



# Insurance in a Change of Era

2019 Geoff Masel Lecture

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# What I'll cover

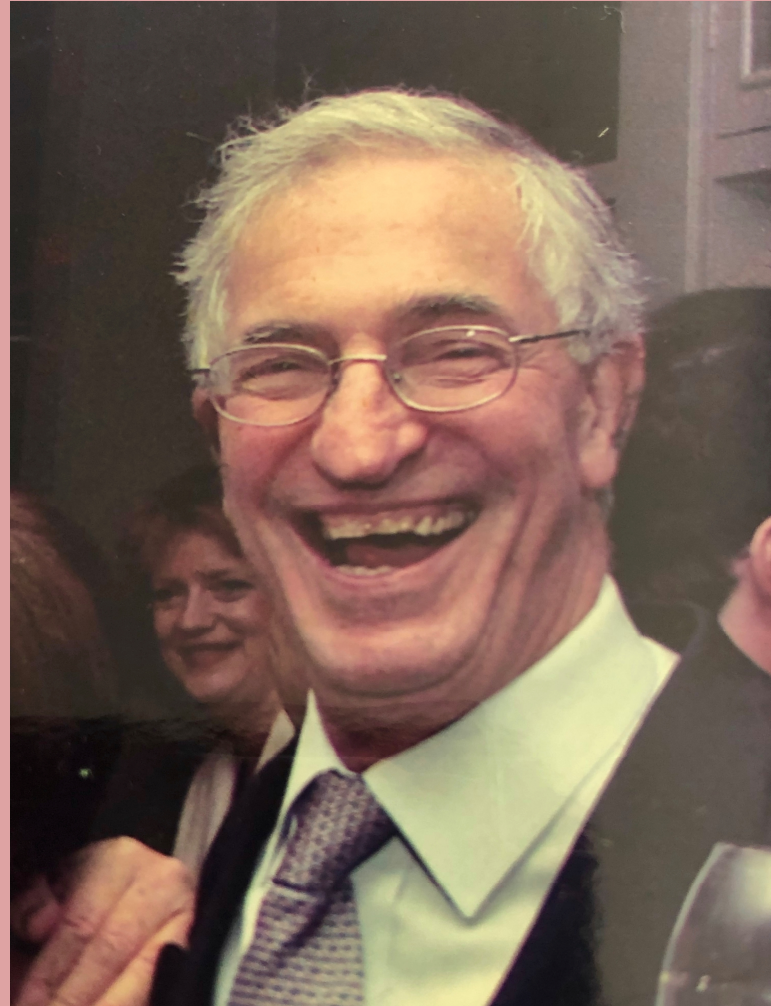
- A bit about Geoff Masel.
- A bit more about AILA.
- A Change of Era.

A bit about the Externals

A touch on the Internals

# A BIT ABOUT GEOFF MASEL

- Geoff Masel, was widely known as a leading expert in insurance, building, professional indemnity, and aviation law. He was an authentic leading lawyer.
- Geoff was born in Melbourne in 1928. He followed his father (Alex) and brother (Leigh) into Phillips Fox (and Masel), ultimately retiring as Senior Partner in 1988 at the age of 60. In 2002 he celebrated 50 years with the firm and in the profession.
- He was often first choice for big clients in big cases.
- He was an educator, a mentor, a mediator and an arbitrator. He was a first choice as conference speaker.
- He was a great human being, humble, professional and unpretentious.
- Geoff Masel was a founder of the Victorian Branch of AILA, the first recipient of the Insurance Law Prize in 1995 and one of AILA's first life members
- Geoff passed away on 8th August 2004, aged 75.
- In recognition, AILA announced the Geoff Masel Lecture Series in 2005



