

Peering over the horizon: it's dark on the other side

A keynote address by Justice Ronald Sackville.

Darwin's Horizons

Charles Darwin, like most of us, sometimes was unable to resist the urge to peer over the horizon. For example, in 'the major work of his maturity',¹ *The Descent of Man* (1871), Darwin suggested, somewhat disconcertingly to modern eyes, that:

'[a]t some future period, not very distant as measured by centuries, the civilized races of man will almost certainly exterminate and replace throughout the world the savage races.'

For the most part, however, Darwin was not a soothsayer. Much of his life's work was devoted to explaining the origins of the living world he studied with such care. Through an astonishing combination of painstaking and meticulous observation, relentless curiosity, ingenuity, a willingness to challenge conventional wisdom (especially religious orthodoxy) and a rigorously honest appreciation of the difficulties in his path, Darwin transformed our understanding of life in all its breathtaking variety.

In his great work, *On The Origin of Species*, published in 1859 after twenty years 'patiently accumulating and reflecting on all sorts of facts',² Darwin formulated his theory of natural selection to explain the profusion of species on Earth. In *The Descent of Man*, Darwin reiterated his (then) startling hypothesis, even now staunchly resisted by many supposedly educated people,³ that:

'man is descended from a hairy, tailed quadruped, probably arboreal in its habits ...',⁴

While not primarily a soothsayer, Darwin's theory unerringly pointed the way to the future. Darwin was ignorant of the discoveries of the Moravian monk and scientist, Gregor Mendel, concerning the laws of inheritance, even though Mendel's findings had been published in 1865. But the essence of Darwin's hypothesis has since been confirmed by modern genetics, in particular molecular

genetics. The completion of the draft sequence of the human genome in 2001, remarkable achievement that it is, constitutes but a step in the 'multidisciplinary research programme' initiated by Darwin.⁵

Darwin's observations were by no means confined to the physical world. On many issues, his opinions resonate with the sensitivities of his 21st century descendants. On slavery, for example, he was passionate. After leaving the shores of Brazil, he recorded in *The Voyage of the Beagle*⁶ that:

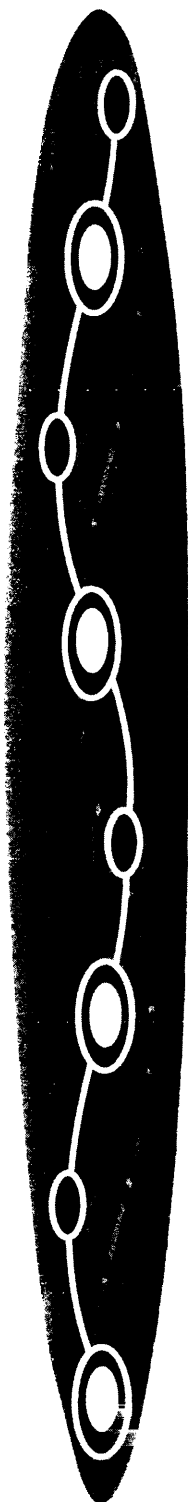
'Those who look tenderly at the slave owner, and with a cold heart at the slave, never seem to put themselves into the position of the latter; what a cheerless prospect, with not even a hope of change! Picture to yourself the chance, ever hanging over you, of your wife and your little children—those objects which nature urges even the slave to call his own being torn from you and sold like beasts to the first bidder!'

On other issues, as with his apparent confidence that the 'savage races' would disappear, Darwin was very much a creature of his times. Consider his views on the relative attributes of men and women:⁷

'Man is more courageous, pugnacious and energetic than woman, and has a more inventive genius. His brain is absolutely larger, but whether or not proportionately to his larger body, has not, I believe, been fully ascertained ...'

The chief distinction in the intellectual powers of the two sexes is shewn by man's attaining to a higher eminence, in whatever he takes up, than can woman—whether requiring deep thought, reason, or imagination, or merely the use of the senses and hands. If two lists were made of the most eminent men and women in poetry, painting, sculpture, music (inclusive both of composition and performance), history, science, and philosophy, with half-a-dozen names under each subject, the two lists would not bear comparison.'

As Stephen Jay Gould says,⁸ to label Darwin as sexist and racist is to adopt a 'stiff-necked and uncharitable attitude'. We cannot fairly



castigate someone, Gould argues, for simply repeating the standard assumptions of his age. The more so in Darwin's case because, despite his paternalism, he was not prepared to be an apologist for slavery or for the dispossession of the 'savage races'.

