TRANSNATIONAL CRIME IN THE
TWENTY-FIRST CENTURY

John Broome

Paper presented at the Transnational Crime Conference
convened by the Australian Institute of Criminology
in association with the Australian Federal Police and
Australian Customs Service
and held in Canberra, 9-10 March 2000
Adam Graycar asked me to speak at this conference at the time I left the National Crime Authority in September last year. I asked Adam what he wanted me to talk about. He suggested that it might be appropriate to do a reflective piece on the National Crime Authority and the state of organised crime in Australia. In any event, he said, we could talk about it next year.

When I talked to him a month or so ago I asked what he wanted me to say. He said “I’ll leave that up to you because you never seem to be short of a few words to say”.

I do not think that now is the right time for a reflective piece on the NCA. That will come later. But in a conference dealing with transnational crime it is appropriate for us to reflect on some aspects of transnational crime, in the past, the present and the future.

I thought I might start with a bedtime story. Of course in the past this would have been known as a fairytale. But fairytales became politically incorrect and so I will tell you a brief politically correct bedtime story.

I will leave it to you as my speech unfolds to work out who I think is the emperor and whether he (or she) has any clothes at all.

The topic of transnational crime has attracted a great deal of interest, particularly over the last decade. The rise in the analysis of transnational crime and its coincidental links to the end of the cold war (or was it just a coincidence?) is something I will return to later.

What we have seen in the last decade are numerous conferences and academic papers on the topic. We have seen a great deal of talk in law enforcement circles about transnational crime. There are whole web sites devoted to the topic. There are now a number of courses in universities across the globe which deal specifically with the topic of organised crime. Yet rarely, if ever, is enough effort given to defining what we mean by this particular all encompassing term.

A look at the program for this conference would identify a number of characteristics that are commonly found in transnational criminal organisations. The program also identifies activities that are usually seen as examples of transnational crime. These characteristics include structure, strategies and tactics and, at least, an implied level of sophistication.

Discussion of organised or transnational crime tends to proceed on an assumption that we know what we are discussing. That is, we assume we are all working from the same definition. In large part that may be correct but, for reasons to which I will return later, some definition is important. In the National Crime Authority Act 1984 the concept of organised crime is defined as “relevant criminal activity”, the essential features of which are offences that:

(a) Involves two or more offenders and substantial planning and organisation;
(b) Involves sophisticated methods and techniques;
(c) Is usually committed with offences of a like kind;
(d) Involves theft, fraud, tax evasion, currency violations, illegal drug dealings, obtaining financial benefit by vice engaged in by others, extortion, corruption, bankruptcy and company violations, harbouring of criminals, forging of passports, armament dealings or importation or exportation of fauna or that involves matters of the same general kind.
For good measure the Act also allows any other offence to be included in the definition by regulation.

A different approach is adopted by Louise L. Shelley in her analysis of the threat of transnational crime. She advocates a description which does not focus on particular offences but rather on the way the crime group operates. Shelly says transnational crime groups are those that:

(a) Are based in one state;
(b) Commit their crimes in one but usually several host countries, whose market conditions are favorable; and
(c) Conduct illicit activities affording low risk of apprehension.

Crimes that fit this latter characteristic include smuggling, money laundering and drug trafficking. However, in my experience it is often the degree of sophistication that is overstated.

Yet most of us would accept that the topics covered in this conference reflect our understanding of transnational crime. The kind of criminal offences involved range over:

- Customs offences - smuggling of all sorts of goods, both licit and illicit;
- Excise fraud;
- Wildlife exports and imports;
- Intellectual property offences involving both the theft of intellectual property itself and an attempt to avoid duty payable in relation to products which have significant intellectual property components;
- Corruption of international banking and financial activities;
- People smuggling, which seems to be treated as a common problem and yet we need to clearly distinguish between those who seek to enter countries illegally as a means of overcoming migration laws and those who enter the country for the purpose of prostitution or to be involved in illegal activities often under coercion.

Let me digress for a moment and say that while both of these areas involve important issues, they are inherently very different in character. Those who seek to smuggle people for purposes such as prostitution are inevitably involved in serious criminal activities. Much of the people smuggling that involves "queue jumping", while it involves criminal acts, may well have its origins in international politics where solutions are more likely to be found in diplomacy than in law enforcement.

