching prudential regulator is proposed – The Australian Prudential Regulation Commission – (APRC). This body would apply a tiered system of prudential regulation to deposit taking institutions, life and general insurers and superannuation funds, with an intensity of regulation (and methods) appropriate to each group of products.

Prudential regulation would be the most intense for deposit and payments products, with no relaxation of current standards. In regard to stored value cards in open systems, more prudential coverage is recommended. The licensing of financial conglomerates in structures with non-operating holding companies (and with multiple licensing possible) will enable service providers to separate financial functions according to the level of regulation required. It will also enable the regulator to impose regulatory arrangements based on functions, rather than on institutional labels.

The reconfigured prudential regulator which we have recommended will not only be able to deal more effectively with the conglomerate structures in the marketplace, but it will be better able to modulate its approach to regulation in the future as practices and community needs evolve. Under our proposals the Reserve Bank will cease its prudential supervision of banks, but will retain the all important roles of preserving systemic stability and supervising the payments system. With respect to the latter, the Inquiry proposes the formation of a Payments System Board ("PSB") within the Reserve Bank responsible for access, efficiency and safety standards in the payments system.

The present paper based cheque clearing systems have very high costs. Therefore the expansion of electronic methods of payment and settlement is a high priority for both regulators and industry participants. Under the proposed arrangements for prudential regulation it will be necessary to have close coordination between the RBA and the APRC. A number of specific suggestions have been made to achieve this. Regulation would need to be consistent with international standards.

The Committee has not recommended a system of deposit insurance. We have recommended that the existing form of depositor protection should be maintained, including depositor preference in the case of failure of a deposit-taking institution, with an extension to deposit-taking institutions other than banks and some clarification where appropriate.

The suggestion to remove the Reserve Bank from banking supervision will raise eyebrows. The Committee has carefully considered the pros/cons and has made its recommendation. About half of the banking systems in developed countries have organised banking supervision to be separate from the Central Bank and it seems more are doing so or likely to do so. Certainly we found for the most part that the RBA likes to supervise banks and banks like the exclusive supervision of the RBA. This is understandable, but not a valid reason for not changing the system.

Ownership and mergers

We have recommended simplification of the ownership provisions currently relating to banks and life insurance companies. The principle of spread of ownership would be maintained for licensed financial entities, with a common limit of 15 per cent ownership by single entities, beyond which regulatory approval would be required. The Treasurer would retain power to decide on foreign investment proposals, and on high levels of ownership of licensed financial entities by non-licensed entities. We have suggested, however, that there should be more flexible application of licensing rules to groups with non-financial activities – where their characteristics warrant it (IT or telecommunication specialists would be possible examples).

A major proposal is the removal of the six pillars policy. The Committee's contention is that competition policy determination in the financial system should be left to the competition law and regulator (the ACCC) as for all other industry sectors. The Committee strongly believes that in the interests of competition and benefits to consumers, the boards and managements of the largest financial institutions should not be insulated unconditionally from the threat of takeovers. The removal of six pillars was supported almost unanimously in submissions to the Inquiry.

The Committee made no determination about the desirability or otherwise of a merger between any of the six pillars, but did devote considerable attention to changes in the financial system markets which are relevant to assessment of possible bank-mergers.

The Inquiry also advocated the lifting of the specific restrictions on foreign takeovers of the four major banks, in favour of following the general FIRB processes and foreign investment policy. We see no sufficient reason to rule out some increase in foreign ownership involving a major participant, although we do see grounds to oppose a large scale transfer of ownership of the financial system to foreign hands.

You are all no doubt aware of the government's response – which essentially revolved around scrapping the six pillars policy and removing the outright prohibition on a foreign takeover of a major bank. The government, however, decided to retain the Treasurer's reserve powers re bank mergers and decreed that there cannot be an in-market merger amongst the four majors at this time.

Coordination/accountability and implementation

Obviously the realigned set of financial regulatory agencies will operate well only if they coordinate closely with each other and keep the lines of communication open with participants in the financial markets. We have therefore made a number of recommendations to improve co-ordination and accountability of the new agencies. These are to do with operational autonomy, office locations, market-based remuneration,

board structures, regulatory charges and so on. We have also included as the last three recommendations in the Report some suggestions as to how the changes recommended can be implemented on a staged basis.

Concluding comments

Considerable competitive pressures and ongoing responses are currently evident in Australia's financial system. In some sectors strong competition in domestic and global terms has existed for a long time. In other sectors competitive pressures are relatively recent or still mostly dormant and global influences are just starting to emerge. The very existence of the Financial System Inquiry is no doubt stimulating change in the financial system. The thrust of the Committee's recommendations is better and more cost-effective regulation. They are not predominantly about deregulation, nor re-regulation.

Although we recommend shifting the regulation of the non-bank financial institutions (building societies, credit unions, friendly societies) to the national focus, we have recognised the need to maintain regulatory presences where markets and institutions operate. Most or all of what the Committee recommends can be found in various forms in other comparable overseas countries. The Committee believes the thrust of its recommendations (eg in relation to prudential regulation) has much in common with what is under contemplation in other overseas financial systems.

The recommendations we have made are based on changes already in place or underway in the financial system. They are not dependent on some radical view of the future rate of change. The proposed system of regulation will, however, ensure that Australia's financial system can respond in flexible and innovative ways if technological innovation or other changes in markets accelerate. Most of the proposals made by the Committee are an integrated set. Fragmentation will not lead to optimum outcomes.