If the vision of a thinker as scrupulous, innovative and wise as Darwin was impaired by the prejudices and values of 19th century upper-class England, how difficult must it be for the rest of us, when asked to peer over the horizon, to shed our own intellectual and social blinkers? Professor John Mattick, who, as a distinguished molecular biologist, is accustomed to flirting with the brave new world revealed by the wonders of the Human Genome Project, prudently reminds us that predicting the future is risky.⁹

'Experience suggests that things will change faster than we expect, but usually not in the way that we expect. Some things expected to have happened quickly, such as the development of genetically engineered vaccines against malaria, have not yet eventuated, whereas other things have happened that we did not anticipate, such as the development of the polymerase chain reaction (PCR) in the late 1980s, which made DNA-based diagnostics a reality and revolutionised genetic engineering overnight.'

Legal Horizons

If it is hazardous for molecular biologists to make predictions on matters within their field of expertise, it borders on the self-destructive for lawyers, whose training and experience are firmly anchored in past events, to prognosticate about the future shape of the law, especially its relationship with other disciplines.

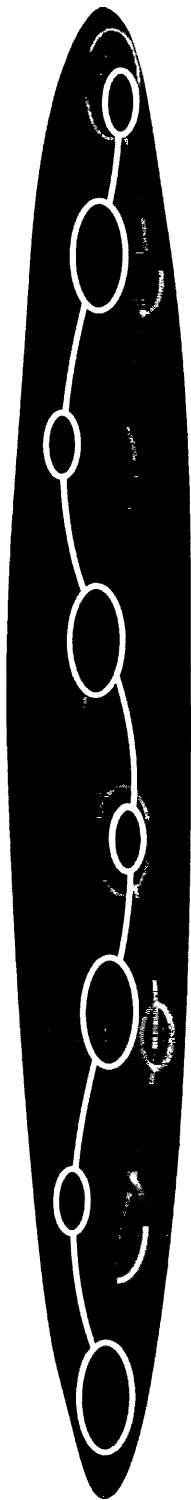
The point can be illustrated by reference to a conference on *Lawyers and Social Change*, held at the Australian National University in 1974. The conference brought together fifty invited participants, including legal academics, practitioners, judges and distinguished non-lawyers. They addressed important questions, such as techniques of constitutional adjudication in Australia, the role of lawyers in bringing about social change, the legal regulation of economic activity and the intricacies of the then apparently entrenched Australian industrial relations system. The report of the proceedings contains the papers and

much else of considerable interest even now, three decades later.¹⁰

What is particularly striking for present purposes, however, is what was not addressed at the conference, either in papers or in the course of discussion. To identify some of the issues that escaped attention is not to criticise the organisers of an important conference, but to demonstrate the pitfalls of lawyers attempting to peer over the horizon, even if they attempt to stand on the shoulders of giants.¹¹

Only three of the fifty invited participants at the 1974 conference were women. The idea of gender equality, or the contributions lawyers could make to attaining it, was not mentioned at all in discussion. Yet perhaps the most profound social change in Australia since the 1970s has been the product of a struggle by women, even now only partly successful, to achieve social, political and economic parity with men. Similarly, the conference made only passing reference to the historical injustices inflicted on Aboriginal people in Australia, despite the fact that a report recommending the grant of land rights in the Northern Territory had recently been presented to the Commonwealth Parliament in April 1974.¹² The question of native title, which was to propel the High Court on to political centre stage in the 1990s, played no part in the proceedings.

With the clarity of hindsight, the examples of missing issues can be multiplied. The conference said nothing about the likely consequences of more liberal immigration policies (after all, the White Australia Policy had finally been abandoned only a decade earlier). Much less did the participants foresee the profound significance for the international community, and for Australia in particular, of mass movements of people claiming the protection of the *Convention relating to the Status of Refugees*. Nor was there discussion about alternatives to the court system, either in relation to alleged criminal conduct or to the resolution of civil disputes. Concepts such as alternative dispute resolution and restorative justice, now a familiar part of the legal lexicon, escaped attention. So did environmental issues, even though within a few years climate change had become a critical problem for the international community, leading to the adoption of the *United Nations Framework Convention on Climate Change* at the 1992 United Nations Conference on Environment and Development in Rio de Janeiro.



