EDWARD ELGAR

THE GARDEN OF AUSTRALIAN DREAMS:
THE MORAL RIGHTS OF LANDSCAPE ARCHITECTS

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THE MORAL RIGHTS OF LANDSCAPE ARCHITECTS
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> Prominent projects such as National Museums are expected to be popular spectacles, educational narratives, tourist attractions, academic texts and crystallisations of contemporary design discourse. Something for everyone, they are also self-consciously set down for posterity and must at some level engage with the aesthetic and ideological risks of national edification.
>
> Richard Weller, designer of the Garden of Australian Dreams[1]

Introduction

This article considers the moral rights controversy over plans to redesign the landscape architecture of the National Museum of Australia.

The Garden of Australian Dreams is a landscaped concrete courtyard.[2] The surface offers a map of Australia with interwoven layers of information. It alludes to such concepts as the Mercator Grid, parts of Horton's Map of the linguistic boundaries of Indigenous Australia, the Dingo Fence, the 'Pope's Line', explorers' tracks, a fibreglass pool representing a suburban swimming pool, a map of Gallipoli, graphics common to roads, and signatures or imprinted names of historical identities.[3] There are encoded references to the artistic works of iconic Australian painters such as Jeffrey Smart, Sidney Nolan, Arthur Boyd, and Gordon Bennett. There is also an allusion to Jackson Pollock's infamous painting *Blue Poles*, which was purchased by Gough Whitlam's Labor Federal Government in the 1970's.

The July 2003 Carroll Report on the National Museum of Australia recommended that the Garden of Australian Dreams should be redesigned to include a lawn area, shrubberies, trees, a sun dial and representations of Aboriginal rock art. Furthermore, David Barnett, John Howard's authorised biographer and a council member of the Museum, objected to a sculpture of blue telegraph poles in the Garden of Australian Dreams because he felt it was a monument to former Labor Prime Minister, Gough Whitlam. The Federal Government was told that it would cost at

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1 R. Weller, 'Mapping the Nation' in D. Reed (ed), *Tangled Destinies* (National Museum of Australia, Canberra, 2002), 125.

2 R. Weller, *Room 4.1.3: Innovations in Landscape Architecture* (University of Pennsylvania Press, Philadelphia, 2005), 218.

3 Horton's map of the linguistic boundaries of Australia provides a complex mosaic of over 300 Australian Aboriginal tribes or nations. The Dingo Fence runs from the South Australian coast to the Queensland Coast - a few thousand kilometres of fencing to prevent wild dogs from moving east. The 'Pope's Line' is the Western Australian border, which was inherited from 15th century maps dividing Spanish and Portugese territories. Gallipoli is the site of a major Australian military conflict in World War I in Turkey, which has been considered to be a nation-forming event.

least $10 million to placate conservatives on the council by remaking the museum's central courtyard. But not all council members agree the work is necessary, with one comparing the proposed makeover to 'putting earrings on the Mona Lisa'.[4] Such language is reminiscent of famous battles over the moral rights of artists.[5]

In response, the landscape architect and one of the designers of the Garden of Australian Dreams, Richard Weller threatened to bring an action for a breach of the new moral right of integrity:

> The plans are offensive to our artistic integrity. To change our design makes a complete mockery of the entire process by which the work was chosen and created. We are speaking with lawyers now about invoking moral rights legislation. We don't want (NMA review chairman) John Carroll to be the first man in history to censor a garden.[6]

He concluded: 'Perhaps we should let Backyard Blitz [a lifestyle television programme] have a go at the national museum'.[7] Howard Raggatt, the chief architect of the National Museum of Australia, commented that the panel's recommendations 'fit in with this awful style of going around destroying (architectural) things that we have in this country'.[8]

The Australian Institute of Landscape Architects (AILA) protested against the suggested changes, suggesting that it was a breach of the moral rights of the architects. The National President, Noel Corkery, said:

> To have a situation in which a panel that was appointed to review the Museum's exhibitions, assuming that it has a mandate and the expertise to propose redesign ideas for The Garden of Australian Dreams, would be laughable if it was not so alarming. It shows a fundamental lack

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4 C. Kremmer, 'Discord - And Lots of Concrete - Fill Garden of Australian Dreams', *The Sydney Morning Herald*, 8 December 2003.

5 In the Canadian case of *Snow* v *The Eaton Centre* (1982) 70 CPR (2d) 105, Michael Snow, a sculptor of international repute, created a work entitled 'Flight-Stop' which he sold to a shopping complex in Toronto called the Eaton Centre. The Eaton Centre tied ribbons around the necks of the geese as a Christmas decoration. Snow argued that this was prejudicial to his honour and reputation. Snow was adamant that his naturalistic conception was made to look ridiculous by the addition of the red ribbons, which he likened to the addition of earrings to the Venus de Milo. The Ontario High Court ruled for Snow and ordered that the ribbons be removed.

6 G. Safe, 'All's Not Well in Garden of Dreams', *The Australian*, 19 July 2003, 10.

7 Ibid.

8 Ibid.

> of understanding of the role of landscape architecture by a group of highly educated and well-respected people.[9]

It is concerning that the Carroll Report fails to address the moral rights issues that would arise in relation to redesigning and changing the Garden of Australian Dreams. The moral rights regime sets up a complex procedure of negotiation and consultation that must be followed in relation to changes to an architectural structure. The failure to respect such a process would expose the Museum to the possibility of an action for moral rights infringement from the designers of the Garden, Room 4.1.3 Pty Ltd.[10]

This dispute raises issues about the nature and scope of moral rights; the professional standing of landscape architects; and the culture wars taking place in Australia. Part 1 considers the introduction of the *Copyright Amendment (Moral Rights) Act* 2000 (Cth), with its special regime for architecture and public sculpture. It focuses upon a number of controversies which have arisen in respect of copyright law and architecture - involving the National Gallery of Australia, the National Museum of Australia, the Pig 'n Whistle pub, the South Bank redevelopment, and the new Parliament House. Part 2 examines the dispute over the Garden of Australian Dreams. The controversy is a striking one - as the Australian Government sought to subvert the spirit of its own legislation, the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). Part 3 engages in a comparative study of how copyright law and architecture are dealt with in other jurisdictions. In particular, it considers the dual operation of the *Architectural Works Copyright Act* 1990 (US) and the *Visual Artists Rights Act* 1990 (US) and a number of controversies in the United States - over the Tilted Arc sculpture, a Los Angeles tower block that appeared in the film *Batman Forever*, a community garden mural, a sculpture park, and the Freedom Tower.

1. TANGLED DESTINIES

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[9] N. Corkery, 'Garden of Australian Dreams: National Museum of Australia Review Places Moral Rights of Australian Designers Under Threat', Australian Institute of Landscape Architects, 18 July 2003.

[10] Room 4.1.3 is an interdisciplinary design group, specialising in landscape architecture. It is an independent, private company with offices in Sydney and Perth.

After two decades of policy debate, deliberation and procrastination, the Australian Federal Government passed the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) in order to comply with the *Berne Convention for the Protection of Literary and Artistic Works*.[11] The new scheme recognised three independent moral rights. First, the author was accorded the moral right of attribution - a right to be identified as the author of the work. Second, the author received the moral right against false attribution - the right to prevent the insertion of the author's name in a way that falsely implies that they are the author of the work. Third, the author obtained the right of integrity - the right to object to derogatory treatment to a work that affects the author's honour and reputation. The legislation provides for a defence of reasonableness in relation to claims of moral rights infringement. The scheme does not allow for the assignment, licensing or waiver of moral rights. However, the regime provides that authors can give consent to acts that would otherwise constitute a moral rights infringement. The scheme provides a similar duration of protection of moral rights as for the copyright term for economic rights, that is, for the life of the author plus 70 years.

The Australian moral rights scheme provides for a two-tiered system of protection. Traditional authors of literary, artistic, dramatic, and musical works receive full protection of the moral rights of attribution, false attribution, and integrity. However, the *Copyright Amendment (Moral Rights) Act* 2000 (Cth) discriminates against particular subject matter. There are specific rules which circumscribe the operation of moral rights in respect of architecture and sculpture[12] and there is a special regime for screenwriters, directors, and producers of cinematographic films.[13] There have also been subsequent developments relating to the moral rights of performers in respect of sound recordings and the communal ownership rights in respect of Australian indigenous creations.[14]

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[11] For a general account of the Australian regime of moral rights, see M. Sainsbury, *Moral Rights And Their Application In Australia* (Sydney: Federation Press, 2003).

[12] M. Rimmer, 'Crystal Palaces: Copyright Law And Public Architecture', *Bond Law Review*, 14 (2) (2002), 320-346, URL: http://www.bond.edu.au/law/blr/vol14-2/blrvol14-2.pdf

[13] M. Rimmer, 'Shine: Copyright Law And Film', *Australian Intellectual Property Journal*, 12(3) (2001), 129-142.

[14] The Federal Government has belatedly extended moral rights to performers in respect of sound recordings as part of the *Australia-United States Free Trade Agreement* 2004. However, there has been much criticism of such amendments, with accusations that they benefit producers, rather than performers. The Federal Government has promised to recognise the communal ownership of moral rights in respect of Australian Indigenous creations. The draft bill, though, has been controversial - with such moral rights being dependent upon the creation of legal relations between Indigenous

The Royal Australian Institute of Architects (RAIA) lobbied publicly for the protection of the moral rights of architects.[15] However, there was much industry complaint from the building industry which, unlike the film industry for example, restrained itself to behind-the-scenes lobbying. The Federal Government vacillated in respect of the moral rights of architects. It started out with the presumption that architects should enjoy a moral right of integrity - subject to a test of reasonableness. It then withdrew this right after protest from the Property Council of Australia. It finally reached a compromise that architects should have a right of consultation - or negotiation - in respect of any changes that are made to their building. However, they do not have the power to prevent the destruction or a modification of a building, so long as there has been adequate consultation.

Section 195AT reflects the compromise reached. In a convoluted set of provisions, it provides that certain treatment of works do not constitute an infringement of the author's right of integrity of authorship.

Subsection 195AT (2A) provides that the owner of a building who changes, relocates, demolishes or destroys a building will not infringe a moral right of integrity of the author in respect of a building, so long as a certain set of procedures are satisfied. First, the owner must serve the author with a written notice stating the owner's intention to carry out the change, relocation, demolition or destruction. Second, the notice must provide the author with access to the building for the purpose of making a record of the artistic work. Third, the owner must give the author a reasonable opportunity within a further three weeks to have such access. Fourth, the owner must also consult with the author in good faith about the change, relocation, demolition or destruction. Finally, the author may require the removal from the building of the author's identification as the author of the artistic work - if there are changes.

