

The New International Criminal Court

by Tim McCormack

Should Australia ratify the *Rome Statute*, which provides for the establishment of the world's first permanent international criminal court? Tim McCormack considers the merits of the proposed court and argues in favour of Australian involvement in its work.

The concept of a permanent international criminal court is not a new one. As early as 1874 the Swiss lawyer, Gustave Moynier, one of the co-founders of the International Committee of the Red Cross, argued that respect for the then newly emergent international law of war would only come with effective enforcement mechanisms. He drafted a statute for his proposed international tribunal and the international community has discussed the concept on numerous occasions since. Finally, in 1998, after more than a century of unsuccessful attempts to reach agreement on the creation of a penal tribunal, the international community of sovereign, independent, nation states met together in Rome and finalised negotiations on the text of a statute for the first permanent international criminal court.

The Australian Government is currently in the process of deciding whether or not to ratify its signature of the *Rome Statute* for the International Criminal Court. The public debate on this issue has often been negative and critical with a number of assertions made about detrimental consequences flowing from Australian participation in the Statute for the Court.

My intention here is to briefly argue the case for a permanent international criminal tribunal, explain key aspects of the *Rome Statute*, assess the prospects for the successful operation of the Court, and expose the misunderstandings inherent in the arguments raised in support of Australia's non-participation in the work of the International Criminal Court.

The Need for an International Criminal Court

The establishment of the International Military Tribunals in Nuremberg and in Tokyo by the Allies in the aftermath of World War II represent watershed events in the administration of international justice. Despite the lingering criticism of 'Victors' Justice', Nuremberg and Tokyo constituted the first international institutions to try individuals for their personal violations of international criminal law, and the precedent they set for ending

impunity has never been challenged. When proceedings before both tribunals concluded in the late 1940s, international expectations of a permanent international tribunal to replace them were high indeed. Sadly, the fulfillment of the promise of Nuremberg and Tokyo has taken far too long to materialise.

In the decades following the Nuremberg and Tokyo experience, the prosecution of international crimes—war crimes, crimes against humanity and genocide—was left exclusively to domestic law. What a sorry tale of inadequacy, ineptitude and inconsistency it has been. States have repeatedly lacked the political will to prosecute many egregious acts and the perpetrators of atrocity have enjoyed a discouraging level of impunity.

The creation by the UN Security Council of the two *ad hoc* international criminal tribunals—for the Former Yugoslavia in 1993 and for Rwanda in 1994—has had a profound effect on international criminal law. The establishment and operation of these two international criminal institutions has enlivened the law and dramatically raised expectations that impunity for international crimes is no longer acceptable. Suddenly proposals exist for tribunals for Cambodia, Sierra Leone, Kosovo, and



East Timor. However, an *ad hoc* approach to the establishment of tribunals for specific conflicts will also be sub-optimal. What is the justification, for example, for establishing a tribunal for Rwanda but not for neighbouring Burundi or Zaire? If the Former Yugoslavia needs a tribunal, why not also Liberia, Mozambique, or El Salvador?

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Here then is the rationale for a permanent international criminal court with no territorial limitations to its jurisdictional competence. Such an institution is needed to redress the inadequacies of an exclusively national approach to the prosecution of international crimes and to the repeated establishment of *ad hoc* tribunals focussed exclusively on particular conflicts.

Key Aspects of the *Rome Statute*

The *Rome Statute* will enter into force after the deposit of the 60th instrument of ratification. At the time of writing, the number of ratifications has reached 33. Estimates of the likely period before entry into force at the conclusion of the Rome Diplomatic Conference in July 1998 were, commonly, in the order of five years. At current rates of ratification, mid 2003 appears to be a realistic target date for entry into force. When the Statute does enter into force, the new International Criminal Court will be established with its seat in The Hague—now, undisputedly, the multilateral legal capital of the world.

The new Court will have the jurisdictional competence to try individuals alleged to have committed the most serious crimes of concern to the whole of humanity—specifically war crimes, crimes against humanity or acts of genocide—all of which are defined in the Statute. The Court will not exercise retrospective jurisdiction—it will only be able to try alleged crimes after entry into force of the *Rome Statute*. The Statute envisages that the Court will only act as a complement to existing national criminal courts and not as a replacement for them. The new Court will not exercise primary jurisdiction over national courts. Instead, it will only act where national courts are either “unwilling or genuinely unable” to deal with a particular case.

Although the jurisdictional competence of the Court will not be limited geographically or temporally post entry into force, that competence can only be triggered in one of three ways. First, the UN Security Council acting pursuant to Chapter VII of the UN Charter can refer a situation to the Prosecutor of the Court who can then investigate alleged crimes and issue indictments accordingly. Second, a State Party to the Statute can refer a situation to the Court and the Prosecutor can act on the basis of that referral. Third, the Prosecutor of the Court can act on their own initiative to investigate a particular case and proceed with it once a pre-Trial Chamber of the Court has determined that there is sufficient evidence to warrant the issuance of an indictment.

The Statute provides that in respect of referrals by a State Party or investigations by the Prosecutor acting on their

own initiative, either the state on the territory of which the alleged conduct occurred, or the state of which the person accused of the crime is a national, must consent to the Court’s exercise of jurisdiction. If either the territorial state or the national state are Parties to the Statute they will be deemed to have already given their consent for the Court to deal with the matter. If either the territorial state or the national state are not State Parties to the Statute, one or other of them must provide their consent *ad hoc* before the particular case can proceed. In the case of referral by the UN Security Council, the exercise of Chapter VII powers obviates the need for state consent and the Prosecutor is entitled to proceed on the basis of the constitutional authority of the Council.

The trial process must be conducted according to the Rules of Procedure of the Court before a Trial Chamber of three judges. The right of appeal exists for both the prosecution and the defence and will be dealt with by a bench of three appellate judges. There will be no trials *in absentia*. Upon conviction, defendants will be sentenced to a maximum of life imprisonment and incarcerated in jails provided by States Parties to the Statute of the Court.

Prospects for the Court’s Success

It is clear that there are some major limitations to the Court’s exercise of its jurisdictional competence which will effect the cases which actually come before the Court. The *Rome Statute* is not a perfect instrument and, while constituting a major breakthrough in the enforcement of international criminal law, reflects the evolutionary nature of international law making and institution building. That said, it is still the case that the Court is likely to receive referrals from the UN Security Council in particular and that it will have significant work to do early in its existence.

Much has been made of the fact that the US is unlikely to become a State Party to the Statute of the Court. Many wrongly assume that US opposition does not augur well for the Court’s success. As a permanent member of the UN Security Council, the US will be in the privileged position of referring situations involving other states to the Court but effectively protecting its own nationals from the Court’s jurisdictional reach—a rather perverse example of having your cake and eating it too. Here the US position is entirely consistent with its general approach to international law and institutions: they exist for the rest of the world but not for the US itself! US opposition to its own participation in the Court will not preclude the Court from trying non-US nationals. Rather, it will simply further emphasise the selectivity and inconsistency which already exists in the implementation

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of international law. While this issue needs to be addressed, there is still scope for the Court to do much positive work in the interim.