Although the conference closely scrutinised the role of lawyers in regulating economic activity, nobody apparently contemplated that in the future an equally, if not more important issue would be the role of lawyers and the courts in economic deregulation. The focus on economic regulation did not extend to the taxation system despite the fact that by the mid 1970s, the taxation system in Australia had been brought into disrepute, in no small measure because of the Barwick Court's now discredited approach to the construction of tax legislation (usually described as 'literalist', but in fact anti-revenue).¹³ Yet the topic was not mentioned, despite the centrality of the fair and efficient taxation system to social and economic justice.

What is on the Other Side?

So attempting to peer over the horizon is an undertaking fraught with difficulty. Even if we succeed, we might not like what we see. It does not take much foresight to identify many formidable global problems that, if not addressed effectively in the near future, could well produce very serious consequences for mankind. Since Australia is a part of the international community, the tyranny of distance, which has been such a comfort in the past, will not save us from these consequences. Indeed, the impact on Australia, in some cases, may be greater than on other parts of the world.

It will come as no surprise that the melancholy list of global problems includes the following:

- The proliferation of nuclear weapons, not least in or near our own region.
- The threats posed by international terrorism, aided and abetted by inept responses to the phenomenon and intensified by the awful prospect of weapons of mass destruction falling into the hands of terrorists.¹⁴
- Global population growth, more specifically the impact on the environment of many more people in developing countries aspiring to and attaining First World lifestyles. Residents of First World countries can hardly complain when residents of developing countries seek the same creature comforts as they have enjoyed for decades. But the effect is to intensify greatly the demand for finite resources and to generate vastly increased levels of waste.¹⁵
- The degradation of the global environment, including ocean fisheries, forests and water

and soil resources brought about by over-exploitation, land clearing and pollution.

- The effect of climate change, a phenomenon which will have a differential impact on various parts of the world, but which can be expected to have severe consequences for Australia's fragile environment.¹⁶ It is sobering to be reminded that since 1860, mean global temperatures, despite considerable fluctuations over time, have increased by about 0.6 degrees Celsius.¹⁷ It is not coincidental that concentrations of carbon dioxide in the atmosphere, the main (but not exclusive) influence on the 'greenhouse effect', remained constant until 1800, at about 280 parts per million, but have since increased to the current figure of about 375.¹⁸ The 2001 report of the Intergovernmental Panel on Climate Change suggests a range of mean temperature changes of 1.4 degrees to 5.8 degrees by 2001, although its methodology has not escaped challenge.¹⁹
- The possibility of pandemics and the spread of diseases which are difficult to treat or control. A recent example is the disastrous spread of HIV-AIDS throughout the world, but particularly in some developing countries, where as a result life expectancy has deteriorated to shocking levels.
- The ageing of the population, especially in developed countries, although some see the ageing population in Australia as a manageable problem.²⁰

Not everybody necessarily embraces such a saturnine outlook. For those who prefer a dose of optimism, some foreseeable developments offer the hope of improving or enriching human life, while at the same time presenting complex regulatory challenges for governments:

- As Professor Mattick explains,²¹ a better understanding of the molecular and genetic bases of life opens the way to the use of diagnostic tests to assess the risk of disease and to determine appropriate treatment, the development of new pharmaceuticals and gene and cell therapies to repair damage and minimise future disease risk, and the tailoring of medication to the individual genetic make-up of patients.
- The new biotechnology offers the chance of deferring once again the Malthusian doomsday prediction that population growth will outstrip the rate of increase in food production. While the introduction of genetically modified ('GM') crops

arouses grave concerns about unintended environmental consequences, some see great benefits and view the opposition to GM technology as an example of misplaced 'eco-fundamentalism'.²²

- The embrace of free market ideology by certain developing countries, within a framework of diminishing barriers to international trade, has contributed to the liberation of tens of millions of people from the crushing degradation and hopelessness of grinding poverty. The two most populous countries on Earth, China and India, have seen in recent years some of the most profound and rapid improvements in living standards in human history. It is true that the benefits have been unevenly distributed and have come at a high environmental cost. Furthermore, as the experience in China suggests, higher living standards do not necessarily translate into greater political freedom or respect for human rights. But the experience in those two countries and elsewhere in Asia offers long-term hope, even for the despairing people of so much of Africa.
- The extraordinary advances in communications technology have not only expanded the sources and retrievability of information and ideas, but have made the information and ideas instantaneously accessible to vast numbers of people throughout the world. The internet and such innovations as satellite technology have made it even more difficult to suppress the free exchange of ideas and therefore, over time, more difficult to halt the movement towards democratic ideals and respect for human rights.
- The emergence of trans-national criminal tribunals, the authority of which is backed by the international community, renders some of those responsible for gross abuses of human rights accountable for their actions. Progress on this front is slow and to some extent selective (the winners have always written and rewritten history), but the developments build on the precedent set by the International Military Tribunal which tried Nazi war criminals at Nuremberg.