Back to my list of areas of transnational crime.

- Cyber crime and information warfare;
- Maritime crime;
- Money laundering (although, of course, we need to be careful to distinguish between a money laundering offence itself and the predicate offences which are still an essential element of establishing the money laundering offence in Australia. Whether that continues to be the case will depend upon the Government's consideration of a number of matters that, so far as I can ascertain, are still before it, such as the ALRC report on *Confiscation that counts*;

3
• Links with national terrorism (where it has often been suggested that transnational crime takes place to provide funding for terrorist activities);

• Last, but by no means least, is the whole topic of Russian organised crime. But the generic reference seems inconsistent with the diversity of activities that fall within that general description. Some have argued that there are up to 6000 separate groups involved in organised crime within Russia or outside its boundaries but with clear connections to Russian criminals. Yet we continue to refer to Russian organised crime as if it were a monolithic (and apparently well organised) activity. While many of these groups may have contact with each other there is little evidence to suggest that these groups are under common control.

More recently transnational crime is being seriously seen as a threat to the Nation-State. Certainly this fear is expressed when discussing transnational crime in developing economies. I doubt this analysis. If we look at those countries where organised crime is seen as posing a real threat to civil order and the Nation-State we find that a breakdown in government preceded the rise of organised crime. The Soviet Union always had a black market economy (to provide the goods and services the communist state could or would not produce) which was tolerated if not run in part by those in officialdom. But it existed because it was allowed to exist. There is little doubt that the Soviet regime could have exerted greater control if it so wished. When the Soviet Union broke down so dramatically in 1989 and Western governments sought to create a market economy overnight a vacuum was created which was filled by what was called organised crime.

Even the Italian experience this century suggests that the absence of effective democratic government had a lot to do with the capacity of the Mafia to exert the control it did. In the three decades following World War II, Italy had many changes of government. Many lasted less than a year. The Italian civil service effectively ran the country. Corruption occurred. There was a lack of national leadership to address the Mafia problem. Yet when a few committed individuals, supported by central governments, which remained in power for some time, started to tackle the problem the results were quite dramatic. Once some successes were achieved others followed.

In short, I do not see transnational crime as a serious threat to the Nation-State in functioning mature democracies. Yet it will pose a real threat to emergence of democratic governments in developing economies. It is the effect of a breakdown in government not the cause.

Against this background, law enforcement has properly seen transnational crime as a major issue. It is. It is serious and it involves serious criminal activity. It is not something we should treat lightly and, as I will explore, I think we are ill prepared to deal with it in its present manifestation. I also believe that the nature of the problem has often failed to receive detailed analysis and that our responses are designed as much to deal with the perception as they are with the reality.

The growth in analysis of transnational crime, and the fact that it is now seen as a threat to civil society and the Nation-State, can be traced to the early part of the last decade. This was when significant numbers of intelligence analysts and those involved in various defence and intelligence agencies - whose focus had been on cold war politics and the eastern bloc - suddenly found there was no obvious and discernable threat to national security. They had lost their raison d’etre. The only threat was to the existence of their agencies because the rationale for such bodies had disappeared. Reinvention was necessary. It occurred.
In the US the CIA obtained approval to expand its activities into the areas of transnational crime. Military resources were channeled into the anti-drugs programs. The FBI and other law enforcement agencies benefited from increased capacity to access intelligence capabilities previously directed at the old evil empire, the Soviet Bloc. The Department of State operates its own Bureau for International Narcotics and Law Enforcement Affairs and funds a number of programs designed to tackle transnational crime and money laundering. In the United Kingdom the intelligence agencies also became far more interested, and active, in investigating organised or transnational crime.

The same can be said of Australia, although to a lesser extent. Here there has been less obvious involvement of what is usually referred to as the intelligence community in areas of law enforcement. Law enforcement issues have, however, slowly risen up the priority chain of national security issues. Nowhere near high enough, in my view, because I believe that transnational crime poses a very significant threat to the Australian community and one which is more immediate, more pervasive and more costly than any identified threat to national security in the traditional sense.

The whole question of organised and transnational crime, as a threat to national security in the literal sense of that term, is a matter that needs much more analysis and discussion. We need as a nation to examine realistically the level, extent and sources of threats to our national well being and to make appropriate decisions about national spending priorities. For far too long governments have seen defence related expenditure as separate from the totality of government outlays. Yet dollars spent in the defence context are inevitably dollars that are not available for health, education or law enforcement.