# THE GEOFF MASEL LECTURERS

- 2005 Peter Rashleigh – *Insurance contracts act: evolution or revolution*
- 2006 Tony Scotford - *Walking the Tightrope: The duties of Australian Insurance Lawyers acting for both Insurer and Insured. After ten years of debate has anything really changed?*
- 2007 Professor Greg Reinhardt - *Can courts ignore the reality of insurance in litigation?*
- 2008 Justice Carmel McLure - *A Practical Guide to the Resolution of Causation Issues in Negligence*
- 2009 Professor Robert Merkin - *D & O Policies and the Global Financial Crisis*
- 2010 Ron Ashton – *Keeping the Faith: development of good faith concepts in insurance*
- 2011 Justice Michael Ball – *Double insurance and contribution: recent developments*
- 2012 Dallas Booth – *Government intervention in insurance markets*
- 2014 Justice Kevin Nicholson – *Reflections on the practical operation of the (not very) uniform proportionate liability regimes in Australia*
- 2015 Ian Enright - *The Insurance Social Contract: 1788 and all that*
- 2016 Justice Martin Daubney - *Reflections on Contemporary Issues in Legal Professional Ethics*
- 2017. Justice Margaret Beazley AO – *Fundamentals of insurance law*
- 2018 Richard Douglas QC – *The lpp legislation: has the game been worth the candle*



# A BIT MORE ABOUT

- A meeting place for all with an interest in insurance law.
- An organisation that provides in-depth consideration, analysis and education of major insurance law issues.
- *Thought Leadership: a new challenge for AILA*

The logo for the Australian Insurance Law Association (AILA) features the acronym "AILA" in large, white, serif capital letters. It is positioned within a dark blue rectangular box that has a thin white border on its right side.

AILA

AUSTRALIAN  
**INSURANCE LAW**  
ASSOCIATION

A large, solid dark blue rectangular box occupies the lower right portion of the slide, positioned below the AILA text and to the right of the bulleted list.

# A CHANGE OF ERA: THE EXTERNALS

*"The precise origins of insurance law are uncertain, and there are plausible arguments to be made for ancient civilisations, including Roman, Greek, Phoenician and Chinese, as the inventors of marine insurance. As far as Europe is concerned, marine insurance appears to have originated with the Lombards. For our purposes it suffices to say that by the seventeenth century there was a thriving marine insurance market in London, important enough for a specialised court for the resolution of marine insurance disputes, to be established in 1600. The eighteenth century was the turning point. Marine insurance remained the most important form, although life insurance existed in embryonic form and a small market for buildings insurance developed after the Great Fire of London in 1666."*

- *"The fundamental and honourable purpose of insurance is to spread risk. Michael Kirby said, "The sharing of risk is the essential brilliant idea of insurance"."*
- *"The Elizabethan marine statute captures this concept: "upon the loss or perishing of any ship, there followeth not the undoing of any man, but the loss lighteth rather easily upon many than heavily upon few"."*
- *"Insurers absorbing financial loss that would otherwise be randomly distributed throughout the community."*

Enright, Mann et al, General Insurance - Background Paper 14, Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, Part 4, 1.1, p 20

# A CHANGE OF ERA; THE EXTERNALS

## TODAY

- Some insurance is so important for the sound working and welfare of society it is now compulsory.
- Insurance is intended to enable consumers to recover from the serious risks of everyday life.
- Consumers are not protected by insurance from the risk of non-payment of a claim; this often falls back on society generally or destroys the individual in many ways.

# A CHANGE OF ERA; THE EXTERNALS

## WHAT HAVE WE TRIED?

- Financial literacy
  - Plain language policies
  - Disclosure documents
  - Statutory intervention
  - Standard covers
  - Informal and consumer-friendly claims dispute protocols
  - Codes of practice
- 
- Have they worked?!?!?

# A CHANGE OF ERA; THE EXTERNALS

## CONSUMERS

- What they want:
  - Prompt and fair payment of claims.
  - Zero to Hero
- What don't they want:
  - To be insurance law experts
  - To spend a lot of time on the purchase decision
  - To spend more than is necessary
  - Surprises



# A CHANGE OF ERA: THE EXTERNALS

## AN UNDERWRITER'S ATTITUDE

*"Son, your job is to get our clients out of their troubles. That's what they pay us for."*

Cuthbert Heath (1912)



# A CHANGE OF ERA: THE EXTERNALS

## CORPORATE CONFLICT

- Shareholders' interests (share price and dividend) -v- policyholders' interests (claims payment).
- Are the interests of shareholders and policyholders opposed?
- Directors' obligations are centred around "*the best interests of the corporation*".
- Do other organisational structures provide a fairer opportunity for policyholders?
- Mutual structures avoid the distinction between policyholder and owner.

