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CHAPTER

18 Australia in the International Order

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Abstract

This chapter offers an account of Australia's engagement with the international legal order, through different aspects of the relationship: designing international institutions, litigating in the World Court, and implementing international standards. These are only fragments of the full picture, but they illustrate both Australia's embrace of and distancing from the international legal order. Australia's relationship with the international legal order overall is marked by a deep strand of ambivalence. It has played both the part of a good international citizen as well as that of an international exceptionalist. In some fields, Australia has engaged creatively in international institution-building, even if with a wary eye to protect certain Australian interests. In other areas, particularly human rights, the relationship is distinctly uneasy, with Australia appearing to believe that international standards should regulate others and that it is somehow above scrutiny.

Keywords: [international legal order](#), [international institutions](#), [World Court](#), [international standards](#), [international exceptionalism](#), [human rights](#)

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THE major subject of the international legal order is the nation state. Statehood is a closely monitored category, requiring both conformity with a set of requirements (a permanent population; a defined territory; government; and capacity to enter into relations with other states) as well as recognition by other states.¹ As Anne Twomey's chapter 4 'Independence' explains, the precise point at which Australia achieved this status is unclear. The Australian colonies had begun to enter into postal treaties with other states in the 1870s, but the Imperial government held firmly onto power to negotiate non-commercial, political treaties on the basis of the need for Imperial unity.² This led to tension with some Colonial politicians, notably Alfred Deakin, who

complained that the Imperial government did not take the interests of the colonies seriously enough, particularly with respect to New Guinea and the New Hebrides.³

p. 426 Federation and the adoption of the Australian Constitution in 1901 were significant steps on the path to independent statehood. The British government, however, continued to retain power over critical aspects of Australia's foreign policy, for example the capacity to enter into treaties. Stephen Donaghue's chapter 10 'International Law' describes the rather muddled debates during the drafting of the Constitution over references to treaties, caused by the drafters' diffidence about taking over treaty-making powers from Britain. By the end of the First World War, Australia, as other Imperial Dominions, began to assert a role in foreign policy. A contemporary observer noted that:

[T]hough the Dominions had had no opportunity of deciding whether or not they should be involved in the war, it was reasonable and just that their views should be considered when the time came for making peace. Their sacrifices in men and money had been so heavy that it would have been most unfair to deny them representation of some type at the Peace negotiations.⁴

Australia signed the Treaty of Versailles as a member of the British Empire and became a party to the Covenant of the League of Nations in 1919, with that document specifically allowing for membership of 'fully self-governing' Dominions and colonies.⁵ There were vigorous objections to the membership of the four British Dominions (Canada, Australia, New Zealand, and South Africa) and India from other countries which saw this as a crude attempt to increase British influence in the League.⁶ Indeed this was one reason for the United States' refusal to ratify the Treaty of Versailles and to become a member of the League.⁷ Australia finally gained independent treaty capacity through the Imperial Conferences of 1923 and 1926.⁸ The British Parliament gave up its power to legislate in a way that bound the Australian Parliament with the adoption of the Statute of Westminster in 1931, thus confirming Australia's status as a sovereign state at international law.

Over the last century Australia's engagement with the international legal order has fluctuated. It was strikingly slow initially to exploit its power to negotiate treaties,⁹ but by the time of the Second World War, it was keen to assert (in Dr H V Evatt's words) its 'full status in every aspect of its external relationships'.¹⁰ In the following decades, Australia played a cautious role internationally, but launched a more profound engagement in the 1970s. Today, Australia is deeply involved in the international legal order, participating in myriad international and regional institutions and treaty regimes. Elsewhere in this volume, Stephen Donoghue analyses this relationship from the perspective of the Australian legal system, pointing out that international law has had a significant, if indirect, influence on the development of Australian law. This chapter focuses by contrast on the perspective of the international legal order, meaning international legal institutions and systems of regulation, and how Australia has engaged with it.