The Center for Strategic and International Studies (CSIS) in Washington describes transnational crime as the "new empire of evil". It has a Global Organised Crime Project that is producing major analyses of organised crime and suggested public policy responses to deal with these threats. Its web site (www.csis.org) contains, for example, a 200 page analysis of Russian organised crime. It is a detailed report that has obviously been based on access to an extensive amount of official information in the US. The members of the Steering Committee of the GOCP include four former Directors of the CIA and a former Director of the FBI. Other members include serving members of Congress. Yet one of its final conclusions is that much more work needs to be done to actually analyse the structure and nature of what is generally called "Russian organised crime" before any coherent policy responses can be developed.

Until we know the nature of the problem we are dealing with, we simply cannot develop appropriate responses. That is, I think, a criticism that can be made of much of the effort that has gone into activities designed to counter transnational crime. There has been too little analysis of the true nature of the threat, how it operates, what might be its vulnerabilities, what strengths and weaknesses does the law enforcement community bring to this task and how may we best maximise our strengths and overcome our weaknesses to tackle the vulnerabilities of transnational crime.

If we look in a little more detail at the amount of criminal activity that was originally characterised as organised crime and now is called transnational crime, a number of observations can be made. At this stage I am leaving to one side what I would describe as the computer related offences (to which I will return later). The following generalisations are true of most, if not all, of the transnational crimes that we have examined at this conference and which now occupies so much time and effort in law enforcement agencies around the world.
• There is no inherent difference between drug trafficking across country borders and within those borders. It always involves the physical movement of the product from point A to point B with the involvement of a number of participants whose role is to facilitate the movement and avoid detection. Particularly where the borders are arbitrary rather than natural (such as most of western Europe), then the cross-border nature of the offence is merely a man-made element that makes investigation and prosecution more difficult.

• Revenue fraud, which may rely on different taxation regimes in different countries, is no different from the way in which lower rates of State duty within Australia gave rise to the cigarette frauds in the mid 1990s.

• In the case of firearms, there is no difference between the importation of such products into Australia and their movement around Australia. The illegal importation of such products is similar to the movement of unlicensed or prohibited guns within Australia. Yet arms movements are seen as a major transnational crime activity. The essence of the offence is the illicit movement of arms not the fact that it happens to occur across a nation's state border.

• Drug manufacture (for example, Ecstasy) in The Netherlands, and its importation and distribution in Australia, is no different from the manufacture of the same drug in a Brisbane laboratory and its distribution throughout Australia.

• There is no difference between a fraud that occurs where both parties are in Australia and a similar fraud where one of the parties is not.

• Extortion through the threat of product contamination is just as real and just as dangerous whether the contaminated products have been imported or have been manufactured, contaminated and distributed in Australia.

• Finally, money laundering around Australia, using inter-bank transfers, the efficient services of the ASX and the buying and selling of their financial products, is no different than similar transactions taking place between Australia and Hong Kong, Singapore or London.

In short, it seems to me that all the major areas of transnational crime are simply the same serious criminal activities which continue to occur at the national level but where some or most of the participants and elements of the offence will be located outside our borders or the borders of another "victim" country.

It follows that if transnational crime is inherently the same kind of criminal activity which we once called organised crime (in a domestic context) then the real questions that we should be addressing are how these criminal activities take place and what we might do to counteract them. What we have tended to do is to create a perception that such crimes are, because they are transnational, beyond our capacity to detect and prosecute. This absolves us of responsibility if we cannot satisfactorily tackle these tasks. That excuse is used as much by government as it is by law enforcement.

The other trend in the last decade has been a propensity to label transnational criminal activity by reference to the ethnicity or nationality of the participants. Thus, for example, the Commonwealth Law Enforcement Review identified in 1995 a menu of work for the NCA that included:
• Russian organised crime
• Italian organised crime
• Romanian organised crime
• Japanese organised crime
• South East Asian organised crime.

Of course there were criminal activities taking place that involved people whose country of origin, ethnicity or nationality fitted these descriptions and who were also linked to Australia by birth, residence or nationality.