Opposition to Australia's Participation in the Statute

The principal criticism of Australian ratification of the *Rome Statute* reflects concern about a diminution of Australian sovereignty. The argument is frequently articulated that if Australia ratifies this Statute ADF personnel will not be able to undertake their deployment free from fear of being taken off to be tried before an international tribunal: "The last time an Australian serviceman was tried by a foreign court it was Breaker Morant—and look what happened to him"!

This argument reflects a profound misunderstanding of the 'complementarity' formula in the *Rome Statute*.

The reality is that if an ADF member commits an atrocity within the jurisdictional competence of the Court, the Australian public will justifiably demand that that individual be tried in an open and accountable process. Public reactions to allegations of bastardisation within the 3rd Battalion of the Royal Australian Regiment have more than demonstrated the truth of that assertion. If the

Australian Government chooses to exercise its right of jurisdiction as the state of nationality in the particular case, the International Criminal Court simply cannot trump that primary jurisdictional claim. Were it to attempt to do so, multiple States Parties would withdraw from participation in the *Rome Statute* because they will only ratify the Statute on the basis of a guarantee of the primacy of national jurisdiction.

If the Australian Government chose not to prosecute the ADF member then, of course, the International Criminal Court could exercise its complementary jurisdiction. However, it is difficult to imagine circumstances in which the Australian Government would make such a choice. It is much more likely that the individual would be prosecuted in Australia to avoid the need for that person to be tried in The Hague. If the particular individual was acquitted for lack of evidence in Australia the International Criminal Court would not be in a position to try the individual unless the Court was of the view that the trial was a sham—a determination the Court will not make lightly. There is still the theoretical possibility of a difference of opinion between the Australian Government and the International Criminal Court about the perpetration of a crime where the Court considers that action by an ADF

member warrants prosecution in contrast to an Australian prosecutorial decision not to proceed because a determination has been made that no crime has been committed. Given the relatively high threshold requirements for the commission of a crime within the jurisdictional competence of the Court, this theoretical possibility is extremely unlikely in practice and, in my view, is not a sufficient basis for Australian non-participation in the *Rome Statute*.

Unfortunately, there does seem to be a deliberate campaign of disinformation about the *Rome Statute* in the Australian public debate. One of the most outspoken proponents of the campaign is Andrew Thompson M.P., who happens to be the Chairman of the Joint Parliamentary Standing Committee on Treaties (JSCOT). One might expect the Chair of a Parliamentary Committee to distance his personal opinion from his role as impartial, open-minded gatherer of information and of views with which to inform the Parliament. Not so Mr Thompson, who has appeared on the Alan Jones Show on 2UE to denounce the Court and Australia's support for it. Mr Thompson has even gone as far as to boast publicly that under his chairmanship JSCOT "has killed Kyoto" and hopefully will kill the *Rome Statute* as well.

This opposition is discouraging because it involves deliberate scare mongering as the basis for promoting criticism. In fact, Australia stands to benefit from ratification of the Statute just as the international community stands to benefit from Australian involvement in the work of the Court.

In the context of several recent overseas peace operations, the Australian Defence Force (ADF) has been specifically mandated to exercise a law and order function in societies in which normal structures of authority have become dysfunctional and criminal violence is rife. This situation prevailed in Somalia and in East Timor and in both cases, the ADF was forced to allocate substantial resources to the detention of alleged criminals pending their proper trial. It would have been much less expensive, less dangerous and more efficient for ADF personnel to have transferred custody of individuals to the International Criminal Court if it had been in existence at the time of both deployments. The sooner the International Criminal Court comes into existence, the sooner the Court will be able to deal with alleged war criminals in conflicts where national police forces, courts, judges, prison facilities and prison administration personnel no longer operate.

Virtually every day in print media and on television screens Australians are confronted with images of brutality and atrocity around the world and are keen to support any initiative aimed at redressing impunity for such outrageous behaviour. The Australian community's unprecedented expressions of support for the East Timorese in the face of obscene brutality, and for the

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deployment of the ADF as lead force in the INTERFET coalition, is ample demonstration of the desire of Australians for international support to stop atrocities and to hold those responsible for such acts personally accountable.

Australia has consistently supported international institutions for the trial of those alleged to have perpetrated international crimes. We did that in the aftermath of World War II and we have been involved more recently in the work of the international criminal tribunals for the Former Yugoslavia and Rwanda. The established history

of Australian support for the Court has always been based on a widespread belief in this country of the need to create an institution to help rein in impunity for atrocity wherever it occurs in the world. It would be entirely inconsistent for Australia to suddenly decide now not to ratify the *Rome Statute* and not to support the establishment and the work of the Court.

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Is Sport The Last Bastion Of Moral Certainty?

by Amanda Smith

Amanda Smith argues that without a strong ethical framework sport loses its meaning.

A

lbert Camus once said that it was from sport that he learned all he knew about ethics.

Why does this seem like an astounding statement? This is a bloke who studied philosophy at university, who wrote extensively on the human condition and about human values, and who won the Nobel Prize for Literature. What could someone as brainy and thoughtful as Albert Camus learn about ethics from something as ultimately trivial as sport? After all, in a wider world of human endeavour and human suffering, whether Collingwood or Essendon won last weekend doesn't really matter. I'd like to suggest that ethics is central to sport because the ideal of sport exists in a pure moral universe. Which is not to say that this moral universe isn't constantly tested and threatened. But, without a strong ethical framework, sport loses its meaning. It loses any reason to exist.

This is simply because of what sport is. The most basic definition of sport is that it's a contest of physical skill. This contest is enacted according to a set of rules, which determine that the contest is fair and the outcome is uncertain. However, within this basic definition, a whole ethical framework is embedded.

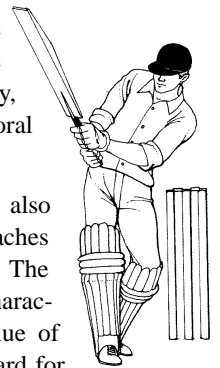
The moral universe of sport exists on two levels. First of all, there are the rules that need to be followed for a sporting contest to proceed at all. That is, for the play to be fair. The best way to understand what fair play is and means is to see it as being about respect for the sport, for the game. If you respect the sport (that is, you play for the sake of the game), you will be motivated to play fairly. The Canadian sports ethicist and Olympic silver medallist, Angela Schneider, argues that if you have this respect, you "will also have a coherent conceptual framework for arbitrating between competing claims regarding the fairness, or otherwise, of actions".

This is the internal moral logic of sport. What I think is attractive about it is that whatever ethical decisions a person may have to make in playing sport (do I go the high tackle?...do I argue about whether the ball was on the line or out?...do I use a drug to assist my abilities?), what's regarded as right and wrong in sport is rather more black and white than in most other contemporary spheres of human activity. There's an umpire or referee

who judges your behaviour, and there are penalties for contravening the internal laws of a sport. In this way, perhaps, sport is the last bastion of moral certainty.