Subsection (3) provides that the owner of building will not infringe a moral right of integrity in such circumstances if they cannot discover the identity and location of the author or a person representing the author. Subsection (3A) specifies what efforts the owner of a building must first make before relying upon this subsection (3).

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communities and artists. The proposed legislation has not yet been widely publicised beyond consultations with stakeholder interests.

[15] For a history of the parliamentary debates over copyright law and architecture, see Rimmer, supra n. 12.

Subsection (1) deals with the destruction of a moveable art work. Subsection (2) considers a change, relocation, demolition or destruction of a building in which an artistic work is affixed. Subsections (4A) and (4B) deal with the removal or relocation of a moveable art work. Subsection (5) provides that 'anything done in good faith to restore or preserve a work is not, by that act alone, an infringement of the author's right of integrity of authorship in respect of a work'.

In the five years since the enactment of the legislation, the Australian courts have not had the opportunity to make a definitive judgment about the new moral rights regime. The Federal Government has taken such an absence as a validation of its approach of encouraging mediation and alternative dispute resolution. By contrast, critics have suggested that such a lack of legal cases reflects the weak and diluted nature of the Australian moral rights regime. Even though there has yet to be a judgment, there have been a number of controversies over copyright law, moral rights, and architecture. Such disputes have involved public landmarks such as the National Gallery of Australia, the National Museum of Australia, the Brisbane Riverside complex, the Queensland Performing Arts Centre, and New Parliament House. This series of disputes provides an important context for the conflict over the Garden of Australian Dreams.

1.1 The National Gallery of Australia

In 2001, Dr Brian Kennedy, the director of the National Gallery of Australia, announced that the architects, Tonkin Zulaikha Greer, would preside over a number of renovations to the building[16] including a new front door; new facilities for the main functions of the gallery; and improvements to disabled access, fire safety and air conditioning.

The original architect, Colin Madigan, complained that he had not been consulted about the proposed changes which he maintained would affect the integrity of the building, and be detrimental to his honour and reputation as an architect. Madigan observed indignantly:

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16 Rimmer, supra n. 12.

> I'd heard rumours, but seeing those plans sent me berserk! It was sacrilegious barbarianism; rape of a shrine! It's akin to bombing the Buddhas in Afghanistan, or glazing in the Parthenon.[17]

The RAIA called for the project to be suspended until a management plan had been developed for the National Gallery of Australia, and the adjoining High Court of Australia. It called for a formalised dialogue between the property owners, the new architects, and Colin Madigan.

In 2002, there was a brief rapprochement between the warring architects.[18] Madigan observed:

> I was really impressed with Tonkin's first scheme. It's very respectful. If I could have seen it when they won, it could have been saved 18 months' turmoil - it could have been built by now. I think I can work with these boys now. We've decided Kennedy's the villain in the piece, with all his Irish-dancing, jumping-around method of talking to us - or rather not talking to us properly - and covering his tracks. We don't think he's been malicious, just a bit naïve.[19]

However, such amity was short-lived. Tonkin Zulaikha Greer produced several further designs, none of which met with Colin Madigan's approval. None have been released publicly.

In retrospect, the director Dr Brian Kennedy regretted the failure to consult with Colin Madigan:

> In hindsight, I regret we were not given advice by anyone that it would be better not to go down the road we chose, but to encourage greater involvement of the original architect. We've been first cab off the rank in this moral rights legislation, and I think part of the benefit is that other people now will have a better idea of what to do.[20]

The Federal Government expressed disquiet about the stalled renovation project. The Arts Minister, Rod Kemp, told the council chairman, Harold Mitchell, and Dr Kennedy that after '$2 million spent [up to June 2002] towards the design of the new

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17 J. Hawley, 'The Edifice Complex', Good Weekend, *The Sydney Morning Herald*, 28 September 2002, 22-30.

18 Ibid.

19 Ibid.

20 Ibid.

entrance, I am most concerned that there is still no solution'.[21] A public servant advised Senator Kemp that he had 'serious concerns about progress . . . involving consultations with the original architect, significant costs incurred to date and no design solution for the proposed entry after three years of development work'. [22]

After the departure of Kennedy in 2004, the new director Ron Radford sought to resolve the ongoing difficulties in relation to the redesign of the National Gallery of Australia. He hired Sydney architect Andrew Andersons to put forward new plans, in collaboration with Madigan.[23] The project has still not yet been completed. Radford confessed:

> It's taking [longer] than we would have thought. But we've got to be able to show the work, and it's not a question of lending more ... or just temporary exhibitions.[24]

Nonetheless, Radford was optimistic that he would unveil a design 'different to what you might expect' within months, and finish the project in about two years. [25]

The case demonstrates the great uncertainty about what a property owner needs to do in order to satisfy the requirement of consulting in good faith with the architect.

1.2 The National Museum of Australia

In 2000, *The Bulletin* raised allegations that the National Museum of Australia had 'plagiarised' the Jewish Museum in Berlin. The journalist Anne Susskind contended:

> It's an open secret in architectural circles, but hasn't gone much beyond that: the 'footprint' of the Gallery of Aboriginal Australians, designed to represent the history of Aboriginal Australians, designed to represent the history of Aboriginal people and one of the most important parts of the National Museum of Australia, traces that of the new Jewish museum in Berlin, designed to represent the history of the Jews in Berlin.[26]

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21 L. Martin, 'Four Years On, Gallery Door Saga Still Open', *The Sydney Morning Herald***,** 10 December 2003, 3.

22 Ibid.

23 L. Martin, 'Smiles All Round for Gallery Boss', *The Sydney Morning Herald*, 1 September 2004, 18.

24 L. Martin, 'NGA Finds Space A Last Frontier', *The Sydney Morning Herald*, 4 March 2005, 13.

25 Ibid.

26 A. Susskind, 'Footprints In The Quicksand', *The Bulletin*, 13 June 2000, 108.

In response, Daniel Libeskind told *The Bulletin*: 'We've looked at the web site and at some plans. It is extremely difficult to make a judgment based on these, but it seems there is a very shocking similarity, and we will investigate it further'.[27]

The story was picked up by the media in Germany. One newspaper headlined its story: 'Stroke of inspiration from the Antipodes; We'll copy you; Architectural kleptomania; How the Jewish Museum in Berlin became the National Museum of Australia in Canberra'. Libeskind told the newspaper: 'At first, I thought it was a joke. Not a proportion, not an angle of the Jewish Museum has been changed'.[28] Libeskind repeated his claims that Howard Raggatt had copied his design for the Jewish Museum, a controversial landmark building.[29] He said that his structure, in central Berlin, with sloping floors and other innovations designed to be metaphors for the disorientation Jews have suffered throughout history, had been copied exactly

In response, Howard Raggart rejected the allegations of plagiarism, which had been aired in the press. He maintained that the building was an overt and purposeful citation of the Jewish Berlin Museum, rather than a covert appropriation. Raggatt offered a poetic defence:

> But plagiarism is what they chant. Plagiarism, it's original sin. Plagiarism, it's just another blasphemy. Plagiarism, it's anathema to originality. Now plagiarism's really a curse. Plagiarism's really heresy too. Plagiarism's really a crime. Plagiarism's kleptomania, everyone knows. Plagiarism is an infestation... But everyone knows we've never tried to hide, everyone knows it's that unspeakable word, everyone knows it's that terrible feast of zig zag.[30]

Raggatt sought to deconstruct the multiplicity of pejorative meanings of the epithet of 'plagiarism'. He suggested that the quotation of the Berlin Jewish Museum has a much more affirmative meaning.

This public controversy has not been translated into a legal dispute as yet. Had he gone to court, Libeskind could have raised the argument that the building was a breach of his economic rights and moral rights. However, Raggatt could have argued that the citation of the Jewish Berlin Museum was a fair dealing for the purposes of criticism and review. He could have also claimed that the quotation of

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27 Ibid.
28 P. Heinrichs, 'Museum a Copy, Claims Architect', *The Age* (Melbourne), 8 April 2001.
29 Ibid.
30 H. Raggatt, 'Another Zig Zag' in D. Reed (ed), *Tangled Destinies* (2002), 43.

the building was reasonable in all the circumstances, and thus not an infringement of the moral rights of attribution or integrity. Much would ultimately depend upon the nature and degree of the similarity between the Jewish Berlin Museum and the National Museum of Australia.[31] That would involve the need for extensive expert evidence from architects and designers about the two respective buildings.

1.3 The Pig 'N' Whistle Pub

In 2003, the famous modernist architect, Harry Seidler, objected to the addition of the Pig 'N' Whistle pub to the Riverside complex in Brisbane, which he had designed.[32] The architect has shown a willingness to protect his reputation in the courts.[33]

Seidler commenced legal action in the Federal Court in Sydney against the Riverside's owner, the General Property Trust and the Pig `N' Whistle, Jimmys On the Mall Pty Ltd, under the *Copyright Amendment (Moral Rights) Act* 2000 (Cth). His lawyer, Philip Beazley of Beazley Singleton, said that Seidler alleged that the works undertaken at Riverside materially altered one of the buildings so it no longer fitted in with the development and 'tarnished the integrity of the design'.[34] He observed:

> Concern with the signage is part of the case. But what he is most concerned with is the integrity of his building and the way architects in general can have their work changed.[35]

The lawyer claimed that the architect was not consulted at all about the work. In terms of legal remedies, Seidler wanted the building to be returned to its original state as well as compensation.

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31 For judicial consideration of the similarity between two buildings in a copyright dispute, see *Pearce* v. *Ove Arup Partnership Ltd* [1997] Ch. 293; *Pearce* v. *Ove Arup Partnership Ltd* [2000] Ch. 403; and *Pearce* v. *Ove Arup Partnership Ltd* (2001) WL 1251820. In this matter an unemployed architect, Gareth Pearce, claimed that his economic and moral rights in his student drawings for a putative town hall in the Docklands had infringed by the world famous architect Rem Koolhaas in the design of the Kunsthal in Rotterdam. In the trial, Jacob J of the High Court of Justice Chancery Division expressed scepticism as to the nature of the allegations of plagiarism and dishonesty that had been levelled against Rem Koolhaas and his collaborators: 'I state my conclusion at the outset: the case has no foundation whatsoever. It is one of pure fantasy - preposterous fantasy at that.'

32 K. MacDermott, 'Doyen Blows Whistle to Prevent Pig of a Building', *Australian Financial Review*, 24 June 2003.

33 Harry Seidler brought an unsuccessful defamation action against cartoonist, Patrick Cook: *Harry Seidler and Associates Pty Ltd* v *John Fairfax and Sons Ltd* (1986) BC8601259 (unreported). A Manly alderman brought a defamation action against Harry Seidler: *Nicholson* v *Seidler* (1990) BC9001981 (unreported). Seidler has also been involved in a number of land and environment court matters: for example, *Harry Seidler and Associates* v *Wingecarribee Shire Council* (1997) BC9707855 (unreported).