However, when the National Crime Authority did conduct major investigations into Italian organised crime (Operation Cerberus), what transpired was a total redefining of the nature of the problem. At the end of that analysis, Australian law enforcement agencies agreed that the preponderance of the available intelligence material suggested that what had been called Italian organised crime was, essentially, much more entrepreneurial and much less rigid in its structure than had previously been assumed. It involved in loose coalitions criminals of various ethnic origins. What was discovered when all (or at least the vast majority of) the available intelligence was pooled and considered was that the perceptions of law enforcement as well as the community owed more to Hollywood than reality in the Australian context. The position in both Italy itself and the US was clearly different.

In short, our perception of the nature of Italo-Australian organised crime changed. The criminal activity did not change. Our analysis of it changed our perceptions.

During this operation that involved 17 different agencies hundreds of criminals were prosecuted. We achieved a significant impact on the level of criminal activity.

There are lessons for us today in the way we address organised or transnational crime in the future. Sometimes careers have been made on the basis of perceptions about the nature of a criminal threat, rather than an analysis of it. That can be said of law enforcement agencies across the globe.

It therefore seems to me that the kind of traditional transnational crime which has been dealt with at a domestic level under the description of organised crime, may actually be different from our perceptions of it. Remember, for example, that organised crime as most of us understood it, was a concept that came out of the '20s and '30s in the US with the Mafia, the mob, Al Capone and the FBI as key participants.

The organised crime that bedeviled Italy for much of the last century was of a different character than the organised crime activities of those who may have some Italian connection in Australia. Certainly it differed very much from the American version of organised crime. So it occurs to me that we may have in fact created an image of organised and transnational crime to date that is different from the reality.

Previously we have been looking, for example, for high level organisations (or as the politicians insist on referring to them “The Mr Bigs”) that simply do not exist. And finally, perhaps we have created a problem by suggesting that transnational crime is so sophisticated, so organised, so assisted by corruption, that we cannot win and therefore our failure is both inevitable and excusable.
Before those of you in the audience from law enforcement organisations form a party to lynch me from the nearest tree, let me reiterate what I said earlier.

The kinds of criminal activities that we now talk about as organised or transnational crime are very serious. They are, difficult to investigate and prosecute. They do involve levels of sophistication and the use of technology. They do have very serious effects on the community. And we must continue to vigorously attack this criminal activity. These criminals often possess rat cunning rather than sophistication. They are resilient and prepared to rapidly change their methods of operation. They rely on fear and intimidation. But whether these crimes occur at the national or transnational level, they are, conceptually at least, capable of investigation, prosecution and conviction, provided we are armed with the necessary weapons.

I have previously spoken at Australian Institute of Criminology conferences about my concerns at the inability of Australian governments to provide the fundamental legal framework in which the investigation of serious criminal activity can take place. I will not repeat this tonight other than to say that we seem to have made virtually no progress. There are many areas in which we could make law enforcement far more effective and far more efficient without in any way creating a “police state” or unreasonably interfering with the civil rights of the Australian community.

My point tonight is that unless we address these issues at a national level, there is no hope of dealing with these problems at the transnational level.

The UN has been working for most of the last decade on a draft convention on organised crime. By UN standards (and I mean no disrespect to the UN) progress has been remarkably quick. But inevitably seeking to achieve international consensus in areas such as this is fraught with difficulty. After all, how can we criticise the UN for failing to reach common outcomes when we cannot do so in Australia?

There is now a considerable body of international treaties, both multilateral and bilateral, to which Australia is a party that provide a basis for mutual legal assistance. The procedures are inevitably cumbersome and time consuming. This is to ensure that the evidence that is finally recovered through those processes can satisfy all of the necessary local hurdles for it to be admissible in Australian courts.

Having been personally involved in the negotiation of bilateral and multilateral treaties I understand the difficult issues involved, including the need to work in different legal systems. But we need to think laterally about how we deal with offences which take place in an instant and where the perpetrators may have moved their location a dozen times before the first request from Australia has been drafted and dispatched through the diplomatic channel.