The second level is that there are also moral values ascribed to sport: it teaches us ethics which apply beyond sport. The catchphrase is that "sport builds character". Thus, sport teaches us the value of teamwork, of leadership, and of reward for effort. These qualities are applicable to life in general, not just on the sports field. This is the basis of the 'games revolution' of mid 19th century England, and the idea of "a sound mind in a sound body". This ethical system, known as 'Muscular Christianity', was promoted through the playing of games via the English public school system. Its most famous early exponent was Thomas Arnold, headmaster of the Rugby School from 1828 to 1841.

Both these concepts, of fair play and of character development, form the basis of the amateur ideal of sport. The amateur ideal always meant more than not being paid. Although the stories you hear about how rigorously the idea of not being paid was applied are often astounding. Dawn Fraser, in an interview I did with her recently, talked about the first time she was banned as a swimmer (not the ten year ban after the Tokyo Olympic games in 1964, that was her third ban). Her first ban was when she was 12 years old. She'd gone to a local football club Christmas picnic. At the picnic she competed in the children's egg and spoon race, and the sack race, and a swimming race. Like all the children there, she'd been given 2 shillings as a Christmas present from the football club. For this, she was banned from competitive swimming for two years. She'd swum, and she'd accepted money, therefore she was a professional. For this, the secretary of the Amateur Swimming Union of Australia told her that she'd never swim for Australia. The irony of this story is that up until then, it had never occurred to Dawn that she might swim for Australia. But, Dawn being Dawn, being told that she couldn't do something meant that she immediately made up her mind that she would!



Even though amateurism is largely dead, as far as athletes now earning a living from playing sport goes, as an ethical system, you'd have to say that it's been remarkably enduring. For over one hundred and fifty years, it's been the guiding principle for how sport should be played, and what its benefits are.

In an attempt to understand why sport might be our last bastion of moral certainty, albeit one that's under considerable threat (which I'll discuss later on) I want to now consider the moral universe in which contemporary sport exists in relation to that of other spheres of endeavour—specifically, the corporate world, and the arts.

“Sport's a business now, you know”. That's a line we hear a lot these days, and in lots of ways it's true. There are serious commercial interests, and a lot of money, involved in the big-time professional sports. Both sport and business are competitive pursuits. However, I'm wary of swallowing the idea of sport-as-business holus-bolus. There are also fundamental ways in which sport can never be business. We should understand these differences in order to protect the integrity of sport, and in order to be a little less seduced by the business paradigm for sport.

Our expectations of ethical behaviour in sport are not the same as our expectations of ethical behaviour in business. Again, this relates to the fundamental requirement of sport to provide an uncertain outcome. What happens when that uncertainty of outcome is removed from a sport?

The biggest international front-page-of-the-newspaper story about sport in 2000 was the cricket match-fixing and betting scandal. Hansie Cronje and his mates on the take, involving some thousands of dollars. Cronje was found to have accepted US\$50,000 from bookmakers in return for interfering with the outcome of matches. And, of course, there's more to come yet on the story of corruption in cricket linked to betting. The interim Condon Report, commissioned by the Anti Corruption Unit of the International Cricket Council and released in May 2001, indicates this.

In my recollection, at least, the equivalently huge international front-page story concerning corruption and scandal in the corporate world was when Nick Leeson ripped off Baring's Bank. The amount of money involved there was US\$1.38 billion.

The amount of money involved is important, by way of comparison. A matter of corporate fraud only gets this kind of major attention when it involves enormous amounts of money, and/or is a very strange story. The Nick Leeson affair was both these things. Whereas a whiff of corruption in a sport, involving comparatively small amounts of money, always gets huge attention. The difference being that we expect, or at least we're unsurprised by, fraudulent and unethical behaviour in the

business world. But we remain genuinely shocked, and find it inconceivable, that a sportsperson could also operate as a rogue trader.

Yet, truly, there are many worse things that happen in this world to get upset and angry about than finding out that a game of cricket has been rigged. Why then, does it seem so truly deeply shocking to discover that a cricketer has pocketed a few thousand bucks, to throw a game? Part of it, surely, is a sense that if you can't even trust a game of cricket to be fair dinkum anymore, then what can you trust in this world?

If you cheat in sport, by way of trying not to win, you destroy the thing itself. To throw a game, to interfere with the uncertainty of the outcome, is no longer participating in sport. It's not just operating outside of the rules (as the insider trader does in business), it's a fundamental denial of the essence of sport.

For sport to exist at all, it has to exist within an ethical framework of playing fairly. There's no point to it otherwise. A game of cricket that's fixed has lost all its meaning. In the corporate world, a rogue trader might wreak a lot of financial damage, but still doesn't destroy the *raison d'être* of business. The presence of a rogue trader in cricket or any other sport does.

This is why it's critically important that sportspeople understand that taking even just a little bit on the side is a fundamental denial of the meaning of what they do. For a sportsperson to think that the kind of cynical acceptance and resignation we might have about corrupt practices in business could apply equally to our feelings about sport—even (actually especially) in the age when sport is thought to be a business—utterly fails to recognise the difference between the two. As the cricket writer and journalist Gideon Haigh put it in *The Bulletin* recently, “Perhaps match-fixing is merely a logical, if perverted, outcome of the concept of sport as business and its leading participants as businessmen, selling their services in the free market of entertainment” (27 June 2000).

The way that different ethical standards apply between sport and business was also manifest in June 2001, with the impending collapse of the One-Tel telecommunications company in Australia. Apparently it simply didn't occur to the company's managing directors, Jodee Rich and Bradley Keeling, to refund the A\$14 million in bonuses they'd paid themselves, until the Prime Minister and Federal Treasurer made public statements to that effect. These were reported in *The Australian* as an “unprecedented attack on corporate morality” (2-3 June

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2001). At least Hansie Cronje handed the 50,000 bucks over to the Reserve Bank of South Africa without having to be asked.

When sport absorbs the business paradigm without recognising that not all of that paradigm applies, we're putting sport in a dangerous place; and threatening its existence as something that has meaning.

To turn now to the moral universe of sport in relation to the arts. The obvious parallel between sport and art is that both share an aesthetic component. Part of the pleasure of sport is watching highly-trained bodies moving in space. The old Graham Kennedy TV show, *In Melbourne Tonight* recognised this in the segment they used to run, "The Footballers' Ballet".

However, what I want to tease out is the entirely different moral universe that contemporary artists occupy, compared to contemporary athletes.

One thing that's striking is how commonplace it has become for sportspeople to be cited as 'role-models'. Clean-cut athletes like Kieren Perkins are "tremendous role-models for our young", it's often said. This is because they exemplify honest hard work and success through effort. Sportspeople who muck up, who are caught cheating in their sport, or who do something disgraceful at a nightclub, are soundly admonished for dishonouring this role. It's believed that sportspeople, as public figures, *should* be setting examples to the rest of us about right behaviour. But when was the last time you heard of an artist, also a public figure—a painter, an actor, or a writer, being cited as a marvelous role model for ourselves and our kiddies?

Art questions structural and moral boundaries. Sport doesn't.