The Australian financial system has performed reasonably well in the deregulated post-Campbell era, but it is clear that it could be performing better. Now is the time to set the scene for the next decade or so. There is a real opportunity to achieve major reforms in Australia's financial system. For most industries in Australia the status quo is not an option in a rapidly changing environment – the financial system equally must respond to the competitive winds of change and deliver, on a continuing basis, substantial benefits to its clients and to the economy as a whole.

In summary, implementation of our recommendations will:

- place Australia's financial institutions and markets in a good position to meet the challenges ahead;
- lower the cost of financial services to end users;
- preserve and enhance the security of the financial system.

CHANGE,

CHALLENGE AND CONSENSUS – PRIORITIES FOR AUSTRALIAN INDUSTRY IN THE NEXT FIFTEEN YEARS

John Moore

I would like to say something tonight about the key factors influencing the government's approach to industry – the need to ensure Australian business is able to grow and prosper in an increasingly global economy characterised by dynamic technological change. I particularly wish to say something about a number of the longer-term trends I see influencing our economy over the next 30 years and to discuss their implications for the priorities of the government over the medium term of the next fifteen years or so. In doing so I hope I can give some indication of the factors currently influencing the direction of the government's approach to business.

There are, of course, always risks for a Minister when he attempts to discuss longer term trends or to widen a debate. There are always those who seek to misrepresent his intentions. My remarks tonight should be seen simply as an initial contribution to an important debate on long-term policy issues. Anyone seeking to apply a seven-day analysis to my remarks will inevitably be wrong.

Industry in 2030

The only certainty about industry in Australia in 2030 is that it will be dramatically different from what we know currently. There are however a number of very important trends which are already clear and irreversible, and which will have profound implications for long-term business investment decisions and for the priorities for government support for industry. Among these trends, I believe the most important to be:

- The commitment of major trading nations to move to free trade. By 2030 free trade among all major nations may well have been in place for over a decade.
- Regional commercial integration will have occurred. In the case of Australia, which has always been a major trading nation, it is inevitable that our economy will be interdependent with our neighbours.

- Investment decisions by large companies will be made on the basis of regional strategies, and not through a series of strategies for individual countries. This trend is apparent already in major international industries which require significant product lead-time, such as the motor vehicle industry.
- By 2030 the Information Technology and communications revolution will have created significant new industries not currently imagined, and profoundly changed others. Will we, for example, still have banks, a stock exchange or harbours? Competitors will no longer be just the person down the road, but could just as easily be someone working from home on the other side of the world. I am in no doubt every business will change significantly as a result of IT.
- The movement of people, products and finances will be much quicker and more frequent, with consequent implications, only just becoming apparent, for national boundaries and the sovereignty of governments.
- Education will be even more an essential, and will be both a skill and an industry. Research, and the ability to successfully develop and commercialise it, will be an absolute necessity for a successful economy.
- Our cities and regions will have changed. Areas once considered remote and unable to attract investment will be thriving. Improvements in transport infrastructure will open up new areas and connect others. Regional cities will be satellites of other major cities. Something as apparently straight forward as improvements in deep sea drilling equipment will have great implications for industrial development. Have we really thought of the implications for the Northern Territory, for example, of a combination of closer economic ties to Asia, dramatically improved freight infrastructure and major new resource development? The implications for investment decisions will be profound.
- The demand for tourism, leisure and services will continue to grow more rapidly than other parts of the economy.
- Finally, I have no doubt the role of the government will have changed. The trend for governments, at all levels and of all political colours, to leave service delivery to the private sector will continue. The community is demanding greater value for money and is seeking better services from more limited resources. This trend, together with the challenge to national sovereignty I referred to a moment ago, and the need for social equity while providing a light handed regulatory framework for a dynamic economy, will make the role of the government more complex and more difficult.

Change, challenge and consensus

I mention these trends to give some indication of the dimensions of the changes I believe will occur to the environment in which business will operate in 30 years time. The changes will be even greater and more profound than those which occurred between 1950 and 2000. The 50 Leaders board may have been remarkably stable in Australia for many years, but I doubt that stability will remain into the future.

The reason I have chosen to dwell on these trends is that I believe Australia is as capable as any country of taking advantage of them. At the end of the last century we were the most prosperous country in the world. That is no longer the case. With the advantage of hindsight, we can all point to very bad decisions made by both government and business over the last century which have adversely affected the living standards of all Australians. If we are to improve our relative position as a nation, I believe we must begin preparing our economy to take advantage of the emerging trends. The most important decisions cannot all be taken over one or two years, but most of them can be taken in the next fifteen. They will require consensus between government, business and the community, a desire to shake off the cynical and dangerously negative attitude to commerce among people in positions of influence which has dogged us for many years, and a willingness to embrace our natural advantages.

The next fifteen years

I believe the trends which I have outlined give a clear guide to the most important areas in which decisions must be made by government and business over the next fifteen years. I would like to give my views on where I see the priorities lying. I again stress that these are decisions I believe must be considered over fifteen years and should not be seen in the context of the current term of government.

Investment

In my view, the most significant factor in Australia becoming a much more prosperous economy over the next 30 years will be our ability to attract investment. Australia's share of world investment declined between 1970 and 1993. Business investment as a share of GDP also fell over that period. In the late 1960s business investment as a share of GDP peaked at around 17 per cent; in the mid 1980s, it averaged around 15 per cent; but in recent years has declined to levels around 12 per cent.

It is one of my current priorities as Industry Minister to rejuvenate Australia as an investment location. This will continue to be important over the next fifteen years and will require some further important decisions. In particular, I believe there are five areas, which

government has particular responsibility for, which will require examination.