The success of transnational crime has more to do with the lack of capacity in law enforcement agencies than the organisational skills of the transnational criminals. I do not mean that those involved in the agencies lack dedication, skill or knowledge. What they do lack is the necessary infrastructure, equipment, resources and legal framework with which they could successfully counteract transnational crime.
At the domestic level, the deficiencies faced by law enforcement include:

- No cross-jurisdictional framework for the use of listening devices, controlled deliveries or the use of assumed identities.
- Relatively few resources applied to the investigation of organised or transnational crime when compared with total law enforcement expenditure. Even in organisations like the AFP, a careful analysis of its expenditure will show that much of the AFP’s budget is spent on community policing in the ACT, protection of dignitaries (both local and foreign), the investigation of various activities such as the leaking of official documents and fraud against various government programs.
- The structure and procedures of the legal system almost guarantee that very substantial amounts of law enforcement budgets are wasted, while outdated rules remain, defence disclosure is not required and witnesses wait endlessly to give evidence.
- There have been substantial changes in the amount of material which must be provided to the defence with no analysis, of which I am aware, that these changes have made any substantive difference to the quality of the judicial system.
- Jurisdictional and inter-agency conflicts adversely affect the overall success of law enforcement because, at least for some, who gets the result is more important than getting the result.
- Our proceeds legislation in most States and at the Commonwealth level is inadequate. This has been known for years and was the subject of analysis by the ALRC in a report that was tabled in 1999. Yet despite the obvious evidence, subsequently accepted by the ALRC, there are still those who argue that the present regime, with its central tenant of post-conviction confiscation, is the appropriate legal regime.

While there have been considerable efforts to enhance cooperation and the collection of evidence, the fact remains that progress has been particularly slow in many areas.

Where transnational crimes are involved, the procedures involved in collecting and exchanging evidence are ponderously slow. Some of the difficulties include:

- The entire resources of Interpol in Lyon devoted to organised crime amount to five people, while an additional three are looking at money laundering.
- Whatever the original potential for Interpol, it has been significantly undermined by the creation of regional cooperative arrangements, such as Europol, which members see as having more commonality of interest and providing greater protection for information which is shared through these agencies.
- UN conventions, such as the 1988 Vienna Convention and the current draft convention on organised crime, together with declarations on issues such as money laundering, have illustrated a significant commonality of purpose across the globe. But it has taken ten years to develop a draft convention on organised crime. Even when it is settled it will no doubt be some years later before it comes into effective operation.

Notwithstanding that an international court to deal with criminal matters is self-evident, inevitable and necessary, the fact remains that the court has yet to be established. More than half a century of genocide, war crimes and crimes against humanity, let alone transnational crime, have failed to move the international community to establish an effective regime to deal with cross-jurisdictional crime.
Multilateral and bilateral treaties providing for mutual legal assistance have been established but any of us with experience in their operation know that notwithstanding some successes, the reality is frustrating delays caused by resource restrictions in both the requesting and requested states. Indeed, there are often concerns expressed by central authorities to reduce the scope of requests for fear that large scale requests may need to be dealt with on a reciprocal basis.

I recognise that in a number of these areas some action is being taken. But what is being done is too little too late.

Given the enormous publicity about transnational crime during the last decade, it is remarkable that the last five years have seen virtually no legislation enacted federally to better enable us to deal with these issues.

In other words, transnational crime is successful because it is hard to investigate and prosecute with our present tools. Not because the kind of activity that we have labeled in this way is extremely complex, sophisticated, hard to identify, investigate and prosecute, but because we are ill equipped to do so.

All of the offences I have discussed thus far involve physical acts that occur in a number of jurisdictions. That is, they involve people moving illicit products physically from one jurisdiction to another.

If we now face a very real threat from transnational crime, and we do, the question is what can be done about it. If we do not provide the appropriate investigative and legal framework, both domestically and internationally, we will remain unable to tackle traditional transnational crime. That is obviously of great concern but how much more concern should we have about our state of preparedness to deal with transnational computer related crime? This is the real challenge for law enforcement in the 21st century.

This is not a new threat. Some have foreseen its possibilities for a considerable period. The new economy has arrived, but the laws to protect it, the structures to investigate crimes against it and the capacity to prosecute such crimes have not been developed.

Let’s look for a moment at the kind of problems we are facing. John Geurts, a federal agent with the AFP, provided some staggering statistics in a speech in September 1999. Geurts claimed that:

"Industry analysts predict that e-commerce, which involved transactions of $7 billion during 1998, is expected to grow to $300 billion globally by 2002. The Australian Government predicts e-commerce will grow by a factor of ten by the year 2000 and keep growing. The current size of e-commerce can be determined through industrial analysis. In an industrial survey involving 55,000 Australian and 27,000 international Internet users, 25% had shopped on-line more than once, with another 13% having shopped once on-line. Australian on-line shoppers spent some $139 million on-line in the 12 months to July 1998. The largest products are books, music as well as software."