Artists don't serve this kind of purpose for us, because they operate in a much more morally ambiguous world. If Cathy Freeman had been found to have won her race at the Sydney Olympics last year through using a performance-enhancing drug, her fall from grace would be complete. She'd be regarded as a dirty low-down cheat. As was the case with Ben Johnson, at the Seoul Olympics of 1988. He was disgraced, and disqualified from the hundred metres final he won, because he returned a positive drug test. But do we care if a painting by Brett Whiteley was created while he was under the influence of heroin—a performance enhancer to his creativity? We might care that using heroin is illegal, or that it was injurious to Brett Whiteley's health, but the painting isn't judged by the fact that it was created in a drug-induced state. It isn't rendered worthless or disqualified from public view. We don't think that a drug-enhanced painting, or novel, or music composition, is inauthentic. We do think this of a drug-induced win and/or world record in sport.

This is because the artist, and the process of artistic creativity, exists in a different ethical framework. There's lots of things a sportsperson can do to bring about a charge of 'bringing the game into disrepute'. What would an artist have to do to 'bring art into disrepute'?

The artist will often claim his or her freedom to create works which critique the moral framework of the day, and which question and test accepted moral standards. They'll also claim the freedom to operate outside of what's been the accepted practice within their artform. Whereas the athlete essentially has to stay within the rules set out for his or her sport, in order to function as an athlete at all. If, for example, I was playing a game of netball I could decide that the most effective and efficient way for me to score a goal would be to get the ball and run with it to the goal post and chuck it in the ring. It wouldn't get me anywhere, though, because it's against the rules of that particular game to do that. The point of sport is to play within defined boundaries and obstacles. In the case of netball—when you get the ball, you can't run with it; and, depending on the position in which you're playing, you can only occupy certain sectors of the court.

Art questions structural and moral boundaries. Sport doesn't. And that's why sport, both literally and metaphorically, describes a path of right behaviour, and why sports-people are taken up as role models. It gets back to the simple difference that sport is a competitive activity, whereas the arts, generally, are not. Sport is therefore less morally ambiguous.

Interestingly, it's most often when art is turned into a competitive activity that moral controversies arise: William Dobell's portrait of Joshua Smith for the Archibald Prize; Helen Demidenko (later Darville) winning the Miles Franklin award for *The Hand that Signed the Paper*. That's where questions of authenticity get raised, because the fundamentals of competition demand it.

Conversely, when sport starts to become more like art, controversy also often arises. The 'aesthetic' sports, like ice-dancing, synchronised swimming, dance-sport (aka ballroom dancing) and gymnastics, don't fit easily into a straight competitive sports model. People question whether they are 'real' sports at all. This is because these sports are judged, and on subjective, aesthetic grounds, as well as technical grounds.

The ice-skater, Christopher Dean, talked to me once about the 'Bolero' routine, for which he and Jayne Torvill won the gold medal at the Winter Olympics in Sarajevo in 1984. The rules for the ice-dancing competition state that the routine must be four minutes long. The trouble with 'Bolero' was that, even condensing it and re-arranging it from the original Ravel composition, which is about eighteen minutes long, they could only get it down

to four and a half minutes. Now, the rules of ice-dancing also state that the routine begins, ie. the stopwatch is started, when the skaters start skating—when their blades touch the ice. So, Torvill and Dean spent the first half minute of their ‘Bolero’ routine lying and kneeling on the ice (which worked rather well choreographically, actually), but they did it to use up the extra time in the music before they put blade to ice and the timer started. After ‘Bolero’, there was a new rule introduced, which banned lying or kneeling on the ice. What Torvill and Dean did was assert their right to work outside of the rules, for aesthetic reasons, and that was regarded as dubious in the competitive environment. It’s reminiscent of the plot of Baz Luhrmann’s film about dance-sport, *Strictly Ballroom*.

Still, there are even greater dilemmas and tensions, and moral grey areas in contemporary sport. As has been noted, rules exist in sport to allow for the determination of a fair victory. Beyond the rules, however, there’s that thing known as ‘the spirit of play’. The spirit of play is a very nebulous concept, but it governs more than what a fair victory is according to the rules. It moves into what constitutes honour, and grace, in a sporting contest.

The Marylebone Cricket Club (MCC) is the keeper of the Laws of Cricket. Last year, it revised and re-wrote those laws, “for the new millennium”. The major innovation effected by the MCC is a preamble to the laws, called “The Spirit of Cricket”. In publishing these new laws with “The Spirit of Cricket” preamble, the MCC noted (with palpable resignation and nostalgia) that this was “previously taken for granted”.

According to the preamble, the spirit of the game involves respect for: your opponents, your captain and team, the role of the umpires, and the game’s traditional values. So, it’s more than the respect for the game itself, discussed earlier, which is what fair play is about. The things that are against this spirit comprise: disputing the umpire’s decision; abusing the umpire or an opponent; indulging in cheating or any sharp practice; and violence on the field of play.

The preamble also says that “captains and umpires together set the tone for the conduct of a cricket match. Every player is expected to make an important contribution to this”. So, the spirit of the game is about “tone”; or “right attitude”, which leads to “right conduct”.

Why then, last year, did the Marylebone Cricket Club decide it was necessary to make explicit what had always been taken as implicit? Obviously because they had a problem. You don’t make a law unless you have a problem. The MCC must have believed that the spirit of cricket was no longer understood or adhered to. Hence they had to move from regarding it as an assumed expectation of the game to spelling it out.

When the games ethic was developed, those hundred and fifty years ago, at Rugby and other English public schools, the people who learnt to play, and how to play, rugby and cricket and other games came to them with a shared set of values. These were shared values derived from being of similar class, education, and religion. Not to mention gender. Sport was one of the things that reflected, consolidated, and reproduced those shared values. However, sport got popular. And it got popular beyond that narrow group of upper middle class, Christian, public school educated boys.

Organised sport democratised over the course of the 20th century. It was no longer the exclusive domain of gentlemen amateurs. In a post-colonial world, sport is now globalising as well. It’s no longer the domain of white, western countries. For all that these changes are to be welcomed, they’ve brought with them a number of ethical questions and issues.

To stay with cricket: the game was disseminated to a number of the British colonies where not only its laws,

but the spirit of the game, were absorbed by local players, in India, Australia, the West Indies and so on. For the time that Australia, and the countries of South Asia and the West Indies, were still largely operating according to a wider set of values imported by their former colonial powers, things were okay. However, as places like Pakistan and Barbados began to re-assert their indigenous cultural values, and as these countries have become less tied to imperial values, then different and diverse attitudes as to what is and isn’t cricket begin to emerge. What the Marylebone Cricket Club is trying to do, in making laws about playing according to the spirit of the game, is to re-assert an attitude to cricket that is no longer readily understood. Globalisation threatens the traditional ethical framework of sport because cultural differences now have to be accommodated and understood.