The first is the well known issue of our rate of *savings*. Our rate of national savings as a share of GDP is about 17 per cent. In Singapore it is 48 per cent in China, in Indonesia 38 per cent, in Thailand 37 per cent, in Malaysia and Korea 35 per cent, in Japan 32 per cent. Through our efforts to reduce the Budget deficit the government is addressing this issue, but over the course of the next fifteen years more will have to be done to encourage stronger private sector savings.

We must ensure the *tax burden* does not become a disincentive to Australia's reputation as a place to do business. In Australia, total taxation as a percentage of GDP is 30 per cent. In neighbouring countries it is significantly less. In Indonesia the figure is 11 per cent, Thailand 18 per cent, Malaysia 22 per cent. I am often asked whether I support tax reform. My reply is that I am less concerned with different sorts of taxes, as important as the correct mix is, as with reducing the overall tax burden. As free trade becomes a reality, as international barriers come down, we will need to carefully monitor the impact of our taxation levels. I am in no doubt that our overall taxation level will need to be reduced over the next fifteen years if we are to remain an attractive investment location.

We must also ensure we are competitive with the rest of the world in the *on-costs* associated with employing people. The cost of employing people must not be allowed to become a disincentive to investment in Australia. I believe the UK has set a desirable example for us to consider. The UK has a much lower level of statutory non-wage costs than its major European competitors. Nevertheless, real yearly take home pay for production workers in manufacturing in the UK is higher than in France or Italy. Like the UK, our challenge is to ensure we are a low *cost*, not a low *wage* economy.

The fourth area which I believe will be important in improving our investment performance is *business financing*. We need to encourage capital to be much more fluid. I will be disappointed, for example, if sometime in the next fifteen years our system of Capital Gains Tax is not further reviewed. In saying this, I am conscious, for example, of the comment in the recent McKinsey report "Australia's Future On-Line" that the main reason for the lack of venture capital is taxation policy, in particular the Capital Gains Tax.

We must also allow businesses to be much more innovative in sourcing their finance. My view on the need for a Second Board or some other form of alternate equity market is well known. The success of Silicon Valley has been built around small business. It must be easy, not difficult, to establish a small business in Australia. Sourcing finance must not be an unreasonable barrier. Business interest rates are still too

high. While loan risks are higher in small business, profit potential is also higher.

My fifth point relates to *regulation*. Over the next fifteen years we must develop the necessary balance to allow light-handed regulation, low barriers to entry for new business, and resistance to the worst tendencies of monopolies, while permitting the development of the economies of scale necessary for large, internationally competitive companies to develop in Australia through amalgamation. If we achieve this balance, I believe it will be important to Australia in attracting investment.

We do have many advantages as a location for investment and we must strengthen those. One which I will mention in passing is our ability to act as a bridge between Europe and Asia. I was recently in Europe and was particularly struck by the level of interest in Australia by companies seeking to establish a regional centre here for their Asian operations.

If, as a nation, we can reverse the decline in our share of world investment, and if we develop a strong local capital base for investment, I have no doubt our relative standard of living will improve significantly. But this will not be easy, and as I have mentioned, a number of very important decisions will need to be taken over the next fifteen years if we are to gain a significant edge as a preferred location for investment.

Infrastructure

There is another area where I believe significant decisions will need to be taken in the next fifteen years and which, in my view, ranks beside investment as a priority. It is the development of our *infrastructure*, and it goes without saying that it is closely tied to the need to make Australia a desirable location for investment. Unlike the turn of the last century, most major new infrastructure projects in Australia will now be developed, financed and managed by the private sector. But, in my view, government still has a very important role to play. The government must set priorities for infrastructure development. It must encourage innovative ideas, and it must assist desirable projects to come to fruition.

I believe infrastructure development, properly managed, can transform the Australian economy in the first half of the next century.

Just think of some of the possibilities.

The Very Fast Train has the potential to link what are now regional areas with major centres. Canberra could become an economic satellite of Sydney; Bendigo or Ballarat could become an economic satellite of Melbourne; the Sunshine and Gold Coast part of Greater Brisbane. This would significantly change the way these regional areas are considered for investment.

A high speed freight line between Darwin and Melbourne and Adelaide and Darwin, with feeders off to new centres along the way, would dramatically expand our ability to service the Asian markets and encourage development and investment in many parts of regional Australia. I am also aware of the success in many countries of free ports and trade zones. I believe this may also be an area worthy of further examination.

If we wish to significantly lift our standard of living over the next 30 years, some of the new infrastructure projects which are currently being proposed will need to be brought to fruition over the next fifteen years. In order for this to occur, the government will need to encourage private sector financing of these projects. In addition, it is my view that disincentives for bodies such as superannuation funds to invest in infrastructure will, in due course, need to be examined.

I am very excited by the possibilities of infrastructure development. They are not pie-in-the-sky and they are not way off into the distant future. Some will have to be undertaken soon if Australia is not to fall behind our competitors.

I would like to briefly mention two sectors which, in my view, will be major parts of our economy over the next 30 years.

Manufacturing

The first is manufacturing. The government is committed to retaining a strong, innovative and export oriented manufacturing sector in Australia. We believe it to be an essential part of any well structured and well balanced economy. Judged by the trends I mentioned at the start of my speech, manufacturing will play an important role in our economy in 2030. Since 1973, trade in manufactured products has grown at six per cent per year while the volume of trade in commodities has averaged two per cent. In the ten years to 1995 world trade in manufactured goods trebled. Almost two thirds of the growth in world trade since 1990 has been in manufactured products. These figures may surprise some, but the fact is an export oriented economy needs a viable manufacturing sector.

The recent decision of the government to develop a new support scheme for the pharmaceutical industry should particularly be seen in this context. The need to develop our export base will also, of course, be an important consideration in other upcoming decisions affecting industry.