34 K. MacDermott, supra 32.

35 M. Healy, 'Architect Wants Pigs To Fly Away', *Courier-Mail*, 25 June 2003, 3.

In response, the General Property Trust office portfolio manager Tony Cope hoped to resolve the issue through mediation. Nonetheless, he was conscious that the Pig `N' Whistle was the first business to be a successful venture in the forecourt of the Riverside complex in 16 years. Tony Cope observed:

> We have the highest respect for Harry. Riverside is not a piece of artwork ... buildings have to change with the times. In 16 years the Riverside's north court has not been a successful precinct.[36]

Similarly, Pig 'N' Whistle owner Godfrey Mantle had heard Harry Seidler was unhappy with the pub design. He noted:

> I wrote telling him that I liked his building and precinct design. I invited him to discuss his concerns so we could discuss them. He chose not to. We are disappointed.[37]

The case is a striking one. Although the property owner had strong commercial reasons to change the nature of space, the initial lack of consultation with the original architect proved to be telling**.**

In the end, the parties, through mediation, reached a confidential settlement in favour of Seidler who released this statement: 'Parties agree (without admissions) that Harry Seidler was not given notice of, was not consulted and had no input into the design of the Pig 'N' Whistle at the Riverside Centre.'[38] The matter highlights that an architect can use even the limited moral right of consultation to great effect.

1.4 The Queensland Performing Arts Centre

In 2004, the Queensland architect Robin Gibson threatened to invoke his moral rights in relation to the redevelopment of the Queensland Performing Arts Centre (QPAC).[39] Gibson had designed QPAC, the Queensland Art Gallery, the Queensland Museum and the existing State Library after winning an international competition in 1973. The

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36 K. MacDermott, supra n. 32.

37 M. Healy, supra n. 35.

38 K. MacDermott, 'Seidler's Pig Pub Brawl Ends Quietly With Deal', *Australian Financial Review*, 22 October 2003, 10.

39 J. Walker, 'Architect Plans 'Moral ' Stand on Arts Centre', *The Courier-Mail*, 17 September 2004, 1.

project earned him world-wide recognition and awards including the 1989 RAIA gold medal.

The Arts Minister Anna Bligh had revealed that a masterplan for QPAC would review 'all physical aspects' of the riverfront building. She was concerned that the building was ageing and required changes and discussed a new central entrance off its east-facing river side. She said: 'People have problems finding the front door and people with disabilities or prams have access problems, both inside and outside the building, given the high number of stairs.'[40]

Gibson had been consulted by the State Government about changes that affect his original buildings but nonetheless, complained that the changes were demeaning to his honour and reputation as an architect: 'You can be insulted a fair way, but at the end of the day there must be mischief afoot to even think about this.'[41] He commented that the proposed redevelopment would destroy the integrity of the design: 'I am disappointed by the fact that what could be is totally different from what they are going to do'. [42]

The State Premier Peter Beattie sought to mollify the disgruntled architect.[43] He pledged to 'take on board' Gibson's concerns, and assured him that 'we will get it [the development] right'.[44] Mr Beattie said debate about the arts precinct was to be encouraged: 'We are spending a lot of money . . . and I think Queensland and Brisbane needs a debate about it.'[45]

1.5 New Parliament House

In 2005, Australia's new Parliament House was subject to a number of modifications, because of security concerns, in the wake of the terrorist attacks on the World Trade Centre and the Pentagon on the 11th September 2001. In particular, there was the construction of a barrier in the form of a wall to prevent unauthorised vehicle access within Parliament Drive. Whilst this was being constructed, pedestrian access to the roof of the building was prevented because of the use of a temporary fence. There were also a number of retractable bollards installed at the slip roads; Ministerial

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40 Ibid.
41 Ibid.
42 J. Walker, 'A Vision Bites the Dust', *The Courier-Mail*, 18 September 2004, 33.
43 J. Walker, 'Cultural Centre Criticism Draws Beattie Pledge', *The Courier-Mail*, 18 September 2004, 4.
44 Ibid.
45 Ibid.

windows were strengthened; and a car pack was closed. The estimated cost of the modifications was $A11.7 million.

The original architect of the new Parliament House, Romaldo Giurgola, initially expressed reservations about the security modifications and was reluctant to be involved in their design: 'I felt I'd rather have nothing to do with it.'[46] As a journalist observed:

> The scars are obvious. Ugly traffic barriers. Ripped turf. Hard hats and diggers. Hardly the tranquil political park Giurgola imagined when he won the international competition to build the 'new' Parliament House in 1980. Surely, such a scene must upset the 84-year-old? His vision was for a people's parliament, a building so democratic ordinary citizens could roam, literally, all over it - symbolising the supremacy of the people over the politicians they elect. An encompassing security barrier therefore strikes not just at the look of Parliament House, but the concept behind it.[47]

However, eventually, Giurgola felt duty-bound to assist: 'In the end, I thought it was better for me to put my hand over it rather than leave it to someone else.'[48] Giurgola hoped that Parliament House would look much the same. He thought that the surrounding wall was a 'viable' compromise. Furthermore, he hoped that people would still have access to the top of the hill via pedestrian ramps: 'So people will still go to the top to neck just as they always did'.[49]

In this case, the moral rights of the architect are weighed against political desires to protect the nation's parliament. The fortifications undoubtedly detract from the integrity of the building. Nonetheless, the original architect was consulted though it seemed he had little choice but to participate in the design of the renovations. The matter highlights the primacy of the interests of the property owner.

1.6 Summary

The *Copyright Amendment (Moral Rights) Act* 2000 (Cth) only accords architects a limited moral right of consultation - rather than a full moral right of integrity. There remains a number of uncertainties about key features of the regime. In particular, it is unclear what a property owner needs to do in order to satisfy the requirement of

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46 Ibid.
47 A. Taylor, 'The Unsung Hero of the Hill', *The Sydney Morning Herald*, 16 April 2005.
48 Ibid.
49 Ibid.

consultation in good faith. The statutory regime has often provided a framework for informal bargaining, negotiation, mediation, and compromise. In some cases, designers have prevailed, in spite of the weak protections available. Supported by the RAIA, Colin Madigan was able to defer the plans of management to redesign the entrance to the National Gallery of Australia. Robin Gibson received a promise of further consultation from the State Government of Queensland. In some matters, the parties have reached a settlement of their dispute. Harry Seidler was able to secure a settlement in respect of the Pig 'N' Whistle Pub being placed on the Riverside Centre. In other cases, the designers have succumbed to the superior strength of their adversaries and intellectual property rights have been soundly trumped by property rights. Romaldo Giurgola decided not to oppose the construction of new security barriers around New Parliament House.

2. BACKYARD BLITZ

In 1997, the Federal Government provided funding of $A133m to establish a building to house the exhibitions of the National Museum of Australia.

In 1998, Ashton Raggatt McDougall and Room 4.1.3[50] won the international competition for the design of the National Museum of Australia's buildings and environs. The collaborative team were commissioned by the Federal Government to realise this design. Led by Richard Weller and Vladimir Sitta, Room 4.1.3 intended that the landscape design would tell the story of Australia incorporating both Indigenous and colonial aspects of its history. The resulting work was called the Garden of Australian Dreams. The team worked in association with the project's architects, Ashton Raggatt McDougall and Peck von Hartel Trethowan, to have the museum and grounds ready for opening in 2001.

The Garden of Australian Dreams is a palimpsest, a kaleidoscope of various maps of Australia. Weller has explained the vision behind the landscape architecture:

> The Garden of Australian Dreams is not a verdant garden nor is it a set design of a 'dreamscape'. It is a map of Australia upon which the public can walk and read complex layers of information. It is a concrete surface, the size of a small sports oval which is made to look like a crumpled paper map or a map printed on fabric. The space for this is formed by the

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> buildings of the National Museum of Australia and the Aboriginal Gallery of Australia. This dialectical framing, an intensification of issues affecting the whole site planning led us to think of the space as a theatrical interweaving of both the 'Great Australian Dream' and the Aboriginal 'Dreaming'. The two main maps used to form the ground pattern of this garden are a standard English language map of Australia and Horton's map of the linguistic boundaries of indigenous Australia. [51]

The Garden of Australian Dreams also features mapping information from vegetation, soil and geology maps, electoral boundaries, explorer's charts, road maps, a weather map taken from Australia Day 1998, a Japanese tourist map, the Dingo Fence and the Pope's Line. It is overlaid with two grids - the Mercator and a local survey grid. The Garden of Australian Dreams incorporates iconic Australian images and symbols. A camera obscura box recalls the famous Ned Kelly series of paintings by Sidney Nolan. There are also allusions to the work of Arthur Boyd and Arthur Streeton, and Gordon Bennett's painting, *Myth of the Western Man (White Man's Burden).* A grid of red and white surveyor's poles recalls the post-industrial landscapes of Jeffrey Smart and there is a jocular reference to Jackson Pollock's *Blue Poles*, with eight blue painted poles on the perimeter of the exhibit, set at the exact angles shown on the painting.

In 2003, a review of the National Museum of Australia contained critical remarks about the Garden of Australian Dreams, and put forward a number of redesign proposals. In response, Weller protested about the lack of consultation, and the impact of the proposals upon the integrity of Room 4.1.3's design. The AILA contended that the report was symptomatic of a lack of respect for the profession of landscape architecture. Furthermore, a number of political appointees to the Council of the National Museum of Australia weighed into the debate, emphasizing that the moral rights of the landscape architect were limited to consultation.

2.1 The John Carroll Report

In 2003, the chairman of the National Museum of Australia, Anthony Staley, announced a review of the exhibitions and public programs of the Museum by a four-person panel. The panel was chaired by Dr John Carroll, a Reader in Sociology at La

[51] R. Weller, 'The Garden of Australian Dreams', http://www.room413.com.au/Museum/GOAD/Garden.html

Trobe University, Melbourne, and also included a banker Richard Longes, an anthropologist Dr Philip Jones, and a palaeontologist Professor Patricia Vickers-Rich.