For example, in 1995, the Pakistani cricketer Salim Malik was accused of offering bribes to the Australian cricketers Mark Waugh, Shane Warne, and Tim May. After the accusations had been made, the Pakistan Cricket Board allowed Salim Malik to continue playing. Now of course, in sport as elsewhere, a person is innocent until proven guilty. I would say, however, that until quite recently, a Pakistani cricketer so accused would never have played again—guilty or not. The taint would have been sufficient for him to have been deemed an unfit person to represent his country. The Pakistan cricket authorities would have been keen to be seen to be doing the right thing by their old imperial power. But in the case of Salim Malik, in

*Beyond the rules
... there’s that thing
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‘the spirit of play’.*

Within a Chinese cultural and ethical framework, using a drug to get the best result ... may not seem like cheating.

1995, the Pakistan Cricket Board continued to select him, almost as an act of defiance against the old regime. Their national interest, by this time, had transcended the ethical considerations of that old regime.

As has been noted, one of the things in the new preamble to the laws of cricket, is that it is against the spirit of the game to “direct abusive language to an opponent”. That sounds very much like Australian cricketers, in particular, are being told to quit their sledging. However, there’s a tradition that’s developed in Australian cricket where sledging isn’t seen as against the spirit of the game, or in any way unethical. *Au contraire*. Ian Healy, the former Australian wicket-keeper, wrote about the practice of sledging in his autobiography last year: “I’ve got no problem with it, so long as it doesn’t degenerate into personal abuse...I grew up in a grade cricket environment where it was normal to be sledged. But elsewhere cricket life is not like that, which is why the Australian team gets nailed. What we consider normal and acceptable, other nations do not”.

Later in the book, Healy describes an exchange he had in 1996 with the Sri Lankan captain, Arjuna Ranatunga, at the Sydney Cricket Ground. Ranatunga had just come out to bat after a break in play, but soon called for a runner, because he had cramp. This is the exchange that Healy reports went on between them (and I’m quite sure the language has been cleaned up considerably for publication); Healy says, “Mate, you can’t have a runner just because you’re unfit”. Ranatunga says, “It’s nothing to do with you, I have cramp”. Healy says, “Have a look at yourself, Porky. That’s why you’ve got cramp”. Now, if that’s not personal abuse, I don’t know what is (even if it’s been cleaned up for the book), but Ian Healy clearly doesn’t think it is. Again, I’m trying to point to cultural differences that have developed over time as to what’s regarded as ethical behaviour in cricket, and these cultural differences that the preamble to the new Laws of Cricket is an attempt to reverse.

To look now to another sport, and another ethical issue: swimming, and performance enhancing drugs.

In 1994, the World Swimming Championships were held in Rome. In the women’s events, the Chinese swimmers cleaned up, swimming times that were fantastically improved from what they’d previously managed. The assumption from other countries was that they were on drugs. It turned out to be true in some cases. Now, the attitude to drug enhancement in sport, certainly in western democracies, is that it’s faking it with chemicals.

It’s cheating, it’s taking an unfair advantage. But is this accepted and understood as an ethical principle in a country like China, which has a whole different philosophical, medical, and physical culture to that of western democracies? As I understand it, the concept of fair play (originally English), has no real equivalent in Chinese languages.

Susan Brownell is the author of a book called *Training the Body for China: Sports in the Moral Order of the People’s Republic*. She’s an American who spent some time as a student at Beijing University, during the 1980s, also competing there as an athlete. According to Susan Brownell, the important moral concept in Chinese sport is what’s best described in English as ‘face’. This relates to reputation, and prestige. Susan Brownell’s analysis is that while the idea of fair play focuses on the “morality of the process by which the winner and loser are determined”, the idea of ‘face’, of prestige, “means that the Chinese cultural focus is much more on the end result than it is on the rules-regulated competition that leads to it”. To extrapolate from Brownell’s analysis, within a Chinese cultural and ethical framework, using a drug to get the best result you can may not seem like cheating.

International opprobrium forced Chinese swimming to work at taking drugs out of their game plan. After all, international sport can only work if all those countries competing agree to some kind of universal view of what the rules are. That doesn’t mean, however, that there’s a unified, universal view on the moral principles of sport. But since modern, organised sport stems from western Europe, it’s a set of historical moral values from western Europe that take precedence as the standard in international competition.

Nevertheless, there are fundamental principles to do with sport that must be adhered to if the game is to proceed. Going back to cricket, the Condon Report was issued in May 2001 by the International Cricket Council’s Anti Corruption Unit. The report reflects a deep anxiety about the ability of today’s cricketers to distinguish right from wrong. The conclusion drawn in the report as to the reason for corruption in cricket is: “it was just too easy”. The report proposes, therefore, to make it harder. It suggests a comprehensive training and education program designed to raise awareness of the risks of corruption, and the methods used to entice players into malpractice. This program recommends a video, emphasising the resolve of the ICC to punish wrong-doers, and including disgraced players relating their experiences in order to deter others.

The report also wants each Test-playing country to appoint a “security manager” for teams during international competition. The person in this position would provide advice and action in regard to the security of players,

officials and venues; prevent and detect improper approaches to players on tour; collate intelligence about improper approaches; and liaise with the Anti-Corruption Unit of the ICC.

What is the message here? It seems from this that the only way to ensure that cricketers do not fall among thieves is to scare them by showing them the consequences of being caught. Also, to remove them from temptation by quarantining them from baddies with mobile phones and chequebooks. It's an attempt to enforce morality by sanction and restriction. The assumption is that unless extensively trained and supervised at all times, today's professional cricketer won't accept that it's a bad thing to sell his wicket, or a match. Surely it's the deeper ethical lessons that should be emphasised and understood, rather than the school monitor approach contained in the Condon Report, for cricket to get back on track as a game of honesty and integrity?

Another ethical issue in contemporary sport arises from the tension between the intrinsic rewards which sport offers, and the extrinsic rewards it offers. When you weren't paid to play or compete, and when you weren't allowed to earn money that in any way derived from your sporting ability or reputation, the only rewards that sport offered were intrinsic ones. Things like fun, fitness, and companionability. If you were successful, you could also take pride in your ability and achievements, and enjoy the respect and admiration of others. With the professionalisation of sport, all of these rewards still hold true, but there's also the possibility of making money (for some, very serious money) from playing sport. (Here I'm talking about making money legitimately—not through throwing a game.) By legitimate means in professionalised sport, the more you win, the more money you make. There's prize money, match payments, endorsements and sponsorships. Obviously that can put a different slant on how you approach winning, and the ethical attitude you might apply to the win. Yet, even in this age when the extrinsic rewards can be so large and so seductive, the value we place on the intrinsic rewards of sport endures.

Professional golf provides an arresting example of this. In many ways, golf is both the richest sport in the world, and also the most ethical. In golf, there's no referee, it's self-regulated. The players score for themselves. It's not uncommon for players at major tournaments to disqualify themselves for filling out their score-cards incorrectly, or to administer a penalty to themselves. Professional golf

challenges the idea that money ruins sport. Somehow or other, there's a culture maintained in golf that puts respect for the game uppermost. This may be simply because, once you've made it onto the Professional Golf Association tour, you earn a very good living from it, regardless of whether you win or not. So you can afford to be gracious. Beyond this however, professional golfers on the PGA tour (unlike professional cricketers) are heavily involved in the administration of their sport. They set the rules as well as play by them.