Services

The other sector I will mention is the *services sector.*

There is no doubt the dramatic growth of the services sector will continue. This is particularly good news for Australia as we are well placed to provide many important strategic services, both directly and

also in partnership with local operators, to Asia. I believe *health services* and *education* will continue to grow in significance and government policy must ensure it is tailored to encourage this growth.

Another dynamic section of the services area, with which as Minister I am especially familiar, is tourism. Prospects for investment in the tourism industry are strong. The Tourism Forecasting Council believes international visitor arrivals will grow by almost 9 per cent per annum over the next decade. This strong demand is stimulating the prospects for new investment and expanded job opportunities. It suggests that a significant increase in investment in tourism infrastructure will be required to meet the forecast demand.

There has been increasing interest in tourism infrastructure investment in recent years. Since its establishment in August 1994, the Australian Stock Exchange's Tourism and Leisure Index has grown from nine companies with capitalisation of $3.6 billion to its current size of 19 companies with capitalisation of $10.5 billion.

There is no doubt the tourism industry has enormous potential, particularly if we ensure the appropriate economic conditions, effective market intelligence and forecasts so we can avoid the uncertainty that existed in the past within this industry.

Implications for current policy

It has been my intention in my remarks today to give a flavour of the long-term trends I believe important in the economy and of some of the implications I see for business and the priorities of government. I would like to conclude by making some general comments about the importance of these trends for the government's approach to industry.

Our major trading partners and our region are moving toward free trade. The time frame may vary but the end point is clear. All of our current industry sector programs must therefore assist their relevant industries to become, over time, self-sustaining. The move to full free trade will occur, but not overnight. It will be a managed transition. It is our desire to see our manufacturing base be internationally competitive at the end of that process.

The government also accepts there is another side to the coin. We will ensure our competitors meet their obligations under international trade agreements. We will help Australian firms gain access to markets overseas. And when Australian firms are unfairly targeted in trade disputes, the government will defend them.

In addition, I have also initiated action to examine those industry sectors which could best be described as the key enablers of industry competitiveness, sectors such as the information industry and the construction industry. These sectors have a significant influence on the effectiveness and efficiency of other industries and I want to make sure

we have a policy environment in place which will enable all industries to achieve their true potential.

I consider it somewhat amazing that in an industry as dynamic and as fast changing as the *information industry* the previous government was working off a strategy formulated in 1987. We need a strategic policy framework which will enable Australia to be leaders, not followers, in this vital industry and work is underway to enable that framework to develop.

An efficient and effective *construction industry* is also vital for other industry sectors. A 10 per cent gain in efficiency in this industry translates into a 2.5 per cent increase in GDP – an objective well worth fighting for. I am determined that the federal government will provide the leadership to ensure we have an internationally competitive construction industry.

As well we are carefully considering the appropriate policy environment for other key industries such as the Passenger Motor Vehicle industry and the Textile, Clothing and Footwear Industry. Whilst we have asked the Industry Commission to examine these industries, it is the government which will make the final policy determinations. We will do so in the context of ensuring that we provide the maximum benefit for all Australians having regard to the economic, social and strategic needs of the community.

I am grateful for the opportunity to set out my views on the factors I see influencing business in Australia in the lead-up to 2030. In doing so, I hope I have given you some indication of the priority areas I see for the government's approach to industry.

ROBOCOP TO

CYBERCOP: A NEW AGE OF CENSORSHIP

Helen Coonan

On the morning of the 28 April 1996, Martin Bryant loaded his yellow Volvo with three firearms, handcuffs, rope, a hunting knife, ammunition and containers of petrol and drove from the Hobart suburb of Newtown towards Port Arthur.

At 1.30pm, Bryant entered the Broad Arrow Cafe in Port Arthur and ate lunch on the cafe's terrace. After eating, Bryant re-entered the cafe and fired an AR15 semi-automatic rifle killing 20 people and injuring eleven others within a time frame of less than two minutes. Outside in the carpark, another four people were shot dead. By the time Bryant had driven back to Seascape, he had added another nine fatalities to his list.

The result of Bryant's outing – 35 dead, 19 injured and 18.05 million Australians in shock.

The massacre deeply affected the Australian psyche, community support making possible national gun ownership laws.

The incomprehensible violence of the event also touched a raw nerve in the community – the perception that violence in the media and widely available pornography were somehow linked to Bryant-type slayings. Port Arthur became the catalyst for an attack on censorship not seen in Australia since the 1970s.

Immediately following the tragedy, a Ministerial Committee chaired by Senator Richard Alston met to examine whether there was a causal relationship between exposure to media violence and Martin Bryant's behaviour. The Committee recommended and implemented strategies ranging from public education campaigns, an industry code of practice for retailers, a later broadcast time for "MA" films, the reclassification of films rated "M" before 1993, a review of the Classification Boards and an investigation of the V-chip option.

A further inquiry conducted by the Senate Select Committee on Community Standards included recommendations for a complaints hotline, stiff penalties for breaches of industry codes of practice, further

use of the V symbol to indicate the level of violence in films, warning labels on all "R"-rated videos to indicate that the content might be harmful to the mental wellbeing of children and those adults suffering from depression and other mental disorders, seminar funding for script writers and producers to highlight the long term effects of exposure to media violence, and funding for conflict resolution programs.