In their final report, John Carroll and the other panel members devoted a whole section of the chapter on exhibitions to a review of the Garden of Australian Dreams. The report was trenchantly critical of the landscape architecture:

> The Panel observed that there is little that is explained clearly to visitors unless they have a brochure in hand or a knowledgeable museum guide to lead them through the intricacies of this space. Visitors are unlikely, for example, to decipher the significance of Horton's map, which derived from Norman B Tindale's remarkable map produced from 50 years' research and fieldwork. As was noted by many who presented submissions or were interviewed, because visitors do not understand the symbols, they find the expanse of concrete overwhelming.[52]

The Carroll Report argued: 'The *Garden* has great potential as an inviting and educational domain—one which draws people into an area where they can sit or stroll, enjoy a meal or drink, in both summer and winter.'[53] It observed: 'More vegetation and shaded seating would make this space welcoming—a real garden.'[54] The Carroll Report liked the resonance of the name of the place: 'The poetic title, *Garden of Australian Dreams*, is full of evocative potential.'[55] However, the Panel wanted the area to serve other functions: 'This space could greatly enhance the welcoming nature of the NMA and, at the same time, provide a context for landscape imaginings, linked performances, and deep time education.'[56]

In the conclusion to the section, the report concluded that 'the *Garden* space could be made both inviting and educational.'[57] It maintained that 'the Museum should investigate opportunities to extend the theme of *Tangled Destinies* into the *Garden*'.[58] The Panel outlined its extensive vision for the redesign of the Garden of Australian Dreams, which is worth recounting in full. It observed:

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52 J. Carroll and other panel members. *Review of the National Museum of Australia, its Exhibitions and Public Programs, a report to the Council of the National Museum of Australia*, Commonwealth of Australia, Canberra, 2003, URL: http://www.dcita.gov.au/Article/0,,0_1-2_2-4_113158,00.html

53 Ibid.

54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid.

58 Ibid.

> Add a number of large rocks that trace the geological history of the continent. Begin with a block of Banded Iron Formation from Tom Price in Western Australia, followed by a number of blocks representing different times in Australia's history. Add planting of vegetation typical of Australia's past and present—for example, the pond and surrounds could support some of the most primitive of Australia's flora...
>
> A sundial might be added, with an explanation of how it works to help people place Australia geographically. Explanations of the tilt of the earth's axis and its effect on Australia's seasonal climate could be explored here, given the sunshine that pours into the courtyard.
>
> Well-produced representations of Aboriginal rock art might modify the alienating effect of Braille embellishments on the building's surfaces. Adding more lawn, so that people could comfortably sit in this area, and lowering, or possibly removing, the hill in the middle would enhance comfort and safety.[59]

The Carroll Report noted that 'cross-disciplinary advice will be needed to realise the potential of the space'.[60] It recommended that a specialist advisory group, including various scientific professionals, be put together by the Museum to examine other uses for the Garden of Australian Dreams. Curiously, there is no suggestion that the landscape architect and designers of the space should be involved in this process.

In an interview on Radio National, Carroll expressed a preference for a classical aesthetic in respect of landscape design. He observed:

> I'm very respectful, personally, of the tradition of landscape design. I mean I'm a great lover of the English 18th Century landscaped space. In the end all of these spaces need to be judged in terms of the beauty, the pleasantness, the harmony, the pleasure of spending time in them. And on that fundamental criterion - and that's in a way the only one that we're applying here - the courtyard at the National Museum is a dismal failure.[61]

Such a tradition evokes Andrew Marvell's poem, 'The Garden', with its vision of peaceful arcadia. Nonetheless, Carroll, sensitive that such remarks could give offence to Weller, observed: 'I can understand that he's upset. It's his design and we're basically saying 'wreck it'.'[62]

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59 Ibid.

60 Ibid.

61 A. Saunders, 'Garden of Australian Dreaming', Comfort Zone, Radio National, ABC, 19 July 2003.

62 Kremmer, supra n 4.

2.2 Richard Weller

In response to such criticisms, Weller threatened to bring an action for breach of the new moral right of integrity. Flummoxed, he stated:

> It's as if they wanted or had an image of a classical edifice, you know picturesquely nestled on the shores of Lake Burley Griffin and now they've got what appears to them to be a riot of colour and flotsam and jetsam and it's sending mixed messages. You know what's the worse thing of all, it's not simple and indicative, it's actually a bit abstract. We think that's a healthy thing, it seems some people find that very disturbing.[63]

The landscape architect was concerned that the sweeping changes proposed by the Carroll Report would be detrimental to the artistic integrity of the design of the *Garden of Australian Dreams*.[64] There was particular disquiet about the suggestion that surrounding walls of the courtyard feature representations of Indigenous rock paintings.[65]

Weller observed that the dispute revealed a common prejudice that landscape architects were not considered to be creative authors, a critical point as moral rights are only accorded to authors of creative works and are for the purpose of protecting the honour or reputation of the author.[66] He observed:

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63 'Controversial designer to defend museum work', *ABC News*, 23 November 2003.

64 There would be a need to establish that there had been derogatory treatment of the work under moral rights law. For a discussion of the meaning of debasement, see the Federal Court of Australia case of *Schott Musik International GMBH & Co* v *Colossal Records Of Australia Pty Ltd* (1996) 36 IPR 267; on appeal (1997) 38 IPR 1.

65 There was much disquiet about the proposal to include representations of Aboriginal rock art. There were concerns that the Committee failed to pay proper respect to the significance and integrity of Indigenous rock art. In general, there has been much controversy about the unauthorised reproduction of Indigenous images and icons, in particular, over the wide-spread exploitation of rock art images, sometimes reproduced in a highly inappropriate manner, without any control by traditional Aboriginal owners and without any royalty payments to local communities. There have been difficulties in protecting such cultural work within the framework of copyright law. Many images (such as those derived from ancient rock art) are too old to be protected by copyright (which only lasts for the life of the author plus 70 years). Nonetheless, the courts have been willing to recognise native title rights extend to the care of rock paintings: *Neowarra* v *Western Australia* [2003] FCA 1402.

66 In *Confetti Records* v *Warner Music* (2003) EWCH 1274 (CH), the Chancery Division of the High Court of Justice considered a claim based on the alleged derogatory treatment of 'Burnin' composed by Andrew Alcee in a remix by the UK garage band The Heartless Crew. His Honour held 'that the mere fact that a work has been distorted or mutilated gives rise to no claim, unless the distortion or mutilation prejudices the author's honour or reputation.' His Honour found that the fundamental weakness in the case was there was no evidence about Mr Alcee's honour or reputation, or of any prejudice to either of them. As a result, the claim about derogatory treatment failed.

> The problem is that people look at landscape and think that anyone can have a go at it. They don't recognize it as the work of a professional body. It's treated differently to a painting or a building or a novel. I think the deep problem is a lack of respect for the profession. It's the status of the profession which is confused between when it's an art or whether its role is to provide a more pragmatic service.[67]

Weller was concerned that the profession of landscape architects was not accorded the respect of other creators - such as authors, painters, architects, and so forth. He suggested that such exclusion was invidious and discriminatory. Weller addressed the argument of Carroll that the landscape architecture lacked public appeal. He noted that such a contention was not supported by submissions to the inquiry or survey evidence.[68]

Richard Weller stressed that the criticisms contained in the Carroll Report would have an impact upon the honour and reputation of the landscape architecture group, Room 4.1.3:

> As designers we are understandably protective of the rights accorded to us by the federal Government's moral rights legislation. We are also understandably concerned about our international reputation which has been unjustifiably placed in jeopardy by the review and by Dr Carroll's public comments.[69]

He felt forced to remind the Council of the National Museum of Australia of the credentials of the team - Weller is an Associate Professor and Discipline Chair of Landscape Architecture at the University of Western Australia and Vladimir Sitta is the recipient of the AILA's Lifetime Achievement Award. The team had received over 45 awards in international design competitions; and were chosen as the only non-American finalist in an international design competition for the Pentagon Memorial to victims of the September 11, 2001 terrorist attacks in Washington DC. Furthermore, the designs of Room 4.1.3 had been exhibited in the Museum of Modern Art in New York City and the Museum of Contemporary Art in Sydney; and were the subject of a monograph published by the University of Pennsylvania Press, USA.

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67 K. Brass, 'Rights of Passage', *Landscape Australia*, 3 (2003), 18.

68 Indeed, only 2 of the 105 submissions to the inquiry mentioned the Garden of Australian Dreams, and these only briefly. One of those submissions was by David Barnett, a conservative member of the Council of the National Museum of Australia.

69 R. Weller, 'Re: The Carroll Report, July 2003', Letter to the Hon. Anthony Staley, Chair of the Council of the National Museum of Australia, 11 August 2003.

Weller was particularly concerned about the lack of consultation in respect of the proposals of the Carroll Report:

> Naturally, after delivering the Museum in record time with very little money and seeing it prosper and become internationally recognised for its design we find the review somewhat upsetting. Many in the design community and the general public are legitimately concerned that the review committee not only has no qualifications in landscape architecture or design but that it has also gone beyond its explicit Terms of Reference. The review, by going so far as to propose how they would redesign the space, makes a mockery of the profession of landscape architecture as well as the entire process by which the design was selected, approved and constructed. Further, in their failure to consult the designers of the space—or indeed any other experts in the field—the Carroll Report has been unnecessarily provocative and divisive. [70]

Weller observed: 'We believe it is essential in respect of our statutorily protected moral rights and the integrity and quality of the design that we, as the original authors, be involved in the process of refining the Garden of Australian Dreams'. [71]

On a conciliatory note, Weller suggested that the Report's criticisms could be effectively converted into design solutions:

> As indicated in this brief response to the review, there are opportunities for improvement within the GOAD that accord with the GOAD's original design and maintain its integrity. Indeed many of the review's criticisms are answered by the original design which, for reasons of reallocation of budget that were outside our control, were not realised in the final built work. Although offended by the presumptions and uninformed criticisms of the Carroll Report, we choose to look upon this as an opportunity to work with the Museum Council to achieve a satisfactory outcome. To this end we propose a design charette involving ourselves, members of the Museum Council and Museum curators to consider the issues raised by the review. [72]

Weller concluded with a heartfelt defence of the value and the significance of Room 4.1.3's creation, emphasizing that it was a signature piece for the Museum: 'The Garden of Australian Dreams should not be underestimated or its design unduly

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70 Ibid.
71 Ibid.
72 Ibid.

affected by passing criticism based on the likes or dislikes of a handful of people.'[73] He observed: 'The design for the Garden of Australian Dreams has been critically acclaimed world-over and has been hailed as being responsible for putting Australian landscape design on the map.'[74] The landscape architecture has certainly been critically acclaimed.[75] Weller concludes that the site should be preserved, because it has some claim to both national and international significance.