To return to the internal moral values of sport, and the idea of fair play and respect for the game. And to try to answer the question: "Is sport the last bastion of moral certainty?" I believe it is, despite the many contemporary incursions on those values. In most cases, even heavily commercialised sport is still played and watched for the love of the game. We strive to maintain this when it comes under threat. The fundamental internal necessities of sport, for it to be sport, ie. a physical contest according to a set of rules with an uncertainty of outcome, do actually

continue to guide and protect and preserve the moral integrity of sport. Of course, we could accept some kind of shift in these defining principles. For example, we could decide that the uncertainty of out-

come is no longer essential to what we think sport is or should be. In which case, professional wrestling will become an Olympic sport. Now, I agree with Roland Barthes when he describes professional wrestling as "a spectacle of excess...the great spectacle of suffering, defeat and justice". But this spectacle operates at the level of pantomime, some would say farce. Let us not confuse this with sport.

This article is a slightly modified transcript of a lecture given by Amanda Smith, as part of CAPPE's public lecture program, at the University of Melbourne on 6 June 2001.

Sources used in the preparation of this lecture include:

Brownell, S., *Training the Body for China: Sports in the Moral Order of the People's Republic*, USA: University of Chicago Press, 1995.

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*The assumption is that ...
today's professional cricketer
won't accept that it's a bad
thing to sell his wicket.*

Australian Plant Intellectual Property: A Growing Concern

by Andrew Alexandra

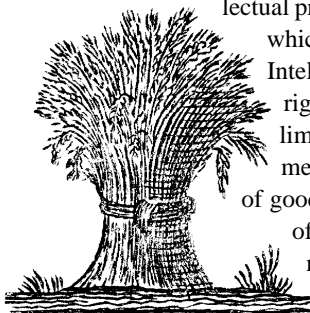
Can intellectual property rights in plants be justified? Andrew Alexandra canvasses the emergence of plant intellectual property in Australia and notes some recent developments.

Over time, the range of things that are recognised as ownable—that can be held as property—changes. Some kinds of things—people for example—that were previously ownable, no longer are. Other sorts of things that could not be owned in the past, now can be. This paper focuses on a new form of ownership of plants. Of course, it has long been possible to own *particular* plants (such as the apple tree in my orchard) or the products of such particular plants (such as the apple that I have picked from that tree). Recently, however, it has also become possible to own *types* of plants (such as a new kind of apple tree) and *types* of commercially useful processes and techniques involving plant materials (such as the process that inserts a genetic sequence into a plant to confer frost resistance). Property of this kind is now often referred to by the generic term ‘Plant Intellectual Property’ (PIP in what follows).

This paper is largely descriptive, aiming to explain the background to the emergence of PIP in Australia and some of the significant recent developments in the area. But it is informed by a normative interest. Any new form of property requires justifications, since it involves restricting access to some class of goods that was previously freely available. PIP is further contentious since it allows for the commercialisation of genetically modified plants. It is hoped that the discussion of this paper will help uncover the issues that are relevant to the justification of PIP, and to consideration of the desirability or otherwise of PIP.

The preconditions for PIP

PIP could in fact have only arisen recently. To see why this is we need to have both a grasp of the nature of intellectual property rights and of the way in which such rights apply to plants. Intellectual property rights provide rights holders with a temporally limited monopoly over the commercial exploitation of some type of good, and derivatively over tokens of that type. (The term ‘token’ refers to a particular concrete instantiation of a type—so a



particular coin might count as a token of the type ‘twenty cents’, another particular coin count as another token of that type, and so on.) Such monopoly is typically rationalised as an effective way of overcoming the tendency in market economies towards insufficient production and dissemination of socially useful innovations. Without such property rights the potential for an innovator benefiting commercially from her innovation would appear to be small; and such benefit depends on the transmission of the knowledge necessary to the innovation being restricted. So it may be that if I, as a widget manufacturer, think of a better way of building widgets I will obtain an advantage over other widget manufacturers such that I gain material rewards for my discovery, just as long as the relevant knowledge is not available to my competitors. I have, therefore, good commercial reason to wish to restrict the dissemination of my knowledge—and if such restriction is difficult (and it often is; and in the case of plants that, as it were, embody the knowledge and are easily replicable, it is generally impossible), and the process of discovery expensive or arduous, good reasons not to seek such knowledge in the first place. The allocation of property rights transforms the incentive structure. If I am rewarded every time my discovery is made use of (through, for example, being paid a royalty) then I have an incentive both to try to make such a discovery, and to have it disseminated as widely as possible. Such dissemination will benefit not only the holder of the property right, but many others.

There are obvious reasons to encourage innovation in the production of useful plant types, and there is a history of such innovation stretching back thousands of years in the case of some plant types. However, it is only recently that the imposition of a plant intellectual property system could have functioned to stimulate such innovation. Firstly, such a system could not have existed prior to the development of systematic botany. PIP depends on being able to uniquely describe different varieties (and hence identify distinct types) and on being able to determine whether a given plant does or does not belong to that variety (so to determine whether it is a token of the type over which rights have been granted). Secondly, even after the development of systematic botany, some three hundred years ago, the discovery of useful new varieties

remained basically a hit-and-miss matter. It was only when the genetic basis of plant breeding became known, just over a hundred years ago, that there was sufficient predictability in plant breeding to allow an organised and systematic approach to the discovery of new plant types. At that point plant breeding (in the sense of seeking and discovering new varieties, not simply the multiplication of existing varieties) as an organised production process became possible.

The internationalisation of PIP

Despite its relative youth, plant intellectual property is of considerable and growing importance both nationally and internationally. The GATT Agreement on Trade Related Aspects of Intellectual Property Rights (better known as the TRIPS agreement) made the enactment of a suitable plant intellectual property regime a condition for membership of the World Trade Organisation. The drive towards the internationalisation of a PIP regime, and of IP laws more generally, is inherent in the very nature of intellectual property within a global free-trading environment.

Anyone who consumes a good without contributing to its cost of production is a 'free-rider'. Consumers in countries that have an effective Intellectual Property system contribute to the production of goods in the form of desirable innovations by paying a premium to innovators in the form of royalties, licensing fees etc. The possibility of gaining such premiums provides an incentive for further innovation. Anyone who consumes these innovations but does not pay the premium is a free rider. So all those manufacturers and consumers who do not effectively acknowledge the IP regime of the countries from whence they derive innovations are free riders. But the kinds of free riders they are depends on the degree of economic openness of the country of origin. To see this, let us distinguish forms of free riding according to two criteria: whether or not the free rider's consumption of the good diminishes the value of that good (by e.g. restricting access to it) for those who have contributed to its production; and whether or not contribution to the production of the good by the free rider would have increased the value of the good for those who did in fact contribute to its production.

Some free riders are what might be called benign free riders. To illustrate this sort of free rider imagine a situation where immunisation of 90% of a population will ensure the eradication of an infectious disease in that population. Someone who refuses to be immunised is certainly a free rider—they are getting the benefits of the disease free environment without contributing to its production. But where the 90% mark has already been reached, that refusal does not make it more difficult for others to gain access to the good—by hypothesis it

makes no difference to the eradication of the disease. For the same reason, if the free rider were now to be immunised that would not benefit those who had already been immunised.