p. 427 Two images recur in discussions of Australia's role internationally, particularly in governmental rhetoric. One is the both descriptive and normative claim that Australia has performed, or should perform, as a 'good international citizen'.¹¹ This usually means that Australia has put aside narrow ideas of national interest in international affairs and become involved in 'problems without passports' that affect the global community, such as poverty alleviation, environmental degradation, and nuclear arms control.¹² The other image is the rather pugilistic one of 'punching above its weight', depicting Australia's valiant role engaged in the international community, contributing more than might be expected as a 'middle' power, somewhere on the spectrum between 'great' or 'super' powers and 'fragile' or 'failing' states.¹³ These images capture some aspects of Australia's relationship to the international legal order, but they also obscure others. Australia is generally prepared to contribute to and accept international legal standards in a wide range of contexts. However, in some areas, it has been reluctant to give them domestic heft, failing to implement international regimes fully in Australian law, particularly if they concern human rights or the rights of refugees. For some commentators, indeed, the undifferentiated category of 'international law' has become a symbol of peril, a source of extravagant and chaotic norms that diminish Australian sovereignty.¹⁴

This chapter offers an account of Australia's engagement with the international legal order, through different aspects of the relationship: designing international institutions, litigating in the World Court, and implementing international standards. These are only fragments of the full picture, but they illustrate both Australia's embrace of and distancing from the international legal order.

A. Australia and International Institution-Building

p. 428 As is typical of middle powers,¹⁵ Australia has been enthusiastic about the formation of international institutions. It participated actively in the drafting of the Covenant of the League of Nations, intervening successfully to resist the recognition of racial equality of members of the League. Japan had proposed amending the draft preamble to endorse 'the principle of equality of Nations and the just treatment of their nationals'. Although the Japanese delegation emphasized that this wording would not restrict the immigration policies of League members, Australia was alarmed.¹⁶ Prime Minister Billy Hughes worried that such a clause would mean that:

Our White Australia Policy would be a pricked bladder. Our control of immigration laws would be so much waste paper. When I first heard of it I could not believe that the [Covenant-drafting] committee would dream of even toying with such a proposal.¹⁷

A majority of nations present at Versailles supported the Japanese proposal, but the Chairman of the Conference, United States President Woodrow Wilson, ruled that the decision should be unanimous and the amendment thus failed. The Australian position unsurprisingly caused significant tension in its relations with Japan.¹⁸

Australia's second major impact on the drafting of the Covenant concerned the terms of the mandate system—the structure for the governance of territories held by the defeated powers in the First World War, Germany and Turkey. Australia was angling for the broadest control possible over the German colonies in the Pacific for which it would be granted a mandate, after an initial bid for annexation of the territories failed.¹⁹ Article 22 of the Covenant of the League of Nations, which established the mandate system, applied to territories 'inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world' and specified three classes of mandates, categorized according to the assumed sophistication of the inhabitants of the territory. Thus Class A mandates (granted, for example, over parts of the Ottoman Empire—Palestine, Mesopotamia, and parts of Syria) allowed simply for advice and assistance to the population 'until such time as they can stand alone'. Class B mandates applied in the case of populations as found, for example, in Togoland, the Cameroons, and German East Africa, and contemplated actual administration of government by the mandatory power, subject to various conditions such as the guarantee of freedom of conscience and religion.

p. 429 Australia was particularly active in the drafting of the terms of Class C mandates, which would apply to smaller, remote, or sparsely populated territories, such as New Guinea. Despite Japan's concerns that an Australian administration would extend the White Australia Policy to New Guinea,²⁰ Billy Hughes, aided by the drafting skills of J G Latham,²¹ finally persuaded the Conference that such territories should be governed directly 'as an integral portion' of the mandatory power. Apart from New Guinea, Australia also administered Nauru under a Class C mandate for the British Empire as formal mandate holder. The mandates were all to be guided by the principle that 'the well-being and development of [the] ... peoples [living in these territories] form a sacred trust of civilisation'.²²

Australia encountered regular criticism over its administration of its mandates in the League's Permanent Mandates Commission. With respect to New Guinea, Australia's main focus was to prevent Japan using the islands as a launching point to attack Australia and it displayed little interest in the welfare of the inhabitants of the territory.²³ During Australia's administration of Nauru under both the League and the United Nations, much

of the territory was mined for phosphate, depleting the land irreparably, and leading in the 1990s to litigation in the International Court of Justice (ICJ), described below.