Around 99 per cent of Committee submissions reviewed by the *Senate Committee* demanded "something be done" to limit the amount of violence portrayed in the media. The Committee concluded that:

> the community cost of events such as Port Arthur and Hoddle Street massacres is so high that the interest of the community should take precedence over individual liberty.[1]

Further evidence of a ground swell of community demand for censorship has emerged from recent complaints about the proposed telecast of the 1997 Sydney Gay and Lesbian Mardi Gras on the ABC, (subsequently the rights were purchased for the first time by a commercial network), the establishment of community censorship panels, the move to ban "X" rated videos and "R" rated movies from Pay TV. Additionally, frenzied speculation as to the alleged influence of the Lyons Forum within the Coalition and the supposed infiltration of the religious right in Australian politics, suggest that a new age of censorship has gained momentum in Australia.

While it is easy to ridicule censorship decisions of the past, it is worth noting that as late as 1969, 178 of the 500 new feature films sent to Australia were banned or edited to remove intra-racial liaisons, female orgasms (even simulated ones), and other untoward and unsocial behaviour! Until recently, however, Australians had been relatively content with a National Classification Code that started from the premise that adults should be allowed to read, hear and see what they want, whilst minors should be protected from material likely to harm or disturb.

But, censorship is no longer a thing of the past. As recently as March, the NSW Premier Bob Carr was deliberating cuts to Baz Lurhmann's acclaimed version of *Romeo and Juliet* to rid the film of suggested drug use before allowing its incorporation into the school curriculum. The award winning film maker has refused any cuts to make the film more suitable for school goers.[2]

Interest in the HSC English curriculum has surfaced recently with the proposal to remove *Top Girls* and *Fineflour* from the recommended reading list, replaced by Peter Goldsworthy's *Maestro*. Although the decision has been attributed to the periodical review of English texts, that it should be linked automatically to acts of censorship is indicative of the current mindset.

Western Australia's Transport Minister, Eric Charlton recently lobbied for the film *Crash* to be banned due to its discord with the State's road safety campaign.

These sorts of efforts of course often have unintended consequences. As a result of public criticism of torture and sexual abuse of children contained in the film *Salo – 120 Days of Sodom*, a Brisbane cinema extended the film's season as a direct result of the widespread publicity the film had attracted.[3] Reaction to Port Arthur grief therefore has caused some to claim that a conservative backlash is sweeping the nation and that the right of adults to see, hear or read what they like is being revisited.

The trend to censor is not confined to Australia alone but appears to be more widespread, as Canadian television stations halt the broadcast of *Teen-Age Mutant Ninja Turtles*, the UK cites violent videos as a possible contributing factor in the Bolger murder case and the *Mighty Morphin Power Rangers* is implicated in the murder of a young Norwegian girl.[4]

It prompts the question whether there is a new moral majority demanding that Australia should censor, cull, cut and ban explicit films, video, CDs, books and magazines, enlisting cybercop assistance in restricting access by the vulnerable to unsuitable material on television, video and on the ever widening Net? Or is it rather the reasoned and reasonable reaction of parents of young children sickened by the level of violence and explicit sex depicted in the multi media and genuinely frightened at the level of child abuse and other aberrant behaviour in the community, thought to be linked to *repeated* and *easy* exposure to such material?

Whatever the extremes, the censors have been out and about in Australia in the year since the Port Arthur tragedy and it is high time that the community took the opportunity to debate the role of censorship in a democracy – *what* should be censored, *who* does it protect, and at what *cost* to freedom of speech and artistic expression?

Is there a link between what we see and what we do?

Sixty-five per cent of respondents to a survey taken after Port Arthur believed that television causes or significantly contributes to violent behaviour. But is there any evidence of a link between what we see and what we do? Research undertaken to determine any causal relationship between media violence and violent behaviour falls into three major categories.

(a) International comparative research

Firstly, there are a litany of international comparative studies which examine the connection between exposure to television violence and homicide rates. The results are inconclusive. Brandon S Centerwall's

(1992) methodology finding a causal link between rising homicide rates and the introduction of television in South Africa (compared to the rates in Canada and 'America) seems just as plausible as the more recent research undertaken by Wiio (1995) finding no such link between homicide rates and the number of television sets in over 40 countries.[5]

(b) Felons vs non-felons

The second category of research undertaken to determine causality involves behavioural comparisons between felons and non-felons. One study conducted by Kruttschnitt, et al. (1986) found a relationship between adult criminal violence and childhood exposure to television violence which "approached statistical significance" after controlling for school performance, exposure to parental violence and a base-line level of criminality.[6]

Also within this category are multiple and conflicting studies examining the extent to which a correlation exists between rape statistics, violence against women and pornography. Whilst laboratory studies of male college students indicate that prolonged exposure to sexually arousing materials can cause an increase in aggressiveness generally, researchers withhold any comment as to the likelihood of this aggression resulting in sexual violence or alternatively whether such aggression is channelled onto the football field.[7]

(c) Serial killer confessions

The third category of research draws on the Ted Bundy-style confessions – a serial killer who cited pornography as the catalyst for murdering several female college students. Whilst there may be some basis of truth in would-be assassin John Hinkley being inspired by the film *Taxi Driver* and mass murderer Charles Manson being inspired by Beatles' music and *The Book of Revelations*, relying on the ramblings of pyschopaths and classic dissemblers as the basis for conclusive evidence would seem unjustified. More recently, Martin Bryant's video library consisted of such dangerous titles as the *Sound of Music* and *Babe*.

So, is there a theory to fit every purpose?