A second class of free riders, who might be called unfair free riders, are like benign free riders in that their consumption of a good that has been produced by others does not diminish its value to those others, but unlike benign free riders in that their contribution to production of the good would have increased its value to those who did contribute to its production. Think for example of a public statue that has been paid for by donations. Someone who did not donate still can enjoy the statue as much as anyone else—they have a free ride. Their enjoyment does not make it more difficult for donors to enjoy the statue, however if they had made a donation as well the statue would have been better than it is (bigger, made out of better material etc.) and so its value to the contributors would have been greater.

Finally, there are 'foul dealing'—free riders whose contribution would have increased the value of the good to those who did contribute to its production, and whose consumption does diminish its value. Actual free riders on public transport exemplify foul dealers—if they had contributed to the good they are consuming (through e.g. paying fares) the value of that good to those who have contributed would be greater (there would be better, more frequent trains etc.); and through their consumption they diminish the value of the good to those who have contributed (by making it more crowded, expensive etc.).

As noted above, producers and consumers who do not effectively acknowledge the IP regime of the countries from whence they

derive innovations are free riders. They benefit from the existence of incentives for innovation but do not pay the premiums that provide these incentives. Consumers in countries that enforce the payment of such premiums would be better off if the non-payers contributed, since this would increase (incentives for) innovation. In the terminology introduced above, then, the non-payers are at least unfair free riders, since those who contribute to the production of the good would be better off if the free riders contributed. Where it is possible to keep foreign goods embodying a local innovation out of a domestic market, however, free riders do not make the contributors to the good worse off, since the incentive effects of the premium contributors pay remain the same as they would be even if the free riders did not exist. On the other hand, where it is not possible to keep such goods out the free riders do make contributors worse off. Since the free riders are not paying the premium while

Some free riders are what might be called benign.

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local producers are, the free riders are able to undercut the price of domestic producers. Domestic producers will either lose business or reduce the amount of premium they can pay, or both. The incentive effect will be consequently reduced. In this situation the free riders become foul dealers.

A community of free trading nations, then, must either harmonise their Intellectual Property legislation or do away with such legislation altogether. Given the growing importance of intellectual property, and the realities of international relations, of course, it is the former of these alternatives that is coming into being. So-called principles of non-discrimination are fundamental to the regulatory framework that agreements such as TRIPS are creating. There are two mandated forms such non-discrimination is supposed to take: 'national treatment', where nations treat their own nationals equally with foreigners; and 'most favoured nation', where nationals of all trading partners in the WTO are treated equally. The individual nation in effect is faced with a choice between two packages—joining the free trade bloc and accepting a globalised Intellectual Property system, or rejecting such a system and remaining outside the global free trading bloc. It is, then, conceivable that a nation may be better off with the package of a harmonised IP system and participation in the free trading community, even though the IP element of that package taken by itself is actually disadvantageous.

This drive towards internationalisation of PIP, of course, is not, nor could it be, unproblematic, given the centrality of agricultural practices to national prosperity and identity and environmental viability. Given the social, economic and natural differences between countries a variety of national legal arrangements must be able to be accommodated within an overarching fair and workable international PIP regime. For example, a plant type that may be unproblematic in one setting may become a rampant pest in another. Nations, then, are justified in legislating to prevent the entry of damaging biological organisms. Nevertheless, they are required not to use such legislation as a covert means of advantaging their own or other favoured nationals.

The historical background to PIP in Australia

National PIP laws, then, face, as it were, in two directions—on the one hand towards the international regulatory framework to which they are bound to conform, and on the other, towards the particularities of the domestic setting within which they operate. Plant intellectual property laws are in a state of flux, both nationally and internationally. In Australia this fluidity is no doubt partly a result of the comparative youth of such

forms of property. But it also reflects idiosyncratic features of the national context. In broad terms perhaps the most salient of these features is the tension between what might be called the nationalising and internationalising forces at work in Australia. In one commonly accepted sense of the term, Australia has long been a very 'open' economy, with a high ratio of internationally traded goods to total national production. But in another way it has also been a closed economy. Government has controlled, regulated or at least influenced much economic activity, and erected substantial barriers to penetration of local markets by overseas producers, providing the conditions for the development of distinctive inward-looking institutional arrangements.

Traditionally, Australia has been an importer of capital and technology, and an exporter of primary produce, and until recently the bulk of that primary produce was agricultural. Mineral products are now the pre-eminent export earners, but agriculture remains important, providing about a quarter of Australia's merchandise export earnings, worth approximately A\$22 billion (about US\$14 billion). Around 80% of agricultural production is exported, and about 60% of this is derived from plants.

Plant intellectual property laws are in a state of flux.

At the time of Australia's political formation in the early twentieth century, a significant manufacturing sector was seen as imperative as the basis for nation building. In a

market as small and isolated as Australia, however, there was little prospect of such a sector developing in a free trading environment. Accordingly, local manufacturers were favoured by various bounties and subsidies, and especially by the imposition of high tariffs on imported goods. For the first seventy years of Australia's existence, then, 'protectionism' was an explicit economic doctrine, one of the cornerstones of what has been called the 'Australian Settlement'. In effect, an efficient export oriented agricultural sector subsidised an inefficient, domestically oriented manufacturing sector.

Behind the shelter of its tariff walls, Australia developed a unique form of State-mediated capitalism. The effects of this were felt as much in agriculture as in other sectors. Australian farmers managed their farms, but most of the decisions about what happened to their produce once it passed through the farm gate were out of their hands. Industry marketing bodies guaranteed to purchase their produce at a fixed price then arranged its on-selling in the world market. Compulsory growers' levies, together with government subsidies, helped fund breeding programs at public research institutions in order to develop superior varieties that were adapted to Australian conditions.

Protectionism began to be unravelled in the 1970s, largely as a result of international economic pressures.

Farmers' terms of trade—the ratio of prices received for outputs to prices paid for inputs—had been (and has continued to be) in decline for many years. It was perceived that protectionism imposed costs on the agricultural sector that it could no longer afford if it were to remain competitive; that by propping up inefficient and antique enterprises it retarded the development of internationally competitive manufacturers; and that in general consumers would be better off without it. These perceptions coincided with the ascendancy of neo-liberal ideology among the policy elite. The market has come to be seen as the preferred institution for the allocation and distribution of goods, both domestically and internationally. The Australian economy has been 'deregulated', not simply with the progressive dismantling of tariffs and the like, but with the privatisation and corporatisation of many public sector organisations, and Australia has become an enthusiastic supporter of international free trade, particularly in agricultural goods. Despite the radical changes of the past thirty years, however, the Australian agricultural sector is still deeply marked by the effects of past practices. More will be said about this below.