# A CHANGE OF ERA: THE EXTERNALS

## MICROINSURANCE (more in the paper)

- Insurance on a 'micro' scale.
- Microinsurance caters to those with little education, limited income and who lack other basic social protections and protects them against specific risks which might otherwise critically disrupt their lives.
- Characterised by:
  - Low coverage limits
  - Simplified, or even standardised terms and policy language
  - Easy to understand outcomes; closes the “expectation gap”
  - Few or no exclusions
  - Efficient claims handling processes

# A CHANGE OF ERA: THE EXTERNALS

## A New Starting Point

Two fundamental questions:

1. "What is in the best interest of the policyholder?"
2. "How can society and the law achieve the optimum outcome every time?"

# A CHANGE OF ERA: THE EXTERNALS

## COMMERCIAL CONTRACT OR SOCIAL PROMISE FOR CONSUMERS

- CHANGING RISK APPETITE
- ZERO TO HERO
- THE SECOND RISK: THE CLAIM IS NOT PAID
- PERSONAL ADVICE
- LEGAL EXPERTISE; BEHAVIORAL SCIENCE; COMMUNICATION SKILLS OR ALL THREE
- WHO KNOWS MOST ABOUT THE RISK
- BETTER MANAGEMENT OF THE DISPUTE RISK



# A CHANGE OF ERA: THE EXTERNALS

## THE EXPECTATION GAP

- *"although the considerable majority of claims are paid ... in some cases, claims are being declined on technical or contractual grounds that are not in accordance with the 'spirit' or 'intent' of the policy" and "an issue arises when a policyholder's reasonable expectations about policy coverage do not align with the technical wording in the policy".*
  - ASIC, Report 498, *Life insurance claims: An industry review* (2016)

# A CHANGE OF ERA: THE EXTERNALS

## SHOULD WE ... ?

- be moving further moving in the direction of interpreting disputes in favour of insureds?
- move the major focus of policy interpretation to achieving consumers' reasonable expectations?
- create processes that have more regard to what more the insurer could have done to assist the consumer to avoid the problem?
- reverse the onus in every instance?
- place on insurers a higher onus?
- embed in the system the learnings of all failed claims and apply them to policy and system modification?

# A CHANGE OF ERA: THE EXTERNALS

## DISCLOSURE: WHERE IS /WHO HAS THE KNOWLEDGE

- 1766 Carter v Boehm; Lord Mansfield: "insurance is a contract upon speculation' and requires the utmost good faith'. Insureds must disclose
- Disclosure element now separated and exists independently within Australian insurance law.
- 2019?



# A CHANGE OF ERA: THE EXTERNALS

## DISCLOSURE: WHERE IS /WHO HAS THE KNOWLEDGE

- 'The Information Age'.
- Insurers, more than ever, are equipped with vast quantities of data from sensor-equipped technology in cars, smart phones, smart watches, home systems, satellite imagery.
- Insurers are increasingly familiar with our behaviour, locations, daily activities, driving habits and health in *real time*.
- From this, and with the assistance of machine learning, insurers are in a better position to manage risk with heightened sensitivity and precision. They are able to benefit from improved underwriting decision-making and product pricing.
- Insurance can be offered in new formats – 'event-based', 'real-time' and 'just-in-time'.