Given that current thinking on the association between media violence, pornography and individual behaviour is now focused on cumulative effects and the impact of repetitive exposure, the continued reliance on the outdated causal relationship theory is somewhat misleading. Take for example the well publicised Zellmann and Bryant (1982) research cited by Susan Bastic, National Spokesperson for the Australian Family Association, in support of the claim that:

> . . . as little as five hours of non-violent porn of the kind Cabinet is going to allow over six weeks has been shown in the US to make men more sexually callous toward women and to regard rape as only half as serious as men not exposed to pornography.[8]

The original findings were formulated from the surveyed responses of 80 *male* and 80 *female* undergraduate university students who had been exposed to varying degrees of non violent sexually explicit videos for a period of six weeks.[9] The greatest exposure endured by respondents over the test period was four hours and 48 minutes, so it probably did not warrant the description of massive exposure. In one scenario, the students were asked to act as jurors and recommend a prison sentence for the offender in a specific rape case from which conclusions were drawn regarding attitudes to rape and sexual callousness toward women. Interestingly, the men and women who took part in the survey did not differ greatly in their responses along gender lines.

Before the conclusions can be regarded as of general and universal application, some aspects of the research warrant further scrutiny. From the published data it is unclear:

- whether the length of a recommended prison term in a specific rape case indicated disapproval and condemnation of rape or merely reflected the circumstances in that particular case;
- whether conclusions about sexual callousness and the trivialisation of rape generally can be satisfactorily drawn from the number of these students who recommended relatively lenient sentences involving short jail terms; and
- whether the failure to find a significant gender bias in the alleged connection between pornography and rape with both *men* and *women* tested recommending short prison sentences detracts from its overall value.

Certainly it seems a long shot to use this research as evidence that exposure of men to as little as five hours of pornography leads in itself to callousness towards women. Whatever the true position, a distinguishing feature of psycho-socio research is that it deals with the complexity of human behaviour and the multiplicity of variables affecting it. Rather than using porn and/or media violence as a scapegoat for explaining human behaviour, Professor Donald Thomson, Department of Psychology at Monash University, has concluded that:

> The fact that we do not get consistent results across some studies is because they are focused on wanting to establish that the exposure to violent videos and films is a sufficient condition. It is not.[10]

Closer to home, the New South Wales Legislative Council Standing Committee on Social Issues concluded that it is "probably impossible" to prove such links.[11]

So, to what degree does the media influence behaviour?

Rather than dismissing out of hand the issues of causality or correlation, perhaps a more appropriate question might be – to what degree does the media *influence* behaviour?

Given the universal popularity of television as a source of entertainment, now occupying 50 per cent of the average American's free time and 21 hours a week per teenager, there must be some weight attached to the appraisal of the media as a medium for *influencing* behaviour.[12] Indeed, society has developed a multimillion dollar industry on the basis that advertising can *influence* the behaviour of consumers.[13]

However, whilst we may accept that the media can and does influence in part our thoughts and behaviour, we simply cannot know or anticipate the effect the portrayal of media violence can have on disturbed and mentally unstable minds.[14] As summarised by Melanie Brown of the Australian Institute of Criminology:

> The effects of watching violence are influenced by the ability of individuals to discriminate between fantasy and reality, between justified and unjustified violence, and the capacity to critically evaluate the portrayal of violence within a social and moral framework.[15]

Can any conclusions be drawn, however, from academic research into the claimed effects of *desensitisation, subliminal messages* and *video technology*?

(i) Desensitisation

Desensitisation is the ability of ideas, materials and values to diffuse what society regards as the established boundaries of acceptability and decency. Whilst today's contemporary standards denounce rape and paedophilia, it is worth remembering that in 1989 a Brisbane magistrate ruled that a once obscene four letter word had become common parlance.[16] In 1969 the words "fucking boong" used in Alex Buzo's play *Norm and Ahmen* was judged obscene.[17] It is a touch ironic that what was found objectionable then was the *adjective* "fucking" whereas the racist *noun* "boong" by contemporary standards is to our thinking more unacceptable.

Still it poses the question, are all contemporary standards negotiable given time and repeated exposure? What are society's outer limits of acceptability and how are they determined given an environment of ever changing values and inter-generational differences?

(ii) Subliminal messages

Another research challenge relating to censorship is linked to the infiltration of subliminal messages. Whilst we may be able to protect ourselves and our children from materials we can see and/or read, how will our laws deal with messages only detectable subconsciously?

The US case *Vance v Judas Priest* involved an accusation by parents against a heavy metal rock band for including subliminal satanic messages in their music inducing their sons to commit suicide. Nevada State District Judge, Jerry Carr Whitehead, ruled that subliminal messages are not protected speech under the First Amendment. The judge also inferred, by referring to a clinical psychologist's report, that the boys' behaviour was affected by other variables and stimuli other than music.[18] However, some elements of the public were not convinced. As a response to aggressive and violent language on CDs, Tipper Gore, wife of the Vice President, came up with the notion of a "Parental Advisory" warning sticker on CDs.[19] Dubbed the "Tipper Sticker" and endorsed by Congress, this prompted Derek Small, bass player for the group Spinal Tap to say: "They should put warning labels on politicians!"

(iii) Simulated video technology

A further challenge for the censors is the introduction of simulated video technology. Whilst technology thus far has allowed us to participate in video and computer games to the extent that a player can direct and control the actions of a third person, simulated video technology and the addition of virtual reality allows a player to deliver simulated violence in the first person genre.

The futuristic sci-fi game *"Doom"*, initially developed by ID Software Inc., allows the player to view the entire game through the eyes of the main character, a champion space marine. In a dungeon setting, the player takes over the character's body, with the objective of killing monsters, aliens and mutants with the assistance of chainsaws, rockets, machine guns and bombs. The result is blood, guts and gore all over the screen. The game intensifies as the player uses skill to advance through the various stages, setting up an ultimate showdown with the superbeast – no chance of a peaceful negotiation at this stage! Here the space marine uses his bare fists and all the weaponry he can muster to terminate the baddy and win the game.