2.3 The Australian Institute of Landscape Architects

Intervening in the dispute, the AILA sought to enlarge upon the wider ramifications of the controversy for the design professions. Noel Corkery observed: 'The July 2003 Carroll Report on the National Museum of Australia has placed the moral rights of Australian designers under threat'.[76] He professed: 'The extract from the Report of the Review Panel on the National Museum of Australia should make you concerned about the standing of the landscape architecture profession in Australian society'.[77] Corkery elaborated upon the conflict between the moral rights of the designer and the political reception of the work:

> If Government, as the owner of the Museum, decides to spend more public money to redevelop the Garden, then of course it has the capacity to do so. However, as the National Gallery recently encountered, the subject of moral rights would need to be addressed, including consultation with the original designers. The Museum would be well advised to seek the advice of qualified and experienced professionals to assist in preparing the design brief that may be contemplated and to ensure that any designer who may be involved are engaged through a process that meets all aspects of probity.[78]

Corkery was critical of the process by which the Carroll Report sought to review the Garden of Australian Dreams: 'A responsible review would have identified that the original design for the Garden is incomplete because money intended for the

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73 Ibid.
74 Ibid.
75 M. Keniger, 'Taste Over Analysis - The Garden of Australian Dreams', *Architecture Australia* 92 (5) (2003); I. Perlman, 'Contested Ground', *Australian Financial Review Magazine* (November 2002), 78-84; D. Firth, 'Room 4.1.3's Design for the National Museum of Australia', *Landscape Architecture* 23 (3) (2002) 45-46; and C. Bull, P. Carter, P. Droege, L. van Schaik and A. McGrath, 'Troubled Dreams', *Architectural Review* 85 (2003, 24-28.
76 Corkery, supra, n 9.
77 Ibid.
78 Ibid.

construction was diverted elsewhere; and a more appropriate recommendation would be a process to secure the integrity of the original design.'[79]

Noel Corkery observed that the problem was not one faced by landscape architects alone: 'What is happening here affects all design professions, particularly those that engage in public art or design.'[80] He concluded: 'If not censorship of design, then this Review demonstrates a complete lack of regard for the integrity of design, the academic and professional legitimacy of landscape architecture, and the moral rights of designers in general.'[81]

The *cri de coeur* of the AILA was taken up by many in the profession. Michael Keniger of the University of Queensland observed: 'Although the moral rights dimensions of the Copyright Act have yet to be tested, the recommendations of the panel and the lack of reference to the designers of the space suggest a disregard for the value and nature of landscape design and so deserve to be challenged by the design professions'.[82] He argued that the criticisms of the aesthetics of the Garden of Australian Dreams were misplaced:

> The GOAD is urban not Arcadian, enclosed rather than limitless, complex and challenging rather than simplistic and sedate. The GOAD is more an active event than a space of repose. It reveals clues as to the structure and nature of the forces that seek to control and shape the land and its pre- and postcolonial occupation. Designed to be seen as a whole from the terrace above, it may be experienced and explored as part of the sequence through and around the spaces and exhibits of the museum. [83]

Indeed, the Garden of Australian Dreams is not necessarily a fixed place, as Carroll would suggest; rather, it has proven to be a much more protean space. For instance, to great acclaim the Museum creatively used the site to stage *Sky Lounge* - a night-time programme which combined performances of modern music from bands like Biftek and classic films from Screensound Australia, such as Flash Gordon serials.

Professor Catherin Bull of the University of Melbourne wondered whether a wholesale re-design and re-construction of the Garden was really appropriate or warranted: 'The building and Garden were designed as an integral composition so

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79 Ibid.
80 Ibid.
81 Ibid.
82 M. Keniger, 'The Review of the Exhibitions and Public Programs of the NMA', *Australian Architecture*, September/ October 2003.
83 Ibid.

that any adaptations would need to be carried out with recognition of that relationship and at the level of sophistication that it manifests.'[84] In her view, any adaptation needed to be designed in response to a clearly developed brief and constructed to enhance rather than compromise the design.[85]

The dispute over the Garden of Australian Dreams was symptomatic of a wider disrespect for the vision of artistic designers of public buildings and monuments. The matter drew comparisons to the case of the Sydney Opera House, a classic example of an architect's vision being overridden by government dictates.[86] The author Philip Drew laments the changes to the design of Jorn Utzon: 'The outcome was a travesty of the original plan'.[87] Another point of comparison was the neglect of Harry Howard's Sculpture Garden in the National Gallery of Australia. Emeritus Professor Helen Armstrong of the Queensland University of Technology explained: 'It is a great tragedy that the late Harry Howard's sculpture garden has been neglected and mismanaged'.[88] The Geelong Waterfront Development[89] and the Birrarung Marr[90] projects provided further evidence of the obstacles facing landscape architects and the integrity of their designs. The landscape architect Perry Lethlean lamented: 'You don't expect design work on the scale of Geelong or Birrarung Marr to be totally obliterated, and nor should you.'[91] In 2003, the decision by the Minister for the Status of Women, Amanda Vanstone, to abandon a suffragette memorial called 'Fan' in Canberra, raised similar concerns about a lack of respect for designers. Davina Jackson, the author of *Australian Architecture Now*, observed: 'Controversy about the Fan needs to be understood within the broader issue of a tendency by federal politicians to thwart or destroy important works of art which they don't understand or don't like for political reasons.'[92] She drew specific comparisons to the controversy over the Garden of Australian Dreams, in particular the similar resentment of the underlying aesthetics and politics of a public monument.

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84 C. Bull. 'Review of the National Museum of Australia', 22 July 2003.

85 Ibid.

86 P. Drew, *The Masterpiece. Jorn Utzon: A Secret Life* (1999), 352

87 Ibid, at 387.

88 H. Armstrong, 'Response to July 2003 Review of the National Museum of Art, It's exhibitions and public programs.' 4 August 2003, http://www.aila.org.au/gardenofaustraliandreams/response.htm

89 Geelong Waterfront, http://www.tcl.net.au/

90 Birrarung Marr, http://www.citymayors.com/environment/birrarung_marr.html

91 K. Brass, supra n. 63.

92 D. Jackson, 'Fan is as Worthy of that Position as other Memorials', *The Sydney Morning Herald*, 18 September 2003, http://www.smh.com.au/articles/2003/09/17/1063625090232.html

In the wake of this series of controversies, the AILA has proposed a number of ways to confront the issue - including an award where site managers would be recognised for their work in maintaining sites and ensuring the integrity of the original design was preserved.[93] They have also considered the development of listings of sites of significance and sites at risk. Paul Costigan, the Executive Director of the Association, has commented:

> Our approach has been to request that the landscape architects be consulted as the original designers whenever changes are proposed. The important point that has to be made is that whenever necessary or desirable changes are sought, the preferred process is to involve the original designers as quickly and early as possible. [94]

The AILA also sought to establish national guidelines to help its members deal with future incidents. It would provide an outline of architects' rights and the steps that members would pursue. It would also deal with situations such as cases where members may be employed to work on sites originally designed by other landscape architects.

2.4 Summary

The conflict over the Garden of Australian Dreams should be placed in a wider context of symbolic battles taking place in Australian politics. A higher education analyst from Griffith University, Gavin Moodie, emphasized that the contest was the 'next episode of the cultural wars'.[95] He observed that the Federal Government has struggled to impose its political will upon about cultural institutions, such as the National Museum of Australia:

> The national museum is a creation of the Howard Government. Howard founded it, funded it and appointed all its council members. Although the museum has a white picket fence, it doesn't promote the accompanying values above others. [96]

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93 Brass, supra n. 67.
94 Ibid.
95 G. Moodie, 'Institutions Outstay Politics', *The Australian*, 23 July 2003, 34.
96 Ibid.

The dispute over the aesthetics and the politics of the Garden of Australian Dreams is not an isolated occurrence. There were similar symbolic battles over the larger building of the National Museum of Australia, and its exhibits.

David Barnett, biographer of the Liberal Prime Minister John Howard and former press secretary to former Liberal Prime Minister Malcolm Fraser, has been on the Council of the National Museum since 1998 and was, in May 2005, reappointed for a further three year term. He is an ardent critic of the Garden of Australian Dreams, referring to it as a political conspiracy. Barnett contended that the Garden of Australian Dreams was a homage to the Labor Prime Minister Gough Whitlam:

> We thought it would be a garden. I objected to the proposal to have a series of blue-painted telegraph poles in the GAD on the grounds that this would constitute a monument to Gough Whitlam. I was told the poles would be painted another colour. They are blue.[97]

Curiously enough, Barnett was a member of the original panel that reviewed and approved the design prior to it being built. The design for the Garden of Australian Dreams did not change much between its conception and execution. Thus Barnett must have known that the Garden of Australian Dreams was not an Arcadian garden in the sense implied by his comment.

In response, Weller denied that the Garden of Australian Dreams was a crude political polemic. He emphasized that his design could not be reduced to a single, simplistic political code. The site was intended to contain a multiplicity of meanings and allusions. Weller said that the sculpture was intended to be humorous:

> (It) was a joke on money and culture and recent Australian history. We were punning on value and how things become valuable. If this current regime thinks there is some problem with the blue poles, perhaps it would suit them better if they were cut down and turned into black stumps. We did not intend them as a monument to a particular political figure.[98]

Infamously, the Whitlam Federal Government purchased Jackson Pollock's *Blue Poles No. II* in 1973 for $AU 1.3 million, which was then a world record for a contemporary American painting. The painting was controversial at the time as the

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97 D. Barnett, 'Underhand Left Snuck In Its Agenda', *The Australian*, 12 December 2003, 11.

98 J. Morgan, 'Gough! Splutter! Museum's Blue Poles Cause A Whole New Row', *The Age*, 12 December 2003, 5.

work of "barefoot drunks" and its purchase seen as a symbol of Whitlam-era. The work has since become a prized and beloved possession of the National Gallery of Australia.

Christopher Pearson, the editor of the *Adelaide Review* and a former speechwriter to the Prime Minister John Howard, also commented upon the controversy:

> The Howard Government has given moral rights of various kinds to artists and architects through amendments to copyright legislation in 2001 [sic]. If this encourages people who design buildings and public spaces - for someone else to fund and occupy - to regard their work as sacrosanct, it seems a step in the wrong direction. The ethos of romantic entitlement (to grants and deference) once you've announced yourself an arts practitioner has persisted unconscionably long after Hillary McPhee, to her credit, first diagnosed the syndrome in the late Keating era. [99]

Pearson observed that Wellers' threat to take the museum to court …might add to the gaiety of the nation, like Harry Seidler's litigation over the Pig 'N Whistle pub signage, which he thought demeaned his Riverside complex in Brisbane.'[100] However, he added that 'if Weller reads the legislation carefully and notes that all he's really entitled to is a process of consultation, he might think better of it and take Candide's advice to gardeners.' [101]

In the end, the controversy has subsided. With the help of the AILA, Room 4.1.3 was able to fend off plans to redevelop the Garden of Australian Dreams. The Museum council was split over what action to take. Weller observed:

> Some council members would love to move in with bulldozers. I think political puppeteers have been pulling strings behind the scenes, but they'll have a fight on their hands.[102]

The Museum management put the cost of the Carroll Report's recommended changes to the museum's content at $30 million. It was estimated that reworking the Garden of Australian Dreams would cost at least $15 million more.[103] As with the case of the

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99 C. Pearson, 'Designs On History Derided', *The Australian*, 26 July 2003, 20.
100 Ibid.
101 Ibid.
102 Kremmer, supra n 4.
103 Ibid.