With the founding of the United Nations, the mandate system was renamed as a system of trusts, under the supervision of the UN Trusteeship Council. Australia's responsibilities with respect to New Guinea and Nauru continued until their independence in 1975 and 1968 respectively, and consistently attracted international criticism for their inattention to the social, economic, and political development of the territories' populations.²⁴

Australia played a modest role in the League of Nations, serving once on the Council in 1934–36, with former Prime Minister Stanley Melbourne Bruce as Australia's delegate. As in the drafting process of the Covenant, Australia's concerns appeared more defensive than creative. Its constant objections to the level of its contributions to the budget of the League gained Australia a reputation for parsimony.²⁵ It also made regular complaints that the League took on too many 'domestic questions which were not truly international in character', such as immigration and customs tariffs.²⁶ Participation in the League, however, transformed Australia's international outlook from that centred on the British Empire to a more global one, providing a valuable 'school for international citizenship' for the young federation.²⁷

p. 430

By 1945, Australia was prepared to play a broader role in the design of the League's successor institution, the United Nations. Led by Australia's Minister for External Affairs, Dr H V Evatt, Australia was an influential participant at the San Francisco conference in 1945 which drafted the UN Charter. Evatt saw this as a chance to compensate for the failures of the League, and championed the interests of smaller states against those of the Great Powers. He ensured that article 2(4) of the Charter, the crucial prohibition on the use of force in international relations, recognized the territorial integrity and independence of individual states.²⁸ Another significant legacy of Evatt's advocacy is the UN's capacity to deal with economic and social problems. The Dumbarton Oaks draft, prepared by the Great Powers in 1944 and discussed at San Francisco, had focused on political responses to threats to peace above all and, while the draft proposed the establishment of an Economic and Social Council, it was relegated to subsidiary status. Evatt dismissed the Dumbarton Oaks proposal as 'anaemic' and argued at San Francisco for greater attention to international economic and social co-operation, particularly full employment, as the basis for peace.²⁹ Although the Great Powers were distinctly cool towards his crusade, Evatt managed to negotiate principal organ status for the Economic and Social Council (ECOSOC).³⁰ His advocacy resulted in the insertion of a pledge in the Charter that UN member states would take action to achieve, in co-operation with the UN, 'higher standards of living, full employment, and conditions of economic and social progress and development' and 'solutions of international economic, social, health, and related problems'.³¹

Evatt also spearheaded a campaign by smaller states to restrict the clout of the Great Powers who were to be permanent members of the Security Council. The Great Powers' draft presented at San Francisco had allocated the power to vote against non-procedural decisions of the Security Council to the permanent members, with a negative vote operating as a veto. The veto would apply to decisions taken under both Chapter VI (peaceful settlement of disputes) and Chapter VII (maintenance of international peace and security) of the Charter. Australia was willing to tolerate a veto with respect to the latter category of decisions, involving serious measures such as the imposition of sanctions or the use of force, on the basis that such decisions would be rare, but not with respect to the broader category of peaceful dispute resolution which would be the bread and butter of Security Council work.³² Despite Evatt's energetic fight against the Great Power proposal, it ended up being retained in the Charter because of the Great Powers' threat to abandon the Conference if the veto power was confined to Chapter VII decisions.³³

p. 431

Evatt was more successful in shoring up the powers of the UN General Assembly so that it could act when Security Council action was obstructed by the veto. The Dumbarton Oaks proposals had assigned the General Assembly a role of discussion and recommendation, confined to the maintenance of international peace and

security. Evatt insisted that the Assembly, with its universal membership, was ‘the most democratic Organ of the United Nations’.³⁴ It was thus appropriate for it to consider any matters falling within the scope of the UN Charter and make recommendations on them. The Great Powers resisted this expansion, but Evatt was able finally to craft an acceptable provision, now contained in article 10 of the Charter.³⁵ It authorizes the General Assembly to ‘discuss any questions or any matters within the scope of the ... Charter or relating to the powers and functions of any organs [established in the] Charter’, unless the Security Council is simultaneously dealing with the matter as part of an international dispute.³⁶