Whilst parents have had to deal with similar games which aim to reward points to players for inflicting violence, how will the participatory nature of this technology alter the degree to which simulated violence impacts upon individuals? Would it be any different if instead of one choice and a winner takes all result, the player could achieve different outcomes by mediation, negotiating or force?

Access and the Net

Which brings me to the vexed issue of censorship and cyber sex. Social commentators suggest that the most significant challenge to Australia's censorship laws relates to technology. As journalist Julian Wood stated: "technology is eroding our ability to control the viewing habits of a democratic society".[20] The simple truth is that society cannot and has

rarely succeeded in effectively policing access to information. The advent of the information superhighway makes this task near impossible.

What can be accessed on the electronic superhighway is truly breathtaking, crossing national borders beyond Australia's jurisdiction to comprehensively regulate. A Boston based consultancy Forrester Research estimated that adult services sold in 1996 accounted for about $50 million or about 10 per cent of all retailing on the Net to US customers.[21] A legislative attempt to limit pornography on the Net in the US via the *Communications Decency Act* was struck down last year in the District Court of Philadelphia as an infringement of the right of free speech and has been recently argued on appeal. Conceding that some material available to minors on the Net was undesirable, the judges concluded that it was impossible to limit the "neverending world wide conversation" without destroying the essence of the medium which for those reasons deserved "the broadest possible protection".[22]

The implications of a borderless electronic superhighway providing unlimited access to virtual experiences within the home provides a monumental dilemma for governments. It poses the question whether the State *can* have any effective role to play in censoring the electronic media even if as a policy decision it were thought desirable to do so? Will effective State intervention be limited to the physical world of books, videos and film? If so, will this lead to the absurdity of material being banned in one medium but not in another?

Protecting minors from harm

Also challenging in a censorship regime which allows adults to read, hear and see what they want, is restricting access by minors to materials likely to harm or disturb. What is the proper role of government in determining the types of materials suited to different age groups? To what degree can our censorship laws be effective in policing access to information by adolescents? Is it appropriate that society prohibits access to sexually explicit videos to minors who are legally permitted at age 16 to participate in sexual intercourse? Are negotiations on the age of consent consistent with this policy? Does a policy of vigorous exclusion prepare minors to use information responsibly upon the clock striking twelve when they turn eighteen? How can harassed parents effectively supervise what is suitable viewing for children of different ages living in one household?

Comparable statistics to Australia indicate that restricting access to minors can be a futile and expensive exercise. By the time a child reaches eighteen years of age, he/she has witnessed 18,000 violent deaths depicted in the media.[23] Content analysis of American programming reveals that a child sees approximately seven and a half violent

incidents during each hour of viewing time, rising to 25 incidents an hour at peak times.[24] Furthermore, Fosarelli (1986) estimates that by the time a child graduates from high school, he/she would on average have spent more hours viewing television than in the classroom.[25]

A far cry from Enid Blyton's *Famous Five*, the release of Maureen Stewart's *Shoovy Jed*, Margaret Clark's *Care Factor Zero* and John Marsden's *Dear Miffy* reinforce social realism as a number one seller with Australian teenage readers.[26] Marsden's latest fiction novel about a sixteen year old character Tony who barely survives a suicide attempt carries a warning notice stating that its content may offend some readers. This manuscript containing several hundred expletives is not an isolated example of modern day fiction but rather represents the replacement of Dr Doolittle's fairy tales and Hollywood endings for the realistic portrayal of domestic violence, incest, drugs and suicide.

In the absence of cyber-cop software, minors can access a range of pornography and other prohibited materials on the Net. Take for example, the title *E is for Ecstasy* – a non-fiction instruction guide to using the drug ecstasy. Whilst the book was banned in hard copy in Australia by the Film and Literature Classification Board in late 1994, the title is available in full from the Banned Books Online site on the Net.[27]

Ideas we don't like

Whilst trying to balance the protection of children with the freedom of adults, how does a democratic society deal with access to ideas it doesn't like?

Take for example the Pedosexual Resource Directory on the Net – a site dedicated to providing information and contacts in support of intergenerational sex. Many Australians will agree that Deborah Coddington's recent release *The Australian Paedophile and Sex Offender Index* is justified in its attempt to identify, alienate and stigmatise paedophiles. Despite, the recent rush of sales, the directory has attracted criticism relating to its data selection, research and methodology. To the extent that paedophilia activities continue to go unreported to police, the directory is incomplete and hence its relevance to parents seeking protection for their children is reduced. Moreover, other commentators have questioned the benefits to society of naming and shaming criminals outside of the law.[28] Whilst there can be no justification on any grounds for paedophilia activities, there is also a public interest to ensure that the 5,000 copies of the directory which have been sold so far are used responsibly.[29]

Shifting boundaries

And what of shifting boundaries between what Australians find objectionable ideas and the right to express those views no matter how unlovely.

The exercise of Ministerial discretion to refuse visa entry to revisionist historian David Irving on 8 November 1996 on the grounds that he did not meet the "good character" requirements is a current indication of where Australia draws the line between protection from offensive ideas and freedom of speech. What is peculiar about the public debate whether David Irving should have been provided with an entry visa to Australia following a four year battle, is that it disregards the fact that Irving has legally entered Australia on numerous previous occasions, his most recent visits in March 1986 and September/ October 1987 and that Irving's publications and videos produced over three and a half decades, (the most recent publication being *Goebbels: Mastermind of the Third Reich* (1996), are freely available in libraries and bookstores across Australia.[30]

Is this an example of how the current censorship laws fail to consistently classify materials available on different mediums? How are we to reconcile the Film Classification Board's decision to rate Irving's 1993 video production on revisionism as "suitable for children" (rated "G") with the decision to effectively ban Irving from speaking publicly in Australia because of his criminal record? Have Irving's historical interpretations changed dramatically since his last visit to Australia or is the real source of change in the last decade attributable to society's perception of his work? Are Irving's distortions of history now beyond the boundaries of tolerance? If so, for how long.[31]

The final frontier

As with racial villification and gun control, individual behaviour and attitudes can be moulded and shaped through legislation. However, the extent to which legislation can be an effective and appropriate vehicle to control access to ideas and the free flow of information in a democracy is problematic.