National Gallery of Australia, the expense of such renovations has, at least temporarily, halted the plans for redevelopment and revision.

3. GOTHAM CITY

It is worth contemplating the global nature of the marketplace for the design of buildings and landscapes. Australian architects and landscape architects often compete to win commissions for international work. Room 4.1.3 has developed an international portfolio of work - both in Australia and overseas. Richard Weller and his team submitted a design for the World Trade Center Memorial,[104] and were shortlisted in a competition to design the Pentagon Memorial in Washington DC.[105] The group designed 'A Memorial to Fallen Bodies', a project for the forecourt of the Criminal Courts and Civic Centre in Los Angeles.[106] Richard Weller and Room 4.1.3 have also been involved in projects in Europe, particularly in Paris,[107] Berlin,[108] and Prague.[109] The group has also conceived of projects for Fusionpolis, a new city in Singapore's 'One North', a conceptual work for Singapore Harbour as yet unbuilt,[110] and the Diomede Islands.[111] It is therefore worthwhile to consider how the issues raised in the dispute over the Garden of Australian Dreams would be resolved in other jurisdictions.

Frustratingly, there is a lack of international harmonisation in respect of the copyright protection afforded to architects, landscape designers, and sculptors. Nation states are obliged to provide copyright protection for architecture under the *Berne Convention for the Protection of Literary and Artistic Works*.[112] However, there remains a tension between protecting the intellectual property rights of the architect, and the property rights of the owner of a building - not to mention safeguarding the

104 R. Weller, supra n. 2, 138-141; and http://www.wtcsitememorial.org/ent/entI=858104.html
105 Ibid, 132-137.
106 Ibid, 124-127.
107 Ibid 130-131.
108 Ibid, 12-33; 34-35; 38-39; 70-81; and 144-145.
109 Ibid, 86-87.
110 Ibid, 52-53.
111 Ibid, 40-41.
112 A commentator has discussed the historical debate over the inclusion of architectural works under the Berne Convention: 'In 1890, the Belgian delegate, Jules de Borchgrave, published an influential article calling for formal recognition of copyright protection for architectural structures. In his article, Borchgrave took the position that architects - like painters, writers, and musicians - create new and original artistic works of the human spirit. It is inequitable, he argued, to rob the architect of the fruit of his labors while guaranteeing the same to other artists.' N. Wargo, 'Copyright Protection for Architecture and the Berne Convention', *New York University Law Review* 65 (1990) 434-39.

wider public interest. There has been a diversity of responses to this inherent tension, ranging from the strong economic and moral protection accorded to architects in the European Union,[113] to the valorisation of the interests of the property developer in the United States. The compromise reached in the new regime in Australia lies somewhere between these extremes.

It is worth contemplating the themes raised by the dispute over the Garden of Australian Dreams in the context of United States law in respect of moral rights and architecture. There are a number of reasons for such a comparative approach. There is increasing harmonisation of copyright law between Australia and the United States in the wake of the *Australia-United States Free Trade Agreement* 2004. Accordingly, precedents from United States courts in the field of intellectual property are being accorded greater weight. In the Federal Court of Australia, Heerey J recently found a United States precedent to be persuasive and noted strong similarities between the two regimes: 'In both countries, in similar commercial and technological environments, the law has to strike a balance between, on the one hand, the encouragement of true innovation by the grant of monopoly and, on the other, freedom of competition.'[114] Furthermore, the Australian courts may find it useful to look at the domain of the United States, as an example of a common law country which has incorporated moral rights into its regime. There may also well be value in considering the rich jurisprudence in the United States in respect of copyright law and architecture.

The U.S. Congress has long resisted the introduction of moral rights into the framework of copyright law. In 1990, the Congress relented and recognised limited moral rights protection under the *Visual Artists Rights Act* 1990 (US) (VARA).[115]

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[113] For a discussion of European laws on moral rights, see J. Ginsburg and A. Francon, 'Authors' Rights in France: The Moral Right of the Creator of a Commissioned Work to Compel the Commissioning Party to Complete the Work', *Columbia-VLA Journal of Art and the Law* 9 (1985) 381; K. Troller, 'Switzerland: Copyright/ Moral Rights: Violation of Architect's Rights to the Integrity of his Work', *European Intellectual Property Review* 16 (10) (1994) D267; C-J. Thorn, 'Sweden - Copyright: Copyright in Architectural Works', *European Intellectual Property Review* 16 (4) (1994) D82-84; A Dietz, 'The Moral Right of the Author: Moral Rights and the Civil Law Countries', *Columbia - VLA Journal of Law & the Arts* 19 (1995) 377; C Swack, 'Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit moral Between France and the United States', *Columbia - VLA Journal of Law & the Arts* 22 (1998) 261-406; V Zlatarski, "Moral rights' and Other Moral Interests: Public Art Law in France, Russia, and the United States', *Columbia - VLA Journal of Law & the Arts*, 23 (2) (1999) 201-240; and P. Goldstein, *International Copyright: Principles, Law, and Practice*. (Oxford: Oxford University Press, 2001).

[114] *Welcome Real-Time SA* v *Catuity Inc* (2001) 51 IPR 327

[115] For commentary on this legislation, see E. Damisch, 'The Visual Artists Rights Act of 1990: Toward a Federal System of Moral Rights Protection for Visual Art', *Catholic University Law Review*, 39 (1990), 945; E. Damisch, 'State Moral Rights Statutes: An Analysis and Critique', *Columbia-VLA Journal of Law and Arts*, 13 (1989), 291; J. Ginsburg, 'Copyright in the 101st Congress: Commentary

William Patry has wickedly called the legislation 'the mini-me of moral rights laws.'[116] The operation of legislation is limited to 'works of visual art' - such as 'paintings, drawings, prints, sculptures, and photographs'. The author is accorded a right of attribution, that is, the right to claim authorship of that work, and to prevent the use of his or her name as the author of any work of visual art which he or she did not create. Furthermore, the author has the right of integrity, that is the right to prevent any intentional distortion, mutilation, or other modification of that work which would be prejudicial to his or her honour or reputation, and to prevent any destruction of a work of recognized stature, and any intentional or grossly negligent destruction of that work is a violation of that right. The duration of such moral rights is limited to the life of the author. Such moral rights may not be transferred; however they can be waived by the author. Several states have passed legislation designed to afford artists moral rights.[117]

Historically, architecture only received limited protection under United States copyright law. Architectural plans and drawings could be protected as copyright works - but not buildings - up until the late twentieth century. Congress passed the *Architectural Works Copyright Act* 1990 (US) that 'architectural works' were recognised as a new category of copyrightable subject matter.[118] The legislation defined 'architectural works' as including 'the overall form as well as the arrangement

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on the Visual Artists Rights Act and the Architectural Works Copyright Protection Act of 1990', *Columbia-VLA Journal of Law and Arts*, 14 (1990), 477; L. Wooton, 'Law for Law's Sake: The Visual Artist Rights Act of 1990' *Connecticut Law Review*, 24 (1991), 247; K. Attlesey, 'The Visual Artists Rights Act of 1990: The Art of Preserving Building Owners' Rights', *Golden Gate University Law Review*, 22 (1992), 371; M. Goodin, 'The Visual Artists Rights Act of 1990: Further Defining the Rights and Duties of Artists and Real Property Owners', *Golden Gate University Law Review*, 22 (1992), 567. R. Gorman, 'Visual Artists Rights Act of 1990', *Journal of the Copyright Society of the USA*, 38 (1990), 233; and J. Zuber, 'The Visual Artists Rights Act of 1990 - What it Does, and What it Preempts', *Pacific Law Journal*, 23 (1992), 445.

[116] W. Patry, 'Destruction of Works of Visual Art', 24 May 2005, http://williampatry.blogspot.com/2005/05/destruction-of-works-of-visual-art.html

[117] These include: California, Cal. Civ. Code § 987 (West 1982) (Supp. 1996); Connecticut, Conn. Gen. Stat. Ann. § 42-116s, 116t (West 1992) (Supp. 1996); Illinois, Ill. Rev. Stat. Ann. Ch. 815 § 320 (West 1993); Louisiana, La. Rev. Stat. Ann. § 51:2151 (West 1987) (Supp. 1995); Maine, Me. Rev. Stat. Ann. tit. 27, § 303 (1988) (Supp. 1995); Massachusetts, Mass. Gen. Laws Ch. 231, § 85S (West 1989) (Supp. 1996); Nevada, Nev. Rev. Stat. Ann. Ch. 597.720 (Michie 1994); New Jersey, N.J. Stat. Ann. § 2A:24A (West 1987) (Supp. 1996); New Mexico, N.M. Stat. Ann. § 13-4B-2 (1988); New York, N.Y. Arts & Cult. Aff. Law § 14.03 (McKinney 1984) (Supp. 1996); Pennsylvania, Pa. Cons. Stat. Ann. 73 P.S. § 2101 (Purdon 1993); and Rhode Island, R.I. Gen. Laws § 5-62-2 (1995).

[118] For a history of this legislation, see R. Winnick, 'Copyright Protection for Architecture After the Architectural Works Copyright Protection Act of 1990', *Duke Law Journal*, 41 (1992), 1598; and A. Vacca, 'The Architectural Works Copyright Protection Act: Much Ado About Something', *Marquette Intellectual Property Law Review*, 9 (2005), 111.

and composition of spaces and elements'.[119] However, Congress also placed a significant limitation upon the exclusive rights bestowed on the author of an architectural work. Section 120 (a) provides: 'The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.' There have been, though, successful actions brought under the *Architectural Works Copyright Act* 1990 (US) for the infringement of an architect's copyright.[120]

3.1 The Tilted Arc

In 1979, Richard Serra was commissioned to create a site-specific sculpture called *The Tilted Arc* on the Federal Plaza in Lower Manhattan. [121] Ten years later, it was removed to storage after a panel of experts failed to find a suitable site for relocation. Serra alleged that the decision to remove his sculpture infringed his rights under the free speech clause of the First Amendment, the Due Process clause of the Fifth Amendment, federal trademark and copyright laws, and state moral rights law.

At first instance, Pollack J rejected all of Serra's arguments. As to the New York law on moral rights, it did not apply to *The Tilted Arc* because of its location on federal property.