Issues for the Future in Australia

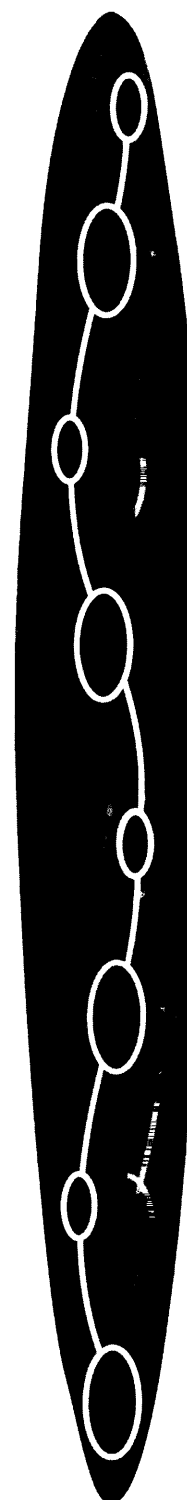
What do these developments mean for the Australian legal system in the foreseeable future? Some of the policy and strategic issues will be addressed primarily through the

international community. Others, however, will have a direct impact on domestic law. Within the constraints to which I have referred, it is possible to nominate some matters that are very likely to receive detailed consideration, if only because they have already been identified as significant by governments, policy makers or the courts.

First, the astonishingly rapid advances in science and technology will intensify the contest between proponents of the ever-expanding boundaries of intellectual property rights and those who emphasise the benefits to the community to be derived from the free dissemination and utilisation of scientific and medical advances or, for that matter, the products of the human imagination. The conflict is hardly new. For example, Lord Macaulay's observation in 1841 that copyright imposes 'a tax on readers for the purpose of giving a bounty to writers' reflected the struggle about the scope of intellectual property rights that had been taking place in England since at least the late seventeenth century.²³ While the conflict is not new, the stakes are very high indeed.

In its modern form, the contest is usually between those who claim the rewards of producing or financing technological innovations and those who wish freely to build on those innovations in one form or another, often in the interests of public health and well-being. A recent illustration of the policy dilemmas created by the opposing forces is the Australian Law Reform Commission's 2004 report on *Gene Patenting and Human Health*.²⁴ The report attempts to steer a path between encouraging technological innovation and avoiding excessive protection to the holders of patents over genetic materials and technologies. The path is, however, by no means easy to chart, particularly when many holders of intellectual property rights not only wield considerable influence themselves, but have the support of economically powerful nation states in constructing an international order that protects and advances their interests.

The difficulties facing policy makers in a relatively small First World economy such as Australia's is nicely illustrated by the High Court's decision in *Stevens v Kabushiki Kaisha Sony Entertainment*,²⁵ albeit in a rather mundane context. In that case, the Court adopted a narrow interpretation of a statutory provision designed to prevent a person making or using so-called 'circumvention devices' capable of circumventing 'technological



protection measures'²⁶. The joint judgment pointed out that the provision, which has its origins in two World Intellectual Property Organisation treaties, reflects a compromise among a variety of positions put by different stakeholders. Accordingly, an approach which paid 'close attention to text and structure' was warranted.²⁷ The joint judgment emphasised that:

'in construing the definition which focuses on a device designed to prevent or inhibit the infringement of copyright, it is important to avoid an overbroad construction which would extend the copyright monopoly rather than match it'.²⁸

As it happens, the Court's caution about extending monopoly rights gave the copyright holder considerably less protection than it sought.

The High Court's decision is, however, only one skirmish in a much wider war relating to intellectual property rights. The Australia-United States Free Trade Agreement requires Australia to legislate to adopt a broad definition of 'technological protection measures'.²⁹ The implementation of this requirement, no doubt designed to protect the investment of copyright holders in electronic products, may well effectively overturn the decision of the High Court.³⁰ The Free Trade Agreement is but one example of bilateral or multilateral treaties that protect and expand the rights of intellectual property holders at the expense of what many would see as the wider public interest.