Australia’s great sensitivity with respect to its immigration policies influenced some of its positions in San Francisco. The Australian delegation strongly supported the inclusion in the Charter of an explicit statement that the UN was not authorized ‘to intervene in matters which are essentially within the domestic jurisdiction of any state’.³⁷ The delegation thus hoped to protect Australia’s White Australia Policy from international scrutiny, and the possibility that the policies might be considered a threat to peace.³⁸

Since 1945, Australia’s engagement with multilateral politics within the UN has ebbed and flowed. The election of a conservative government in 1949 led to a distancing from the organization, and an emphasis on the preservation of domestic matters from UN scrutiny. This approach extended to Australia voting against General Assembly resolutions during the 1950s condemning the practice of apartheid in South Africa on the basis that this was an issue of domestic jurisdiction.³⁹ The enlargement of UN membership as a result of decolonization also reduced the status of the organization in Australian eyes. Prime Minister Menzies indeed suggested that Australia needed to be protected from the UN and that he would not have ‘the citizens of Australia dictated to by the burghers of the Chad and Upper Volta’.⁴⁰ As discussed below, the Whitlam government, elected in 1972, offered a distinct change in attitude towards the international order, and this was largely continued by the Fraser Coalition government (1975–83). Later Australian governments have oscillated in their engagement with the international legal order but have had to confront its increasing reach and complexity.⁴¹

Australia has been elected as a non-permanent member of the Security Council on five occasions (1946–47, 1956–57, 1973–74, 1985–86, and 2013–14).⁴² Australia has displayed particular interest in improving the governance of the UN and streamlining its operations.⁴³ It has consistently supported UN peacekeeping, being engaged from the very start of this activity in 1947 when the UN Security Council established a Consular Commission to monitor the ceasefire between Indonesian and Dutch forces.⁴⁴ Australia made significant contributions to the UN Transitional Authority in Cambodia (1992–23) and the UN Transitional Administration in East Timor (2000–02). Its diplomats have been critical to the conclusion of multilateral instruments in many areas, including the law of the sea, Antarctica, international humanitarian law, and arms control.⁴⁵

Australia’s internationalist and multilateral orientation has been strained on occasion by its alliance with the United States. One example is Australia’s participation in the invasion of Iraq in 2003 as a member of a ‘Coalition of the Willing’, led by the United States. Prime Minister Howard acknowledged the United States alliance as ‘unapologetically a factor’ in this decision.⁴⁶ The Coalition bypassed the collective security system established under Chapter VII of the UN Charter. Although members of the Coalition issued legal justifications for their actions,⁴⁷ without explicit approval by the UN Security Council the invasion was widely regarded as illegal as a violation of the prohibition on the use of force in international affairs under article 2(4) of the UN Charter.⁴⁸ Shortly after the invasion, Australia’s Foreign Minister, Alexander Downer, condemned multilateralism in the context of security as ‘a synonym for an ineffective and unfocussed policy involving internationalism of the lowest common denominator’.⁴⁹ And Prime Minister Howard later described Australia’s participation in the invasion of Iraq as a triumph of substantive values over empty formalism,⁵⁰ implying the insignificance of the UN in such contexts.