If the Government’s prediction about e-commerce growth in Australia was correct, then this year almost $1.5 billion will be spent on-line in Australia. My guess is that that figure will prove to be significantly understated.
Much of the concern about e-commerce has been related to issues such as security of credit card information used to purchase on-line. That is a genuine concern. But it is not where I believe the major threats will come in relation to transnational computer crime.

Our real vulnerability is that our whole commercial structure now depends on the successful operation of computer networks. The same can be said of government. Most government agencies would no longer possess a typewriter! Yet in the event of a power failure they will effectively be unable to communicate with the rest of the world except by long hand and Australia Post. The fax machine won’t work and, of course, there will be no e-mail.

In the last month we have seen the consequences of a serious denial of service attack on major US web sites. Unknown individuals, from unknown locations, who may well have worked alone, were able to close down sites such as E-Trade and Yahoo for a number of hours. Press reports have suggested that these attacks are the subject of FBI investigation in the US and of AFP investigation in Australia. According to some press reports smaller scale versions of the denial of service attack affected unnamed Australian sites. The problem is that there seems to be no offence on the statute books concerning such attack, at least in Australia.

On 12 February 2000, the Minister for Justice and Customs released a discussion paper relating to computer offences. This coincided with the denial of service attacks in the USA. The discussion paper is part of the development of a Model Criminal Code. In the discussion paper a number of new offences are proposed. According to the Minister “these new offences address a number of short comings in existing offences. They recognise the fact that the criminal law cannot remain the same for even a reasonably short period if it is to genuinely reflect a change in society”.

I agree. The difference is that the existing computer crime offences in the Commonwealth Crimes Act are a decade old and have not been reviewed despite enormous changes in technology and the widespread prediction of the potential for disruptive conduct during that time. Indeed, the process by which the Model Criminal Code is being developed can best be described as thorough and painstaking because it had its origins in reports by Sir Harry Gibbs in the 1980s and the Code is still being developed.

I commend to you the recently released material concerning computer crimes. It seems to me to provide a very sensible analysis of the need for offence provisions relating to denial of service attacks and other computer crimes but we must expect that it will be some years before we will have such laws enacted, particularly if the recent pace of legislative reform is maintained.

In the second part of the Model Crime Code discussion paper, the issue of geographical jurisdiction is analysed. I found that analysis to be a depressing catalogue of the conspicuous failure of Australia’s legal system to address the modern world.

For example, a scheme was developed by the Solicitors-General, endorsed by the Standing Committee of Attorneys-General and implemented in a number of States, to ensure that the antiquated common law rules of jurisdiction were overcome where all of the elements of an offence could be established, albeit that they did not all occur in one jurisdiction. It has been conspicuously ignored by Australian judges, despite the clearest possible statement of legislative intention. What courts across Australia have demonstrated is a clear preference to ignore the unequivocal language of the statute and to return to the dark ages of jurisdictional difference between the Australian colonies.
As the discussion paper itself says “the history of criminal law reform in Australia, including that of the consideration and implementation of the recommendations of this Committee, shows that the goal of uniform criminal laws has been illusive, particularly when dealing with laws which provoke highly emotive debate. Australians can expect disuniformity to continue in relation to such areas as gambling, drug law reform, uniformity, age of consent for sexual behaviour and the like”.

If we cannot achieve uniform criminal laws between the Australian States, what chance have we got to combat transnational crime in general and computer crime in particular.

I refuse to accept the excuse that it is all too hard. That compromise (and not at the level of the lowest common denominator) cannot be achieved. That so-called States rights interests override those of the Australian community. The fundamental role of government is to provide for the peace, order and good government of society. By not providing a basis on which we can successfully tackle these problems, our governments have failed at the most fundamental level.

To anyone who says that agreement is impossible, because it is too complex or involves some abrogation of sovereignty, I say that this is rubbish. One simply needs to examine the history of the European Union, particularly over the last ten years. The development of uniform rules within the European Union in a range of areas shows that jurisdictions with vastly different social, cultural and legal histories can reach agreement where the Commonwealth and the Australian States and Territories have failed. We cannot expect the world community to deal with these issues while we have such a tardy domestic record.