A second group of emerging issues relates to the perceived demands of national security. It is clear enough that a great deal of the time of Parliaments, the courts and law enforcement agencies will be taken up with measures intended to combat the activities of terrorist organisations and the actions of individual terrorists. The events of September 2001 in the United States prompted the convening of a summit of Commonwealth, state and territory leaders in April 2002, at which the states agreed to refer their powers relating to 'terrorist acts' to the Commonwealth.³¹ The referral of power was followed by the enactment of Commonwealth legislation creating a variety of offences relating to terrorism.³²

The new statutory regime now includes the *Anti-Terrorism Act (No 2) 2005* (Cth). This legislation introduces new grounds for proscribing terrorist organisations, creates new terrorism-related offences, establishes a regime of 'control

orders' designed to restrict and monitor the movements of persons suspected of terrorism, sets up a preventative detention regime which authorises the detention of persons without charge for the purposes of interrogation by security agencies, expands police powers for warrantless searches and seizures, and enhances the information and intelligence gathering capacity of police forces and security agencies.³³ More recent legislation has greatly expanded the powers of law enforcement agencies to intercept communications between innocent persons and suspected wrongdoers.³⁴

The Australian Law Reform Commission has already contributed to the policy debate on national security issues. In 2004, it published its report on the *Protection of Classified and Security Sensitive Information*.³⁵ More recently it has been charged with responsibility for reviewing the so-called sedition laws enacted by the *Anti-Terrorism Act*.³⁶ In the meantime, the first criminal trials under modern anti-terrorism legislation have taken place.³⁷ Undoubtedly more will follow. And, equally clearly, law enforcement and intelligence agencies will take advantage of their expanded powers.

A third looming challenge is to subject the behaviour of private corporations that have taken over the functions of government agencies to appropriate competitive and regulatory constraints. As the ideology of the free market has taken hold in both the domestic and international spheres, functions that only recently were regarded as the inalienable responsibility of government are now discharged, wholly or in part, by the private sector. The new 'contractualism', as one aspect of privatisation is sometimes described, even extends to decision-making in connection with eligibility of individuals for income support.³⁸

The traditional mechanisms for regulating the activities of public sector agencies may not be suitable for private corporations, or may be unavailable as the result of a judicial hesitancy to adapt administrative law principles to new circumstances. The point is graphically illustrated by the refusal of the High Court to apply the *Administrative Decisions (Judicial Review) Act 1977* (Cth) to decisions made, of all bodies, by a subsidiary of the Australian Wheat Board ('AWB').³⁹ The majority reached this conclusion notwithstanding that the AWB, through its own subsidiary, effectively had a legal monopoly of exports of Australian wheat.

It is true that the activities of 'private' corporations are subject to the constraints

of competition law and often to supervision by regulatory bodies such as the Australian Competition and Consumer Commission. But competition law may be a blunt and ineffective constraint in markets that are small by world standards and may support only two or three participants. Regulatory controls, especially when they are invoked after the event, may prove less effective than the traditional forms of direct political accountability. An effective balance has yet to be struck.

A Fundamental Question

As important as these issues will be, there is a more fundamental question that the Australian community must face. It concerns the very nature of Australian democracy.

On one (increasingly fashionable) view, democracy is one-dimensional. If the government is elected by the people at free and fair elections, the system of government is democratic. It is this majoritarian view that seems to underlie efforts to 'bring' democracy to countries in the Middle East that have never experienced freedom as understood in Western political theory. The same majoritarian concept also seems to underpin the common criticism levelled at proposals to entrust 'unelected judges' with the power to determine whether legislation is compatible with human rights norms. The critics are undeterred, even where the enactment of a statutory bill of rights leaves ultimate legislative authority with the elected Parliament.

True democracy is not, however, a one-dimensional concept. If there is one thing that modern history teaches, it is that even a freely elected government is capable of perpetrating egregious human rights abuses. An essential element in a democratic system of government is the protection of minorities and the preservation of individual liberty against the authority of the state. Virtually all parliamentary democracies have recognised this truth by adopting, in one form or another, a bill of rights which mirrors international human rights norms. The major exception is Australia.