# A CHANGE OF ERA: THE EXTERNALS

## DISCLOSURE: WHERE IS /WHO HAS THE KNOWLEDGE

- Would Lord Mansfield still say:

*"Insurance is a contract upon speculation.  
The special facts, upon which the contingent  
chance is to be computed, lie most commonly  
in the knowledge of the insured only ... [and]  
... [g]ood faith forbids either party by  
concealing what he privately knows, to draw  
the other into a bargain from his ignorance  
of that fact, and his believing the contrary"?*





# A CHANGE OF ERA: THE EXTERNALS

LORD MANSFIELD TODAYISH!

## MORE IN THE PUBLISHED PAPER

- The insurer has access to sensors, smart devices, raw data, artificial intelligence risk modelling, a myriad of info sources including social media, wikileaks from security services etc
- The weakness of the “ fort” and the intentions of the French are known and probably in the public domain
- In fact the insurer probably knows more than the insured including ways to mitigate ( a royal navy gunboat), strengthening of defences and materials sourcing for reinstatement.
- And more.....

# A CHANGE OF ERA: THE EXTERNALS

## Other Implications

- For insurers, technology and machine learning present an opportunity for insurance providers to replicate the advice traditionally provided by insurance agents.
- 74% of consumers are willing to receive computer-generated advice about the type of insurance cover they should buy.
- Technological improvements may also pave the way for more streamlined, instant claims-handling processes to become effective.
- For customers, technological advancement creates an opportunity to enjoy unprecedented access to immediate, personalised advice in relation to their insurance needs and options.

# A CHANGE OF ERA: THE EXTERNALS

## Is more law/regulation the answer?

- Australia has experienced a legal and regulatory tsunami over the last 50 years.
- How effective (and efficient) has it been? Who knows? What's been measured (if anything)?
- Who benefited? Has the expectation gap closed?
- In hindsight, were there better ways to solve the problems?
- Mandatory disclosure as a case example, suggests regulatory intervention can often simply distort, or mask difficulties, but not actually alleviate the underlying problem.
- This experience was reflected in a joint report produced by ASIC and the Dutch Authority for the Financial Markets.

# A CHANGE OF ERA: THE EXTERNALS

## WHAT'S LEGAL -V- WHAT'S RIGHT

- "Community standards and expectations".
- AFCA – a definition of "Fairness".
- Would the industry benefit from less input from regulators and lawyers and more contribution from behavioural scientists, psychologists and ethicists?
- In hindsight, were there better ways to solve the problems?

# A CHANGE OF ERA: THE EXTERNALS

## THE CHALLENGE OF CULTURE

- *“...there is no single ‘best practice’ for creating or maintaining a desirable culture, but one necessary aspect of a desirable culture is adherence to the basic norms of behaviour that I have described elsewhere in this Report:*
  - *obey the law;*
  - *do not mislead or deceive;*
  - *act fairly;*
  - *provide services that are fit for purpose;*
  - *deliver services with reasonable care and skill; and*
  - *when acting for another, act in the best interests of that other.”*
- *“...every financial services entity, whether examined in a case study or not, must look at its own conduct and the way in which it governs itself”*

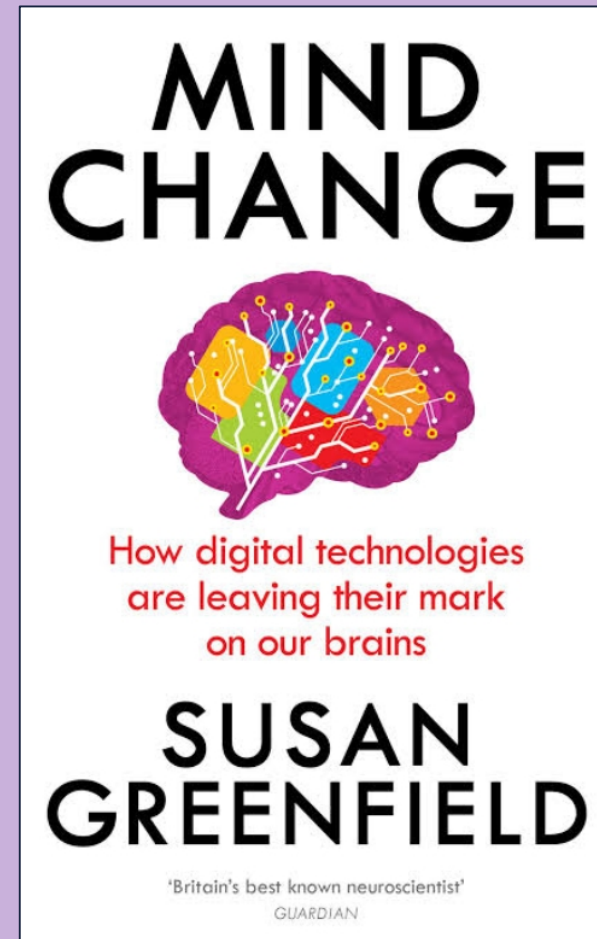
*Final Report – Financial Services Royal Commission, Vol. 1 (2019)*