Australian Plant Intellectual Property Legislation

Australia's Intellectual Property regime is consistent with the international agreements to which it is party, in particular the World Trade Organisation Agreement on Trade Related Aspects of Intellectual Property Rights and the International Convention for the Protection of New Varieties of Plants (UPOV). The most important forms of domestic plant intellectual property protection are plant breeder's rights (PBRs) and patents. Under the *Plant Breeders Rights Act* (1994) breeders are granted the exclusive commercial right, within a limited period, to market a new plant variety or its propagating material, which includes producing, selling and reproducing the new variety or material. The *Patents Act* (1990) gives a patent holder the exclusive right, for a limited term of 20 years, to 'exploit' a patented invention in Australia, after which time the knowledge embodied in the invention enters the public domain. This act is broad in reach. All technologies may be patented with the exception of human beings and the biological processes for their production. Clearly, biological processes for the production of plants and animals can be protected by patents.

Plant breeder's rights legislation was extremely controversial when it was introduced in 1987, both in the rural sector and more generally. That controversy, while not completely dissipated, is now much fainter. On the other hand, while there does not seem to be much disagreement about the principle of patenting in general, there is certainly increasing disquiet about the patenting of genetic information.

Notwithstanding the public controversy generated by genetic engineering, the impact of this technology on Australian agriculture remains slight (despite the continuing claims of imminent importance). Expenditure on gene technology is estimated to be currently in the order of \$100 million a year, with most of this research being performed by public sector organisations. It is unclear how much of this research is in the area of genetic engineering (in the sense of what goes on in producing genetically modified organisms) as such—a good deal of it in fact seems to involve the use of genetic techniques in the service of traditional breeding techniques. Penetration of GE crops is low, and most of the crops grown so far are experimental in nature: to mid 1999 only 3 GMOs had received approval for commercial use. The only GE crop grown in commercially significant quantities is cotton: results have not been as good as anticipated.

Powerful forces such as big business, the peak farm body (the National Farmers' Federation) and the scientific establishment have been enthusiastic proponents of GE research and the adoption of GE varieties and produce. Nevertheless, there is a good deal of resistance to GMOs among both consumers and farmers. The Australian New Zealand Food Standards Council undertook extensive stakeholder consultations in the process of developing policies regarding GE food. The over 6,000 respondents indicated overwhelming support for the mandatory labelling of GE foods, and most claimed to be willing to pay more for non-GE foods. A survey of farmers undertaken by Biotechnology Australia (a body set up by the Federal Government) found that 77% of the farmers surveyed required more information before they would plant GE crops; 70% worried about the safety of GE crops. In both cases resistance to GE appeared mostly to be pragmatic rather than ideological—that is it was based on fears of consequences rather than on a conviction that GE was bad per se.

Respondents expressed concerns about such matters as the possible effects of GMOs on environmental integrity and biodiversity, the social practice of farming and rural life, and human health. These concerns seemed to reflect general community unease about GE foods, with widespread press coverage, discussion on talkback radio, and the like.

The most significant (very) recent legislative development in the area of plant IP is the *Gene Technology Act* (2000), which can be seen as, in part, an expression of this unease. This act aims to protect people and the environment from risks associated with gene technology. In order to carry out this aim it establishes the Office of

There is a good deal of resistance to GMOs among both consumers and farmers.

the Gene Technology Regulator, an office with significant powers and a large degree of autonomy. The Regulator is charged with the regulation of all 'dealings'—research, manufacture, production, commercial release and import—with live viable organisms that have been modified by techniques of gene technology. Every dealing with a GMO will need to be licensed by the Regulator, except where such dealings falls into one of the categories of 'exempt dealing', 'a notifiable low risk dealing' or 'on the Register of GMOs'. A GMO that is to be released into the environment cannot be placed into one of the exempt categories.

A noteworthy feature of the new Act is that the assessment of GMOs is not to be made on a cost/benefit basis, but rather on a risk assessment basis. That is, it is not enough to show that potential benefits to the community of, say, licensing the planting of a GMO outweigh potential costs; what must be shown is that the risks associated with a GMO—understood as a function of the hazards associated with that GMO and the probability of those hazards occurring—fall below an acceptable threshold. Ethical and social concerns are given institutional recognition as relevant to the making of such judgements, with an ethics committee and a community consultative committee providing input to the guidelines constraining the Regulator.

Though the way in which the *Gene Technology Act* is implemented remains to be seen it seems inevitable that it will make the release of GMOs for agricultural purposes a more time consuming and expensive process.

Any new form of property requires justifications, since it involves restricting access to some class of goods that was previously freely available.

Due to recent developments in the agricultural sector the nature of the relationships between farmers and seed breeders have become more difficult to discern. We know that about 70% of research is undertaken by public organisations, though that research is now often funded by licensed seed companies (both foreign and local). Public sector organisations are increasingly dependent on outside funding, including industry funding and license income. Clearly, there are a number of seed companies, including subsidiaries of multinationals, which see themselves simply as commercial entities. In recent years, however, a number of statutory bodies and growers' co-operatives have restructured themselves into (often unlisted) public companies. In turn these public companies have spun off subsidiaries dedicated to plant breeding and seed selling. The interests of growers and breeders, then, remain interlocked in ways that are not often easy to see.

Most of the PBRs for commercially important crops are held by Australian concerns, in many cases by growers' bodies, reflecting the historical development of the agricultural industry. On the other hand most patents for genetically modified varieties are held by (subsidiaries of) large multinational companies.

Conclusion

Any new form of property requires justifications, since it involves restricting access to some class of goods that was previously freely available. On the face of it there would seem to be one group of people—those who previously possessed free access—who must be worse off, and another group—those who now possess property rights that they previously did not have—who are better off. In the case of Plant Intellectual Property farmers are the group of people who are most immediately affected. However, it is far from clear that farmers as a group are disadvantaged by the emergence of PIP in Australia, for three reasons. Firstly, while farmers may have to pay more than they previously did to gain access to superior cultivars, the implicit claim of the supporters of PIP is that the benefits farmers gain under the new system in the way of improved cultivars are greater than the costs that they have to pay. Secondly, as discussed in the body of

A noteworthy feature of the new Act is that the assessment of GMOs is not to be made on a cost/benefit basis.

Plant Breeding in Australia

Traditionally most plant propagating material used in Australia has been produced in Australia and, conversely, most Australian produced plant propagating material has

been used locally. That is, the Australian plant breeding and seed industry has basically functioned as a handmaiden to Australian agriculture, and consequently reflected the structure and interests of that industry. It appears that this is still largely the case.

Currently, the Australian seed industry is estimated to be worth in excess of \$400 million per annum, with about 4,500 farmers forming the core of the industry, which is based around the private commercial sector. Most newer cultivars are proprietary lines. The overwhelmingly favoured form of protection for such cultivars is Plant Breeder's Rights.

the paper, in many cases it is misleading to distinguish sharply between consumers and owners of plant intellectual property—farmers, directly or indirectly, are both. Finally, even if it were true that the costs of the plant intellectual property system to farmers outweigh its benefits, it may still be the case (and is clearly taken to be the case by farmers themselves) that they are better off with the package of free(r) trade and PIP than the package of no PIP and less free trade.

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