On other occasions, Australia has participated in international institutions, even in the face of considerable pressure from the United States not to do so. It seems more ready to resist its ally’s urgings when legal

institutions are involved. The Australian government was a major player in negotiations during the 1990s to establish a permanent International Criminal Court, finally achieved in 1998 with the adoption of the Rome Statute.⁵¹ The Court allows individuals to be held accountable for egregious human rights violations, such as genocide, war crimes, and crimes against humanity, if the relevant national legal systems are unable or unwilling to prosecute such behaviour. The United States' opposition to the Court rested on a fear that it would be used to target members of the American military. The United States brought pressure to bear on Australia not to become a party to the Rome Statute establishing the Court, but Australia eventually did so, despite considerable dissension within the Coalition government on the issue.⁵² Australia's acceptance of the Court's jurisdiction is, however, limited. Although the Rome Statute prohibits reservations, Australia appended a declaration to its ratification to the effect that no Australian could be tried by the Court without the approval of the Australian government.⁵³ Prime Minister Howard explained this as a mechanism to preserve Australian sovereignty.⁵⁴

After Australia's ratification of the Rome Statute, the United States launched a diplomatic campaign to persuade Australia to enter into an agreement under article 98 of the Rome Statute. Article 98 prevents the Court from requesting surrender of a person or any assistance from a party to the Statute if that would require the requested state to breach any international legal obligations. The United States has negotiated a series of bilateral immunity agreements with over ninety states parties precluding the latter from co-operating with the Court in relation to United States nationals, thus triggering the protection of article 98. Despite intense pressure, and some wavering by the Coalition government,⁵⁵ Australia has not yet acceded to the American request.

B. Australia and the World Court

The Covenant of the League of Nations directed the Council of the League to draw up plans for the establishment of a Permanent Court of International Justice (PCIJ).⁵⁶ The original draft of the Court's statute provided for compulsory jurisdiction over disputes between states. Australia strongly resisted this proposal, in part because of 'the bugbear of League interference in the White Australia Policy'.⁵⁷ In the end a system of optional adherence to the Court's statute was devised⁵⁸ and Australia accepted the Court's jurisdiction in 1929, along with Great Britain and the other Dominions. The instrument of acceptance excluded a number of categories of dispute, including disputes with other members of the British Commonwealth and disputes falling within domestic jurisdiction.⁵⁹

Australia accepted the jurisdiction of the PCIJ's successor, the ICJ, in 1954. It attached a series of reservations to its acceptance. Two were identical to those referred to above in the context of the PCIJ; another related to disputes occurring in times of hostilities; and, in anticipation that Japan might bring a case against it over a dispute about pearl fishing off the Western Australian coast, Australia restricted disputes about the continental shelf from the ICJ's jurisdiction.⁶⁰ In 1975, Prime Minister Gough Whitlam realized his longstanding ambition for Australia to accept the Court's jurisdiction without a substantive reservation.⁶¹ This position changed in 2002, when Australia again amended its acceptance to preclude the ICJ hearing a variety of disputes, most notably those relating to the delimitation or exploitation of maritime zones,⁶² in order to fend off litigation with East Timor over the distribution of resources in the Timor Gap.

Australia has been a remarkably regular litigant before the ICJ, bringing two cases as applicant, and defending three cases as respondent. The first Australian appearance as a party in the ICJ was in the *Nuclear Test* cases, brought by the Whitlam government against France in 1973, on the basis that France's conduct of atmospheric nuclear testing in the Pacific Ocean breached international law. New Zealand filed a similar case against France at the same time. France challenged the Court's jurisdiction and refused to participate. Australia and New Zealand first successfully sought interim measures from the ICJ on the basis that the next round of

French testing was to take place two months after the proceedings were instituted. The French continued their testing programme, but made statements to the effect that France intended to replace its atmospheric tests with underground ones, once the current round of atmospheric tests had been concluded. Over the strong objection of Australia's ad hoc judge, Sir Garfield Barwick, the Court held that the case had become moot. It found that the statements by French officials constituted a binding, if unilateral, commitment to end the atmospheric tests.