# A CHANGE OF ERA: THE INTERNALS

More complex than you think?

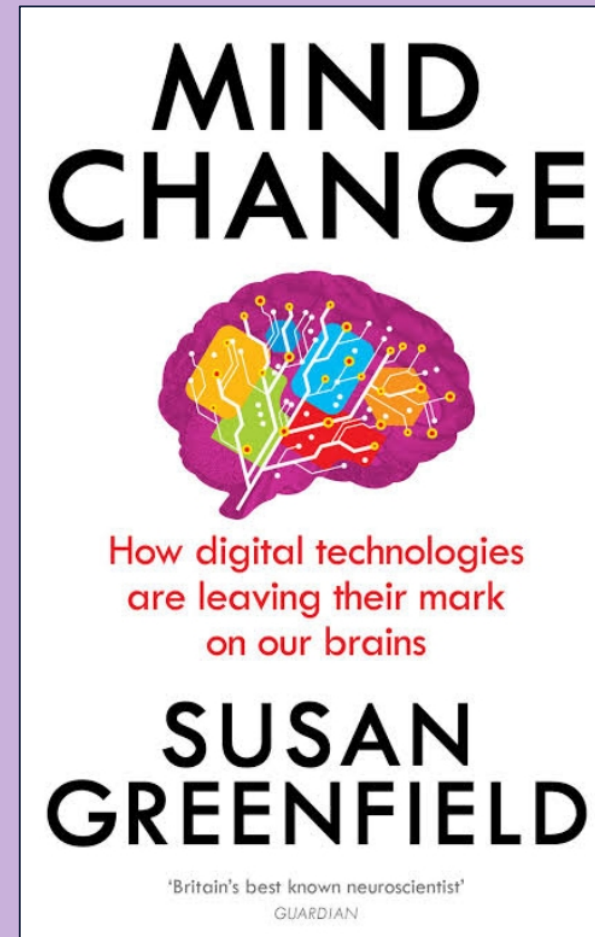
- A new era brings new challenges AILA, the law and insurance.
- *“The argument underlying Mind Change goes like this: the human brain will adapt to whatever environment in which it is placed; the cyber world of the 21<sup>st</sup> century is offering a new type of environment: the brain could therefore be changing on parallel, in corresponding new ways. To the extent that we can begin to understand and anticipate these changes, positive or negative, we will be better able to navigate this new world. So let’s probe further into how Mind Change, just like Climate Change, is not only global, ....but also unprecedented, controversial and multifaceted.”*