Sometimes I wonder whether this lack of preparedness for governments to govern in areas as critical as these, is the unforeseen consequence of an unquestioned commitment to “small government”. Or is it a fundamental failure to understand the issues and the importance of them to our national well-being?

In February 1998 the Prime Minister, the Hon John Howard MP, opened the ICPO-Interpol 15th Asian Regional Conference. In specifically addressing the question of transnational crime the Prime Minister said:

"Transnational crime is now a serious security issue which has been recognised by Interpol's new observer status at the United Nations. But there is only so much that governments can do either in isolation or collectively. Treaties may be important but all the agreements in the world cannot replace the indispensability of cooperation between law enforcement professionals. You, as individual police professionals, will always be the most important element in defeating international crime."

It seems to me that the Prime Minister is both right and wrong. There is a limit to what governments can do. It is true that the level of cooperation between law enforcement professionals is essential to the investigation of transnational crime.

But much more can and must be done by governments than has been the case to date. And law enforcement professionals cannot cooperate if the legal systems in which they work are so encumbered by procedural difficulties that it becomes virtually impossible, if not actually impossible, to collect, transmit and use admissible evidence. In his second Inaugural Address Bill Clinton spoke of the need for governments to govern. He pointed out that the problems of discrimination and inequality in American society could only be solved by government taking a leading role. You cannot expect the market to develop policy and implement law.
In any event, as things stand at present, the criminals involved in transnational computer crime can be so far away from the crime scene, it is doubtful whether we can even identify, under present legal arrangements, the correct jurisdiction in which a prosecution can be brought, even if an offender were located.

A person, who wishes to extort vast sums from the business community, by disrupting computer transmissions, can do so via satellite, from the open sea, and ensure the disruptive messages pass through a number of jurisdictions before reaching their eventual target. It is a very real possibility indeed that companies, faced with the threat of catastrophic disruption to their business, may well succumb to extortion in circumstances which will be much more difficult to investigate than recent examples of product contamination. We are ill prepared and going backwards.

My concern about the failure of Australian governments to deal with these issues is highlighted by the fact that the Model Criminal Code discussion paper actually proposes a model to deal with computer crime that was developed by the UK Law Commission in the 1980s and is reflected in the *Computer Excise Act 1990* (UK). That is not a criticism of its content, rather a comment on its speed of evolution.

Essentially, the UK legislation seeks to:

- Protect data and programs from unauthorised access;
- Prevent criminal activity consequently upon unauthorised access; and
- Protect the corruption of data.

It will be clear that these principles do not deal with the denial of service problem. That requires a fourth element that prevents the intentional disruption of a computer service. The discussion paper specifically rejects the notion of an offence of sabotage in relation to computer systems (except perhaps in a national security context) but does make strong recommendations in relation to the need for offences relating to the impairment of electronic communication. Whether, however, maximum penalties of imprisonment for ten years are adequate is debatable.

In the recent denial of service contract, Yahoo is reputed to have lost almost $700,000 in revenue during the period that its system was closed down. Imagine the likely penalty for someone who had stolen $700,000 from, say, a bank. I venture to suggest that Australian courts would be unlikely to impose a similar penalty in relation to computer crime. Indeed, the evidence strongly suggests that the larger level of fraud or commercial impact, the lower the period of imprisonment. The Alan Bond case is but one example.

So we need to not only provide an appropriate legal framework, but we need to do something to ensure that the seriousness of these offences is reflected in the sentences that are imposed. Our present domestic legal systems and law enforcement structures and our international treaties and agencies have proved inadequate to deal with transnational crime in the 20th century. I fear they will prove even less so this century unless significant advances are made and made rapidly.

The real challenge is to develop a national and international response to transnational crime, which has some element of urgency to reflect the real social and economic threats that we are facing. It is, of course, essential, that we critically and correctly analyse the nature of the problems that we are facing.
Just as in Cerberus, we had to discover the paradigm before we could deal with it; we need to ensure that our solutions to transnational crime for the 21st century are practical and effective. They must be based on sensible and rigorous analysis and not on perceptions of what the problem might be. Then we must have a national and international effort to deal with these issues that bears some resemblance to the seriousness and urgency of the problem.

I fear I will be disappointed.