In times of anxiety and fear, individual rights and liberties inevitably come under threat. Sometimes this is done in the name of national security. Sometimes it is done for other reasons, for example to combat the threat of serious crime or to promote good relations with neighbouring countries. But the primary threat to individual freedom is not from terrorists or

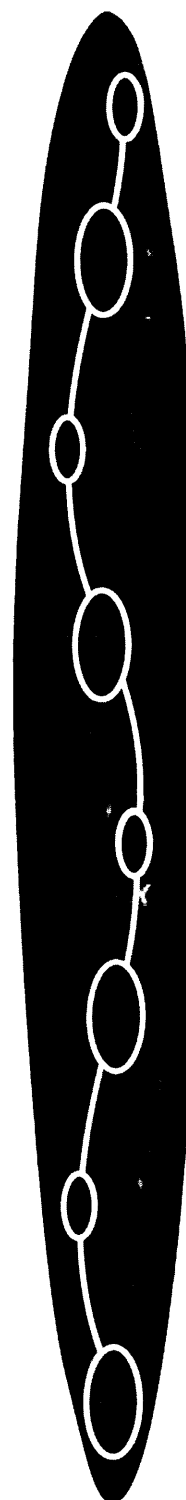
criminals or their sympathisers, but from well-intentioned measures that curtail liberty in the interests of national security or community harmony. High levels of anxiety and fear are usually sufficient to ensure the requisite degree of public support for the measures.

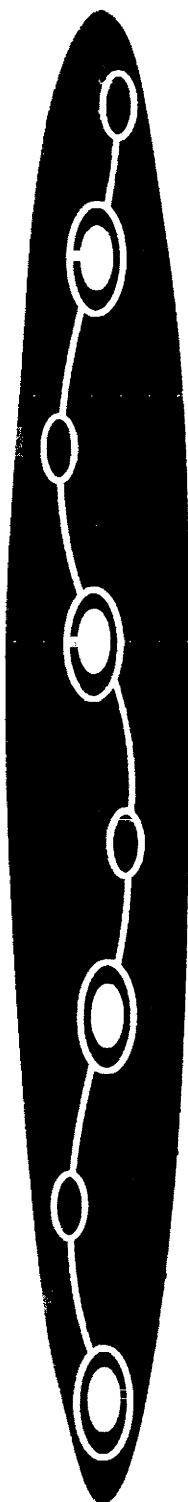
In Australia, there are relatively few mechanisms to curb excessive legislative or political responses to perceived dangers. The *Constitution* is bereft of a bill of rights and those few provisions that expressly protect individual rights have generally been given a narrow meaning. While it is open to the states to introduce their own statutory guarantees of human rights,⁴⁰ such legislation can have little effect on Commonwealth laws or executive actions. International law, which exerted a powerful influence on domestic law in the aftermath of World War II, is now less and less a constraint on legislative or executive action, particularly when national security or other paramount interests are thought to be at stake. The greatest human right, so it is repeatedly said, is the right to life and safety, as if this provides an answer to the dilemma of reconciling the public interest in security and harmony with individual rights and freedoms.

There is no doubt that Australia will remain a democracy for the foreseeable future. But what kind of democracy will it be? The answer lies over the horizon.

Endnotes

1. S Gould. *The Mismeasure of Man* (1997), 416.
2. See Darwin's Introduction to *On the Origin of Species*, reproduced in J Watson (ed). *Darwin: The Indelible Stamp—The Evolution of an Idea* (2005), 346.
3. A Gallup poll conducted in 1993 found that 47% of adult Americans believed that Homo Sapiens is a species created by God within the last 10,000 years: D Dennett, *Darwin's Dangerous Idea: Evolution and the Meanings of Life* (1995), 263.
4. J Watson, (ed), *Darwin: The Indelible Stamp—The Evolution of an Idea* (2005), 1047.
5. The phrase is used by Richard E Leakey. Introduction to *The Illustrated Origin of Species* (1979), 36.
6. C Darwin, *The Voyage of the Beagle* (1845), reprinted in J Watson, (ed). *Darwin: The Indelible Stamp—The Evolution of an Idea* (2005), 333–334.
7. C Darwin, *The Descent of Man*, reprinted in J Watson, (ed), *Darwin: The Indelible Stamp—The Evolution of an Idea* (2005), 1008, 1013.
8. S Gould. *The Mismeasure of Man* (1997), 418.
9. J Mattick, 'The New Genetics: The Human Genome and the Future of Medicine' (2003) 179 *Medical Journal of Australia* 212, 214.
10. See D Hambly and J Goldring (eds), *Australian Lawyers and Social Change* (1974). A second conference, to mark the 30th anniversary of the first, was held in September 2004.