# A CHANGE OF ERA: THE INTERNALS

## A FEW QUOTES; WORTH THE READ (286 pages)

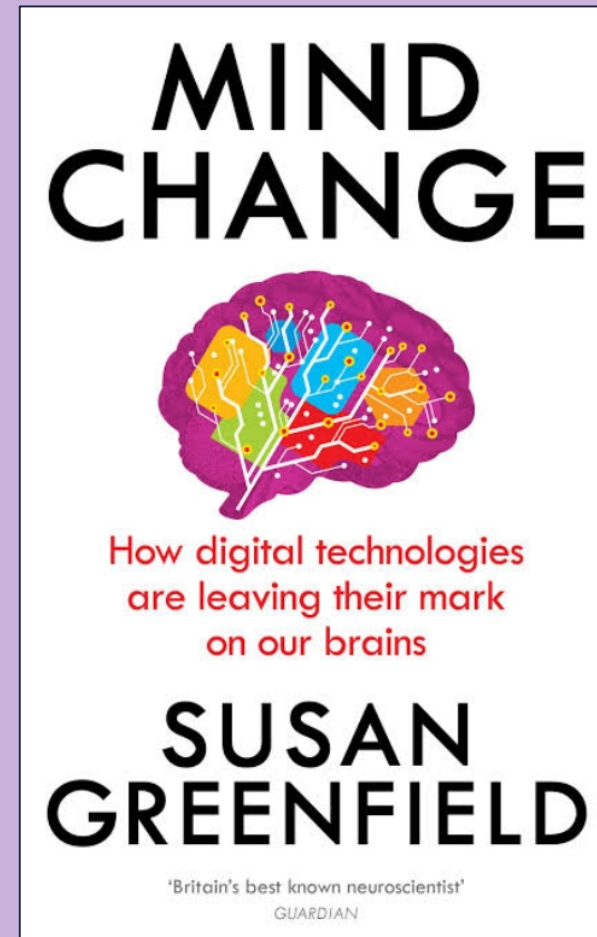
- “...the majority of Facebook , if you haven’t rehearsed the basic non-verbal communication skills of eye contact, voice modulation, body language perception and, above all, physical contact, you’ll not be particularly good at them. And, if so, it **will be harder for you to empathise** with others.....overall levels of empathy may be declining with an especially steep drop in the last ten years – a time frame that corresponds well with the advent of social networking among Digital Natives” p.36
- “While this survey, like all surveys, cannot provide a causal link, the **somewhat eerie correlation** between the **soaring popularity** of social networking sites and the **decline** in empathy is undoubtedly worth considering” p.140
- “...these observations indicate that **excessive internet users have deficits** in the early stage of face perception processing...”p.142



# A CHANGE OF ERA: THE INTERNALS

A FEW QUOTES; WORTH THE READ (286 pages)

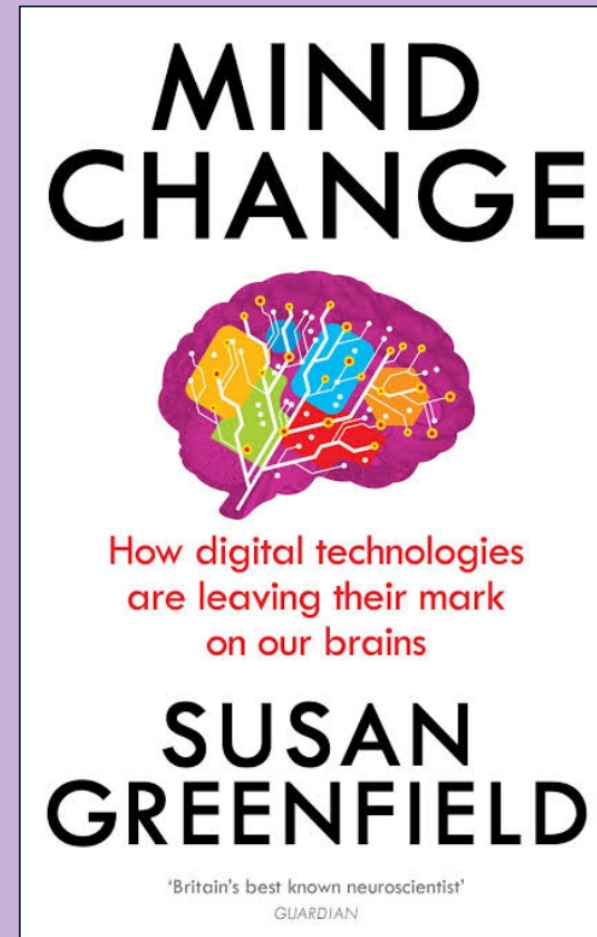
- “The **lack of rehearsal of social skills** might well foretell a decline in deep and meaningful relationships. An important consideration is that a preference for online rather than face-to-face communication **could result in greater distrust** of people. After all, **trust grows from empathy**, which in turn is **best established through face-to-face communication and body language.**” P.146
- “Internet Use Disorder” has been included in the fifth edition of Diagnostic and Statistical Manual of Mental Disorders...”p.163