In 1989, Nauru launched a case against Australia over the latter's failure to fulfil its obligations as international administrator, first as a mandate holder under the League of Nations and then as a trustee under the UN. Nauru argued that Australia should compensate Nauru for the damage caused during Australia's administration, particularly the devastation of its phosphate lands. Australia challenged the admissibility of the case on the basis, first, that Nauru had waived any claims to land rehabilitation when the phosphate industry was transferred to Nauruans in 1967; second, that the termination of the UN trusteeship on Nauru's independence in 1968 had effectively discharged any Australian responsibility; and third, that, as the mandate and trusteeship had been held jointly with New Zealand and the United Kingdom, the case implicated these countries' liability without their consent. The Court rejected all these challenges, and decided that it had jurisdiction to proceed with the case. At this stage, Australia negotiated an agreement with Nauru to settle the action, and obtained financial contributions from both New Zealand and the United Kingdom towards the settlement.⁶³

Australia was again respondent to an action in the ICJ in the East Timor case launched in 1991. Portugal instituted the action on the basis that Australia had negotiated with Indonesia to determine maritime boundaries in the Timor Sea, thus ignoring Portugal's interest as the UN-recognized Administering Authority of Timor. Portugal also argued that Australia's actions violated the rights of the Timorese people to self-determination and to permanent sovereignty over its wealth and natural resources. Indonesia had not accepted the optional jurisdiction of the Court and so could not be pursued by Portugal in that forum. Australia entered preliminary objections to Portugal's case to the effect that Indonesia was the proper respondent, and that the resolution of the dispute required determination of the legality of Indonesia's sovereignty over East Timor. The challenge to admissibility was heard at the same time as arguments on the merits of the case. While the Court recognized the right of the Timorese people to self-determination as an *erga omnes* norm, it endorsed Australia's position that Indonesia was an indispensable party to the dispute. Thus the Court could not proceed to determine the issues in the case without Indonesia's acceptance of its jurisdiction.

In 2010, Australia instituted a second case in the ICJ, challenging Japan's whaling programme in the Southern Ocean. This litigation had been foreshadowed in the Labor Party's platform ahead of the 2007 election of the Rudd government. Japan had long insisted that its activities constituted scientific research, a category of whaling contemplated under article VIII of the International Convention on the Regulation of Whaling of 1946. Australia's argument was that the nature and scale of the Japanese whaling programme meant that it could not be considered a form of scientific research. New Zealand intervened in the case to support Australia's position. The Court decided that, while Japan's whaling programme included activities that constituted scientific research, the programme was not designed or carried out in a way that could reasonably achieve the stated scientific objectives. For this reason, Japan's whaling permits could not be said to be 'for purposes of scientific research' within article VIII.⁶⁴ The Court ordered Japan to revoke existing permits it had issued authorizing whaling and to refrain from granting any new permits under the Antarctic programme.⁶⁵

In the wake of the Court's decision issued in 2014, Japan suspended its whaling programme in Antarctic waters. The following year, however, Japan altered the terms of its acceptance of ICJ jurisdiction to exclude 'any dispute arising out of, concerning, or relating to research on, or conservation, management or exploitation of, living resources of the sea'.⁶⁶ Japan has since launched a modified scheme of whaling in the Southern Ocean causing friction with Australia and the international community. Prime Minister Malcolm Turnbull has nevertheless downplayed the prospect of further international litigation on this matter, declaring that diplomatic solutions are preferable.⁶⁷

p. 437

The fifth case in which Australia has been involved at the ICJ is the *Seizure and Detention of Certain Documents and Data* case. Timor-Leste sought provisional measures against Australia to force Australia to return documents relating to an international arbitration on maritime delimitation that had been taken from the Canberra office of Timor's lawyer in 2013. Timor argued that Australia had violated its right to communicate with its lawyers confidentially on matters related to resolution of a dispute between the two countries. Australia resisted the Timorese application and urged the Court to accept its undertakings that the documents would not be made available to people involved in the arbitration. It, however, reserved the right to use the seized material for 'national security purposes'. The ICJ granted the request for provisional measures, requiring Australia to ensure that the seized material not be used to the disadvantage of Timor until the Court proceedings were concluded; that the documents and data be kept under seal; and that Australia refrain from interfering in communications between Timor-Leste and its legal advisers in any matters involving maritime delimitation. The Court set a date for the hearing of the merits of the case, but Australia and Timor-Leste sought an adjournment. The case was removed from the Court's list in 2015 at Timor's request once Australia returned the seized material, still under seal.⁶⁸