11. The last expression is usually attributed to Isaac Newton who used it in a famous letter to Robert Hooke. Far from being a generous tribute to a fellow scientist, it is likely that Newton was mocking Hooke, who was a small man with a twisted back: J Gribbin, *Science: A History 1543–2001* (2002), 162–164. And they say that lawyers are unpleasant to each other.
12. Aboriginal Land Rights Commission (AE Woodward QC), *Second Report*, AGPS (1974).
13. R Sackville, 'Avoiding Tax Avoidance: the Primacy of Pt IVA' (2004) 39 *Taxation in Australia* 295.
14. While the potential threat from global terrorism is no doubt great, the fact is that the numbers of people killed or injured to date by 'terrorist' acts is very small compared with the dire consequences of famine, wars and preventable diseases in Third World countries.
15. J Diamond, *Collapse: How Societies Choose to Fail or Survive* (2005), 494–496.
16. See generally Tim Flannery, *The Weather Makers: The History and Future Impact of Climate Change* (2005). The impact of global warming on the Great Barrier Reef, for example, is discussed in ch 11. It is sometimes forgotten that great changes in climate have occurred relatively recently. During the Last Glacial Maximum, about 21,000 to 15,000 years ago, mean monthly temperatures in parts of what is now Australia were 6°C to 10°C lower than at present and the sea level was about 130 metres lower: J Mulvaney and J Kamminga, *Prehistory of Australia* (1999), 114–116.
17. House of Lords Select Committee on Economic Affairs, *The Economics of Climate Change* (2005), [10].
18. *Ibid.* [8].
19. *Ibid.* [25], chs 3, 4.
20. See Australian Government Department of Health and Aged Care *Ageing Gracefully: An Overview of the Economic Implications of Australia's Ageing Population Profile* Occasional Paper No 10 (2000).
21. J Mattick, 'The New Genetics: The Human Genome and the Future of Medicine' (2003) 179 *Medical Journal of Australia* 212, 214.
22. For the argument of a proponent of GM technology, see D Taverner, *The March of Unreason: Science, Democracy and the New Fundamentalism* (2005), chs 4, 5.
23. R Sackville, 'Monopoly Versus Freedom of Ideas: The Expansion of Intellectual Property' (2005) 16 *Australian Intellectual Property Journal* 65, 66–67.
24. Australian Law Reform Commission, *Genes and Ingenuity: Gene Patenting and Human Health*, ALRC 99 (2004).
25. *Stevens v Kabashiki Kaisha Sony Entertainment* (2005) 221 ALR 448.
26. *Copyright Act 1968* (Cth) s 116A.
27. *Stevens v Kabashiki Kaisha Sony Entertainment* (2005) 221 ALR 448, [31], [32].
28. *Ibid.* [47].
29. Article 17.4.7, Australia must legislate by 1 January 2007, art 17.12.
30. See generally Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Review of Technological Protection Measures Exceptions* (2006).
31. The State legislation is entitled *Terrorism (Commonwealth Powers) Act*.
32. See now *Criminal Code Act 1995* (Cth), Pt 5.3.
33. For a convenient summary, see Australian Law Reform Commission, *Review of Sedition Laws* (Issues Paper, 2006), 1.24–1.35. For summary of the communique issued by the Special Meeting of the Council of Australian Governments, see *ibid.* 1.17–1.23.
34. *Telecommunications (Interception) Amended Act 2006* (Cth), Sch 2.
35. Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004).
36. *Anti-Terrorism Act (No 2) 2005* (Cth), Sch 7, amending the *Criminal Code Act 1995* (Cth). See Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, ALRC 98 (2004).
37. See *R v Zaky Mallah* [2005] NSWSC 317; *DPP v Thomas* [2006] VSC 120.
38. R Sackville, 'Some Thoughts on Access to Justice' (2004) 2 *New Zealand Journal of Public and International Law* 85, 108.
39. *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277. The AWB is at the heart of what is popularly known as the Iraq 'kickbacks' scandal.
40. See Human Rights Consultative Committee—Justice Department, Victoria, *Rights, Responsibilities and Respect* (2005).