On appeal, the three-judge panel of the Second Circuit affirmed the granting of a summary judgment and held that Serra's First Amendment rights were not infringed. Justice Newman observed:

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[119] The copyright lawyer and policy commentator, William Patry, recalls drafting these amendments. See W. Patry, 'Louis Kahn, Architecture, and the Search for Soul', Copyright Blog, 2 May 2005, http://williampatry.blogspot.com/2005/05/louis-kahn-architecture-and-search-for.html

[120] For instance, in September 2003, the architect William Hablinski filed a federal lawsuit against the owner and builders of a mansion, alleging copyright and trademark infringement, unfair competition, conspiracy and other claims. After a three week trial, a six-member jury determined that the four Elihu brothers, and their two firms, Amir Construction, Inc., and EuroConcepts, Inc., conspired with Mehran Shahverdi, a former Hablinski + Manion employee, to copy plans for a $20 million Bel-Air, California mansion. The copied plans were used to build a $14 million Beverly Hills home. The jury awarded William Hablinski Architecture $5.9 million in damages: M. Groves, 'That Fascia's Familiar', *The Los Angeles Times*, 13 April 2005; and Foley and Bezek, 'Celebrity Architect Awarded $5.9 Million for Copied Plans', Los Angeles,13 April 2005, http://www.foleybezek.com/hablinski/hablinski.html

[121] *Richard Serra* v *United States General Services Administration* 847 F 2d 1045 (1988); and R. Serra, 'The Tilted Arc Controversy', *Cardozo Arts and Entertainment Law Journal*, 19 (2001), 39.

> 'Tilted Arc' is entirely owned by the Government and is displayed on Government property. Serra relinquished his own speech rights in the sculpture when he voluntarily sold it to GSA; if he wished to retain some degree of control as to the duration and location of the display of his work, he had the opportunity to bargain for such rights in making the contract for sale of his work.[122]

The Second Circuit was of the view that the Constitution did not grant Serra the authority to completely prevent the GSA from carrying out its statutory authority to maintain, alter and manage government buildings, their grounds and appearances.

There have been similar battles over the Vietnam Veterans Memorial.[123] In 1981, Maya Ying Lin designed The Wall for the Memorial - consisting of two large black granite walls on which are inscribed the names of those missing or killed during the Vietnam War. Some veterans claimed that The Wall was 'a black gash of shame' or a 'giant tombstone.'[124] Frederick Hart was awarded a commission to create a suitable work of sculpture to be added to the Memorial. The statue *The Three Servicemen* was unveiled in 1984, two years after The Wall's completion. There has since been litigation over unauthorised commercial T-shirts and photographs, which feature reproductions of the sculpture *The Three Servicemen* and The Wall.[125]

Such cases provided impetus for Congress to pass the VARA which extends to visual artists certain rights governing the display and resale of their work.

3.2 The Mural Garden

The case of *English* v *BFC & R East 11th Street LLC* involved six artists who had created certain artwork in a community garden on East 11th Street, which was called the 'Lot' or the 'Garden'.[126] The artwork in question consisted of five murals and five sculpture. The six artists also alleged that the Garden itself constituted a single work of art. They described it as 'a large environmental sculpture encompassing the entire site and comprised of thematically interrelated paintings, murals, and individual sculptures of concrete, stone, wood and metal, and plants.'[127] The artists, seeking to

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122 *Richard Serra* v *United States General Services Administration* 847 F 2d 1045 (1988).

123 M. Mathis, 'Function, Nonfunction, and Monumental Works of Architecture: An Interpretive Lens in Copyright Law', *Cardozo Law* Review 22 (2001) 595.

124 http://www.vietnam-war.info/memorial/memorial3.php

125 *Hart* v *Sampley* CIV. A. No. 91-3068, 1992 WL 100135 (D.D.C. Feb. 4, 1992); and *Hart* v *Sampley* 24 U.S.P.Q.2d (BNA) 1233 (D.D.C. June 24, 1992).

126 *English* v *BFC & R East 11th Street LLC* 1997 WL 746444 (S.D.N.Y.)

127 *English* v *BFC & R East 11th Street LLC* 1997 WL 746444 (S.D.N.Y.)

prevent the redevelopment of the site into housing, brought an action under the VARA against New York City, the NYC Partnership Housing Development Fund and developers BFC & R East 11th Street LLC.

Baer J considered whether the Garden could be conceived of as a single work of visual art, or whether each mural and sculpture constituted an independent work:

> Plaintiffs find some support for this argument in Judge Edelstein's opinion, following a bench trial, in which he found that a work of art in a building lobby, consisting of various components affixed to the ceiling and walls and a mosaic on the floor and walls, constituted a "single work." Whether the Garden constitutes "a single piece of art, to be analyzed under VARA as a whole, rather than separate works to be considered individually," is a question of fact.[128]

In the end, the judge did not need to rule upon this aspect nor the constitutional challenges because he held that the VARA did not apply to the art work as it was illegally placed on the property of others, without their consent, and such artwork cannot be removed from the site in question. His Honour denied the motion for a preliminary injunction.

Ron English and the other community artists appealed against this finding. They conceded the validity of the District Court's finding**,** but argued that the judgment should be reversed nonetheless because of 'the likelihood that the City will perform routine maintenance that will destroy or mutilate the mural during Farinacci's [one of the mural artists] lifetime.'[129] The United States Court of Appeals declined to adjudicate upon this new argument which was not presented to the District Court, and therefore to decide whether Farinacci's mural was entitled to protection under the VARA.[130]

3.3 Pembroke Real Estate

In *Phillips* v *Pembroke Real Estate*, a well-known sculptor, David Phillips, brought an action under the VARA and the *Massachusetts Art Preservation Act* 1984 against the manager of a public sculpture park.[131] In collaboration with the landscape architect Craig Halvorson, Phillips had helped design Eastport Park, and install 27 sculptures.

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128 *English* v *BFC & R East 11th Street LLC* 1997 WL 746444 (S.D.N.Y.)
129 *English* v *BFC & R East 11th Street LLC* 1997 WL 746444 (S.D.N.Y.)
130 *English* v. *BFC Partners* 198 F. 3d 233 CA2 (NY) 1999.
131 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003).

The sculptor was upset that Pembroke had hired London landscape artist Elizabeth Banks to redesign the park and remove his sculptures which had been specifically created for the public park, sought an injunction to prevent the park's modification.

In the District Court, Saris J considered whether Phillips' 27 sculptures could constitute a single 'work of visual art', or instead be treated as discrete works of art for the purposes of the VARA. His Honour reviewed the relevant case law and held that it was likely that the sculptor could prove that the sculptures 'along the northwest to southeast axis of the Park' constituted a single work of art. However, the judge found that the remainder of the sculptures (like the six-foot bronze conch shell and miscellaneous whimsical sea creatures) that do not lie along the axis are not part of the same work of visual art.[132] This decision is thus a mixed one - a certain collection of sculptures are considered to be a 'work of visual art' but the remainder are treated as singular pieces only deserving separate protection.

Saris J considered the novel issue of whether the park could constitute a 'work of visual art' under the VARA as Phillips contended that the Eastport Park as a whole was one large integrated piece of 'sculpture.' Saris J rejected this argument:

> As Professor Barreto conceded, a park does not fit within the traditional definition of sculpture, and the definitions in VARA are to be construed narrowly. Conceivably, a sculptor could design a sculpture garden that includes multiple inter-related sculptural elements that form an integrated work of visual art. However, here, many elements in the Park were not created by Phillips… Phillips was also not responsible for the plantings or any of the landscape architecture apart from the stone elements… While Phillips certainly assisted in designing the stone elements in the paths and walls and in placing his own sculptures, the Park as a whole is not an integrated work of art.[133]

Saris J concluded that the artist had no right to the placement or public presentation of his sculpture under the VARA and thus Pembroke was under no obligation to display the works in the park. His Honour found that the 'defendant is under an obligation not to alter, modify or destroy the "works of visual art" as I have defined them.'[134]

Given the limited scope of VARA, the judge went onto consider the applicability of the *Massachusetts Art Preservation Act* 1984, which provides broader protection to artists. Modelled upon the *California Art Preservation Act* 1979, this

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132 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003) at 98.
133 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003) at 99.
134 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003) at 100.

legislation protects both an artist's right of integrity, that is the right not to have his or her creations altered, and an artist's right of paternity, which relates to an artist's right to claim or disclaim authorship of a work of art.

Saris J held that the park could constitute a 'work of fine art' for the purposes of the *Massachusetts Art Preservation Act* 1984; but questioned whether it had a 'recognised quality'.[135] His Honour held: 'Although Mr. Halvorson is a renowned landscape architect, and two experts (Barreto, Driscoll) believe the park design has meritorious quality, there is only conclusory evidence as to whether the quality of the Park design itself has been "recognized" by a cross-section of the artistic community or by artistic experts in the field.'[136]

Nonetheless, Saris J held that Phillip was well placed to establish a claim in respect of the sculptures under the *Massachusetts Art Preservation Act* 1984, 'given the broad definitions of "fine art" in the statute, the undisputed expert testimony that for site-specific art, the location of a piece is a constituent element of the art, and the absence of a "public presentation" exclusion in MAPA'.[137] His Honour held that protecting the sculptor's work under the *Massachusetts Art Preservation Act* 1984 did not violate the park manager's First Amendment Rights. Saris J noted that the defendant could have obtained a waiver of the moral rights of the sculptor, but chose not to. His Honour ordered that the defendant could not alter, destroy, move or remove any of the sculptures along the northeast-southwest axis of the Park until the conclusion of this litigation or further order of the Court.[138] With respect to the other sculptures, the defendant could move the sculptures but not destroy or alter them.[139]

The decision of Saris J provides a curious counterpoint of federal and state law with respect to the moral rights of artists. As Natalia Thurston comments, the decision highlights the 'narrow scope of types of works protected under VARA as well as the broader implication that VARA is perhaps more harmful than helpful to artists in promoting the creation of new works.'[140] Nonetheless, the judgment also reveals that certain jurisdictions provide an enhanced protection of the moral rights of

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135 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003) at 101.
136 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003) at 101.
137 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003) at 102.
138 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003) at 105.
139 *Phillips* v *Pembroke Real Estate Inc.* 288 F. Supp. 2d 89 (2003) at 105.
140 N. Thurston, 'Buyer Beware: The Unexpected Consequences of the Visual Artists Rights Act', *Berkeley Technology Law Journal*, 20 (2005), 701.

artists. The decision of Saris J is under appeal to the Supreme Judicial Court in *Massachusetts Art Preservation Act* 1984.