# A CHANGE OF ERA: THE INTERNALS

A FEW QUOTES; WORTH THE READ (286 pages)

- “The critical issue facing us is **how we negotiate a transition** from the old question-rich, answer-poor environment of the twentieth century to make sense of, indeed survive in, the current question-poor, answer-rich environment delivered by fast paced technology. In my view there are three essential factors often overlooked in current education and certainly not necessarily inspired by the current cyber lifestyle. **FIRSTLY, to have a strong sense of one’s own individual identity** (and to respect it in others); **SECONDLY, to have a sense of individual fulfilment**; and **THIRDLY, to be useful to society**. How might these somewhat abstract goals be realised? “p.257
- “There is something that ticks all three boxes: **creativity.....the essence of creativity is simply**
- **seeing something in a new way...**”p.257



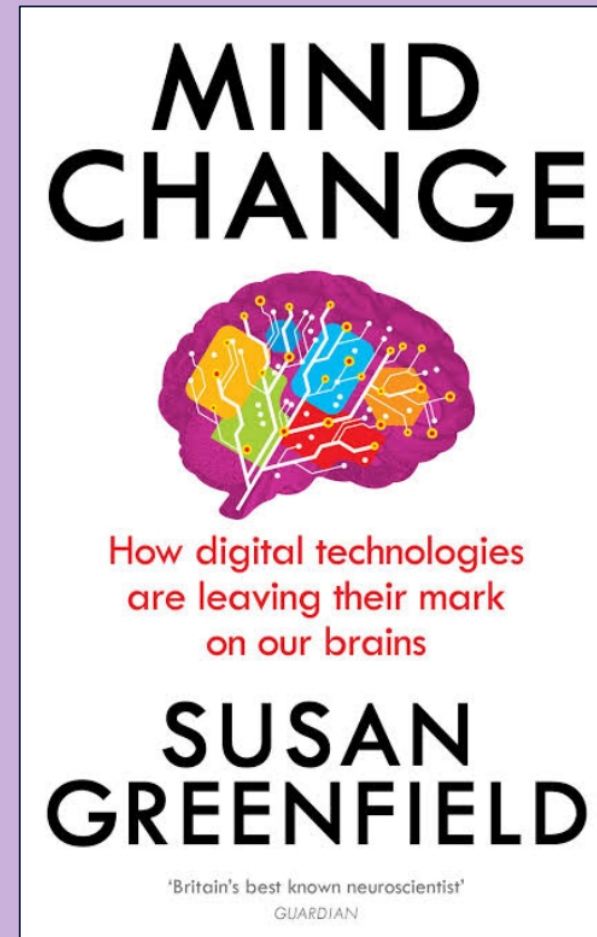


# A CHANGE OF ERA: THE INTERNALS

A FEW QUOTES; WORTH THE READ (286 pages)

- The challenge is to produce an environment which encourages “individuals to **have confidence to question** and deconstruct dogma and traditional views, to **possess the courage** to make new associations without fear of the opinions or cynicism of others.’ P.259

Still **we cannot ignore the real world**. However much digital technologies draw us into their pixelated, frenetic hall of mirrors, this world still **serves as a parallel to the ever present, bulky, three dimensional environment in which even the geekiest technophiles still have to exist”** p.260



# Take confidence from others



*"Imagination is more important than knowledge. Knowledge is limited. Imagination encircles the World."*

Albert Einstein

# Take confidence from others



*"Some men see things as they are and say why. I dream things that never were and say why not."*

Senator Robert Kennedy

Thank you