Australia, then, has had considerable exposure to the ICJ. It has been suggested that middle powers tend to show more interest in the World Court than powerful states, because the former rely less on might and more on law in international dispute resolution.⁶⁹ Australia's experience as a respondent in three cases brought by or on behalf of its small neighbours, Nauru and Timor, suggests that its comparative regional power can equally be restrained by resort to the Court. While Australia considers itself a model international law-abiding state,⁷⁰ the Phosphate Lands and Seizure cases, although not proceeding to decisions on the merits, indicate that Australia's self-image may not be widely shared, at least in the region.

p. 438

Two Australians have been elected as members of the ICJ. Sir Percy Spender was elected to the ICJ in 1958 and served nine years on the Court, the last three as President. His controversial use of the President's casting vote to deny Ethiopia and Liberia standing to challenge South Africa's administration of South West Africa (now Namibia) in 1966,⁷¹ stymied Australia's later nomination of Sir Kenneth Bailey for election to the Court.⁷² In 2015 Professor James Crawford was elected for a nine-year term. As no Australian judge was a member of the Court at the relevant times, Australia has appointed ad hoc judges in four of the five cases in which it was involved.⁷³

C. Implementing International Law: The Case of Human Rights

Australia has implemented many provisions of international law without controversy. Treaties concerning taxation, postal, and aviation arrangements for example have significant domestic implications but attract little domestic attention. In the area of trade and investment law, Australian governments have entered into both bilateral and multilateral treaties that regulate many areas of local activity. The protection of human rights has become an area of acute contention in the implementation of international law in Australia, contrasting with the active role that Australia has played at the international level in the design of the international human rights system. As Australia's Minister for External Affairs, Dr H V Evatt ensured the inclusion in the UN Charter of the primary purpose of 'promoting and encouraging respect for human rights and for fundamental freedoms for all'.⁷⁴ Evatt was similarly a strong supporter of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948 while Evatt was President of the General Assembly. The early Australian interest in the design of international human rights standards was, however, deferential to Australian domestic policy. Like Billy Hughes at Versailles, Dr Evatt was particularly chary of any international statements on the right to racial equality, concerned that this might affect Australia's restrictive immigration policies.⁷⁵

Australia initiated a four-year campaign for an International Court of Human Rights at the 1946 Paris Peace Conference and continued it later in the UN Commission on Human Rights. Australia argued that international judicial pronouncements were more likely to encourage state compliance with human rights than political action. The proposal foundered on the resistance of the permanent members of the Security Council to what was perceived as a violation of state sovereignty.⁷⁶ Australia also was closely involved in the drafting of later treaties ↪ that translate the commitments of the Universal Declaration into binding obligations for states that accept them, including two general treaties (the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), both adopted in 1966) and a range of specific treaties covering particular rights or particular categories of people (eg, the Convention on the Rights of Persons with Disabilities of 2006).⁷⁷

p. 439

International instruments dealing with the human rights of Indigenous Peoples have been treated warily by Australia. It has not ratified the relevant International Labour Organization (ILO) conventions, and participated in the twenty-year negotiation process for the UN Declaration on the Rights of Indigenous Peoples,⁷⁸ often to advocate a restricted definition of the right to self-determination in order to preclude the possibility of secession. The UN General Assembly finally adopted the Declaration in 2007, with Australia taking the unusually strong step of voting against it, together with Canada, New Zealand, and the United States. The four countries objected to the scope of the right to self-determination in the Declaration as well as its requirement of the consent of Indigenous Peoples to certain decisions affecting them, and its elaboration of rights relating to land, territory, and resources.⁷⁹ The Rudd Labor government withdrew Australia's negative vote in 2009.