Recent community demand for tighter control over censorship in Australia is premised on the assumption that cutting down on the availability of offensive material in the public domain will aid in the protection of the young and vulnerable in society. Whilst this has been an understandable reaction to the Port Arthur massacre, is it defensible in the absence of any conclusive proof that preventing access to such material alone will have the desired effect on those who are motivated to run amok?

One year later there are signs that questions about censorship and the adequacy of the classification system have had some positive outcomes. Positive community and industry reaction to Cabinet's decision not to ban "X"-rated video material outright but to introduce a sanitised version eliminating some of the justifiable complaints about "X"-rated materials such as child sex and allowing "R"-rated material

on Pay TV to subscribers only with PIN access, is as much due to commonsense as it is to recognition that bans have never worked.

Before we set about the "tongue-tie art", as Shakespeare put it, or alter the rights of tomorrow's generation, it is well we remember Whitney Griswold's famous words:

> Books won't stay banned. They won't burn. Ideas won't go to jail. In the long run of history, the censor and inquisitor have always lost. The only sure weapon against bad ideas is better ideas. The source of better ideas is wisdom. The surest path to wisdom is a liberal education.[32]

Endnotes

1 Senate Select Committee on Community Standards Relevant to the Supply of Services Utilising Electronic Technologies Report on the Portrayal of violence in the Electronic Media. February 1997, p. 7.
2 Porter, J. "Baz cut up at Censor". *The Daily Telegraph*, 1 February 1997, p. 11.
3 Strutt, S. "Qld: Cinema May Keep Controversial Film Going". AAP, 12 March 1997.
4 Senate Select Committee on Community Standards Relevant to the Supply of Services utilising Electronic Technologies. *Report on R-Rated Material on Pay TV*. Part One, February 1995, p. 6.
5 Standing Committee on Social Issues. *A Report into Youth Violence in New South Wales*. Legislative Council,. Parliament of New South Wales, 1995, pp. 168–9.
6 Ibid, p. 168.
7 Heins, M. *Sex, Sin and Blasphemy. A Guide to America's Censorship Laws,* New York Press, 1993, p. 158.
8 Daly, M, "The X Philes", *The Melbourne Age* 12 April 1997, p. a20.
9 Zillmann, D and J. Bryant. "Pornography, Sexual Callousness, and the Trivialisation of Rape". *Journal of Communication*. 32(4) , 1992.
10 Senate Select Committee on Community Standards. 1995. Op cit. P. 42.
11 Standing Committee on Social Issues. Op cit, p. 167.
12 Latham, M. 1997. "Turning on For A Virtual Society". *The Sydney Morning Herald,* 30 January 1997, p. 17.
13 Lipski, S. 1996 "Can Technology Solve our Moral Dilemmas?" *The Age.* 12 July 1996.
14 Mackay, H. 1996 "Attack on Media misses real problem." *The Weekend Australian.* 13 July 1996.
15 Melanie Brown. "The Portrayal of Violence in the Media: Impacts and Implications for Policy". Australian Institute of Criminology, (55) June 1996, p. 2.
16 Stafford, A. "Can They Stop the Music?" *The Australian*. 4 July 1996.
17 Dutton, G. "Lady Chatterley Revisited" *Australian Lawyer* vol 31(8). September 1996, p. 28–9.
18 Daus, MW. "Subliminal Messages in Music: Free Speech or Invasion of Privacy?" *Entertainment and Sports Law Review* Vol 9(2). Fall 1992: 241–295.
19 Stafford. Op cit.
20 Wood, J. "How Video Killed the Censor's Knife". *The Australian*, 18 June 1996.
21 "Cyber Sex: An Adult Affair". *The Economist*. 4 January 1997, p. 68.
22 Editorial. "Censors Not Needed in Cyberspace". *The West-Australian*. 17 June 1996.
23 McLean, L. "Screen Violence Faces Tough Comedy" *The Australian* 7 May 1996.
24 Standing Committee on Social Issues. Op cit, p. 172.
25 Comstock, G and P. Haejung. *Television and the American Child*. Academic Press Inc. 1991, p. 56.
26 Legge, K. "Life Sucks, Timmy". *The Australian Magazine*, 8–9 March 1997, p. 10–11.

27 Casimir, J. "High Tech Catches Censor in the Net", *The Age* (Melbourne) 18 June 1996.

28 Refer to: "Rights Raised in Index of Paedophiles" Editorial *The Courier Mail* 24 February 1997, p. 10. Faust, "When Right is Simply Wrong", *The Weekend Australian* 1 March 1997, p. 22. Mackay, H. "Revenge a Dish Best Not Served", *The Weekend Australian* 22 February 1997, p.2. "Shaming Criminals Not The Answer", Editorial, *The Canberra Times*, 23 February 1997, p. 8.

29 Phelan, A. "Sales Boom for Paedophile List" *Sydney Morning Herald* 22 March 1997.

30 Maher, L.W.. "Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving" *Sydney Law Review*. Vol 16. 1994, pp. 358–393.

31 Ibid, p. 359.

32 Whitney Griswold (1952) quoted in Platt, S. *Respectfully Quoted*. Library of Congress, Washington. 1989, p. 87.