3.4 Batman Forever

In *Leicester* v *Warner Brothers*, artist Andrew Leicester, known for his large-scale public art, sued Warner Bros. studios claiming his work was prominently featured in a film and was used without his permission. [141] The case concerned Leicester's artwork on the 801 Tower and four towers that form its street wall in downtown Los Angeles. The building towers have distinctive metalwork depicting allegorical images of the city's history. These were used to depict the Second Bank of Gotham in the film *Batman Forever***.** Leicester claimed copyright protection for these towers along with other artistic works he created in a courtyard space called the Zanja Madre. He registered the whole of Zanja Madre as a 'sculptural work' and sued Warner Brothers for infringement.

Following a bench trial, District Court Judge Harry Hupp found that the streetwall towers (even though they had artistic elements) were part of the 'architectural work.' As such, the court concluded, pictures taken of the streetwall towers along with the 801 Tower are not infringing pursuant to the exemption for pictorial representations of buildings in the *Architectural Works Copyright Protection Act* of 1990.

On appeal, Circuit Judge Rymer for the majority observed: 'Classification of the Zanja Madre as an architectural work is critical because unlike PGS works, architectural works are afforded a more limited copyright protection'.[142] His Honour, though, upheld the finding of the District Court that the streetwall towers constituted an architectural work:

> When copyright owners in architectural works were given protection for the first time in 1990, the right was limited by § 120(a) so that publicly visible buildings could freely be photographed. This reflected a shift from the prior regime of relying on "ad hoc determinations" of fair use. Having done this, it would be counterintuitive to suppose that Congress meant to restrict pictorial copying to some, but not all of, a unitary architectural work.[143]

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141 *Leicester* v *Warner Brothers* 232 F. 3d 1212 (2000)
142 *Leicester* v *Warner Brothers* 232 F. 3d 1212 (2000) at 1216.
143 *Leicester* v *Warner Brothers* 232 F. 3d 1212 (2000) at 1219-1220.

His Honour held that the building developer had an exclusive right to make three-dimensional representations of the Zadre of all sizes; and therefore the building owner could sub-licence that right to Warner Brothers. Circuit judge Tashima concurred with the result and most of the reasoning of the majority.

In dissent, Fisher J argued that the language of the *Architectural Works Copyright Protection Act* of 1990 did not explicitly eliminate separate copyright protection for pictorial, graphic, and sculptural works that are incorporated into buildings. Further, a reasonable reading of the legislative history supports the view that such separate protection remains available. Fisher J concluded:

> Depriving artists of PGS ["pictorial, graphic, and sculptural works"] protection if their works are part of an architectural work is a drastic change in the law. It threatens to deprive the public of innovative and challenging forms of artistic and architectural expression. This result seems inconsistent with the overarching goals of the AWCPA and the VARA, taken together.[144]

For Leicester, only if the street wall towers are conceptually separable to the building, would he be able to proceed to a trial on the merits of his copyright infringement claim.

There has been mixed responses to the verdict. The Warner Brothers attorney, Robert Schwartz, observed:

> Congress intended the American landscape to belong to everyone, including filmmakers producing commercial movies. This decision holds that cities and streets can be freely filmed without fear of being dragged into court.[145]

Such a gloss is interesting - especially if one considers the role of the landscape artist. The attorney for Leicester, Gregory Wood, complained: 'I think fundamentally the judge has interpreted an architectural work in such a way that it takes away copyright rights from artists who create major works of art just because of where they are located.' [146] Academic Jay Orlandi argued that this decision was fundamentally

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144 *Leicester* v *Warner Brothers* 232 F. 3d 1212 (2000) at 1235-1236.

145 'Judge Rules in Favor of Warner Bros., Says No Copyright Infringement', Associated Press, 6 June 1998.

146 Ibid.

flawed in its understanding of traditional copyright principles.[147] He argued that a sculptural work created to be part of a common architectural scheme should not have its copyright protection denied.

3.5 The Freedom Tower

In the wake of the destruction of the World Trade Tower in the terrorist attack on the 11th September 2003, there was a public competition to redevelop the site held by the Lower Manhattan Development Corporation and the Port Authority of New York and New Jersey. The winning architect Daniel Libeskind waxed eloquent about his vision of the Freedom Tower:

> I arrived by ship to New York as a teenager, an immigrant, and like millions of others before me, my first sight was the Statue of Liberty and the amazing skyline of Manhattan… The sky will be home again to a towering spire of 1776 feet high, the Antenna Tower with gardens. Why gardens? Because gardens are a constant affirmation of life. A skyscraper rises above its predecessors, reasserting the pre-eminence of freedom and beauty, restoring the spiritual peak to the city, creating an icon that speaks of our vitality in the face of danger and our optimism in the aftermath of tragedy. Life victorious.[148]

However, the property developer, Larry Silverstein, commissioned the architect David Childs from Skidmore, Owings and Merrill to design the skyscraper.[149] The developer wanted to ensure that there was sufficient office space in order to make the rebuilding project a commercially viable one. There was much conflict between Libeskind's initial vision and Child's plan for the tower to be a 'torqued' tube, crowned with a trellice. In the end, the two architects were forced to collaborate, and produce a new design for the Freedom Tower.

However, the dispute over creative control ended in court. In *Studio Daniel Libeskind* v *Silverstein Properties Inc*, Libeskind sued Silverstein for US$843,750 over unpaid fees.[150] Libeskind observed:

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147 J. Orlandi, 'Gargoyles in Gotham: A Sculpture Incorporated into an Architectural Work Should Retain Independent Copyright Protection', *Southwestern University Law Review*,29 (2000), 617.

148 http://www.daniel-libeskind.com/press/index.html

149 For wider discussion of the politics of building the Freedom Tower, see D. Libeskind and S. Crichton, *Breaking Ground: Adventures in Life and Architecture*, (2005); and P. Goldberger, *Up from Zero: Politics, Architecture, and the Rebuilding of New York*, (2005).

150 G. Younge, 'Architect Sues Developer in Row over 9/11 Tower', *The Guardian*, 15 July 2004.

> It's a straightforward legal issue. Larry wanted us to reposition the tower. We wouldn't, and won't. He's been holding back our fees. We want to get paid. And that's it. It'll get solved and we'll carry on with planning Ground Zero. It's been hard to hand over the working design of Freedom Tower to another architect - although we're still a part of the team, and so is Larry. And, yes, I love the process of building. But maybe it's good for architects to have their egos kept in check once in a while.[151]

The law suit alleged: 'While Silverstein disingenuously claimed to support the masterplan, his actions, then and up to the present time, bespeak a clear intent to derail the project wherever he perceives a conflict with his personal financial interests'.[152] The law suit noted that the design of the 541-metre tower had been changed considerably, but it conceded that it still 'retained the spirit and key elements of Libeskind's vision'. In response, Silverstein Properties argued that Libeskind's main contribution was to the overall plan, for which he had been paid by public agencies, but his work on the design of the towers was minimal compared to that of Childs.[153]

Following court-ordered mediation, Silverstein agreed to pay Libeskind $370,000 for his work on the new skyscraper and the parties issued a joint statement that featured forward-looking words about the rebuilding.[154]

There have been similar creative disputes over the transformation and evolution of the design of the memorial planned for the World Trade Centre.[155]

The case of the Freedom Tower is an interesting one. It illustrates the weak protection accorded to architectural works in the jurisdiction of the United States. Under US law, Libeskind could plead for design fees, insisting upon his economic rights in relation to the design. However, the architect could not rely upon moral rights to protect the integrity of his designs of the Freedom Tower. As a result, he was forced to seek to defend his plans in private negotiations, and in public airings of the dispute. Ultimately, Silverstein has been successful in trimming the original design for the Freedom Tower to serve his twin objectives of securing the commercial

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151 J. Glancey, 'You've Got to Have Faith', *The Guardian*, 4 August 2004.

152 Younge, supra n. 150.

153 M. Haberman, 'WTC designer a shakedown artist – builder', *New York Daily Times*, http://www.nydailynews.com/news/local/story/214066p-184349c.html

154 E. Cockfield, 'World Trade Center Developer, Master Planner Resolve Dispute', Knight Ridder/ Tribune Business News, 7 October 2004.

155 R. Pogrebin, 'Pushed and Pulled, Designer of 9/11 Memorial Focuses on the Goal', *The New York Times*, 10 May 2005, p. 1.

viability of the skyscraper and protecting the security of the building from future terrorist attacks.

3.6 Summary

In the United States, there has been a distinct tendency to discriminate against architects and landscape architects within the formal law of copyright jurisprudence. The economic and moral rights of the architect have been circumscribed so as to protect the interests of property owners, and safeguard access to public places. The *Architectural Works Copyright Act* 1990 (US) does provide recognition of the economic rights of architects. However, there are broad defences in respect of the use of architectural works. The *Visual Artists Rights Act* 1990 (US) has only provided weak protection of works of visual art. It has been difficult to classify architecture or landscape in terms of the copyright subject matter of sculpture. Only in a few instances, architects have been able to successfully rely upon their economic and moral rights. Thus the sculptor David Phillips was able to protect his public park sculpture. Likewise, Daniel Libeskind was able to obtain a design fee for the Freedom Tower. However, Richard Serra was helpless to prevent the removal of the *Tilted Arc*. Ron English and the community artists were unable to prevent the redevelopment of the mural garden. Andrew Leicester was defeated in his action for copyright infringement against Warner Brothers over the film *Batman Forever*. Such differential treatment is a residual prejudice against architects, who were formerly denied any copyright protection at all on the basis they only produced useful works, rather than creative products. The discriminatory approach is also evidence of a suspicion of neighbouring rights within common law countries.

4. CONCLUSION

This study has considered the moral rights controversy over plans to redesign the landscape architecture of the National Museum of Australia. It has examined the dispute in terms of legal, cultural and political resonance. This study has also examined this conflict against the background of wider disputes over copyright law and the built environment in Australia, and the United States. It has considered conflict over the copyright ownership of architecture, landscapes, buildings, sculptures, and gardens. Such a survey has revealed a lingering prejudice under

copyright law against the creators of a built environment. At present, landscape architects need to use all their wits and ingenuity to defend the integrity of their designs, as they have little legal protection. As Richard Weller has observed:

> It is only recently that landscape design has been reduced to a service industry and trivialized by those who practise, teach, administer and commission it. Still one cannot ignore that dominant culture and I have said before that we must seduce and outwit the market place.[156]

There is a need to reconceptualise copyright law, and the intellectual commons to better take into account the position of landscape and architecture. There is a need to defend the artistic prerogatives of designers against the commercial imperatives of property owners and the political aspirations of governments. In other words, the law must ensure that the Garden of Australian Dreams, and its like, should not be razed.

[156] F. Saunders. 'Interview with Richard Weller', 1998, http://www.room413.com.au/413Introduction/Interview.html