Australia ratified some human rights treaties in the post-Second World War period, such as the Convention on Genocide, however, by the late 1950s until the early 1970s its interest in the international human rights system waned.⁸⁰ For example, it signed, but did not ratify, the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1966, and did not sign either the ICCPR or the ICESCR. This inactivity was explained as the product of the Australian federal system in which the Australian States rather than the Commonwealth had legislative power over many issues dealt with in human rights treaties.⁸¹ Despite this concern, the Labor government led by Gough Whitlam, elected in 1972, moved to accept a number of international human rights treaties, enacting the *Racial Discrimination Act* that approved ratification of, and implemented, ICERD in 1975. It also signed the two Covenants but did not move to ratify them on the cautious basis that they were not yet in force internationally. The Fraser Coalition government ratified the Covenants in 1976 (ICESCR) and 1980 (ICCPR).⁸² Australia has ↪ now accepted seven of the nine 'core' international human rights treaties adopted by the United Nations.⁸³

p. 440

Whitlam's bold approach to the international human rights system was vindicated by the High Court's 1982 decision in *Koowarta* which upheld the validity of the *Commonwealth Racial Discrimination Act 1975* in the face of a challenge by Queensland. The *Koowarta* decision affirmed that the constitutionality of federal human rights legislation depends largely on the Commonwealth's power to legislate with respect to 'external affairs'.⁸⁴ In 1983 the High Court reinforced the power of the Commonwealth to override State legislation to ensure that Australia complied with its international obligations in the *Tasmanian Dam* case.⁸⁵ In this sense, national protection of human rights in Australia is closely connected to the scope of the international legal system.

Australia has participated in the UN systems for human rights monitoring, but there have been periods of acute tension. Australia's periodic reports to human rights treaty bodies have prompted a consistent catalogue of concerns in the treaty bodies' Concluding Observations. These include the disadvantaged situation of Australia's Indigenous Peoples, the treatment of asylum-seekers, the reach of counter-terrorism legislation, excessive use of force by the police, the rights of prisoners, and high rates of homelessness.⁸⁶ The reporting mechanism has not, however, proved a strong form of regulation of Australia's human rights performance. On one occasion, indeed, it led to a rupture in Australia's relationship with the international human rights system. In 2000, the Concluding Observations of the Committee on ↪ the Elimination of Racial Discrimination on Australia's report praised many legislative and policy measures designed to reduce the incidence of racial

p. 441

discrimination in Australia, but also expressed concern about a range of forms of discrimination against Aboriginal and Torres Strait Islander People.⁸⁷ The Commonwealth government rejected the Committee's views, calling them 'an unbalanced and wide-ranging attack that intrudes unreasonably into Australia's domestic affairs'. The Attorney-General, Minister for Foreign Affairs, and Minister for Immigration issued a joint statement:

We are seriously disappointed about the Committee's comments on race relations in Australia. The Committee has apparently failed to grapple with the unique and complex history of race relations in Australia. It has paid scant regard to the Government's input and has relied almost exclusively on information provided by non-government organisations. This is a serious indictment of the Committee's work. It is unacceptable that Australia, which is a model member of the UN, is being criticised in this way for its human rights record.⁸⁸

As a result of this incident, the government reduced its engagement with the human rights treaty bodies. While there has since been some rapprochement between Australia and the UN treaty bodies, the latter's Concluding Observations have had little effect on Australian policy and law.

p. 442 Unlike the system of periodic reports, which applies to all treaty parties, States have an option to accept the possibility of the treaty bodies considering complaints from individuals alleging that the State has breached the terms of the treaty, if all local remedies have been exhausted. Australia has agreed to such mechanisms in relation to some of the human rights treaties to which it is a party: the ICCPR,⁸⁹ ICERD,⁹⁰ CEDAW,⁹¹ and the CRPD.⁹² This has led to a number of international decisions on Australia's record of human rights protection. The first was that of the UN Human Rights Committee in 1992 declaring Tasmanian laws that criminalized male homosexuality to be inconsistent with human rights.⁹³ The Commonwealth government then legislated to override the relevant provision of the *Criminal Code Act 1924* (Tas).⁹⁴ *Toonen* is, so far, the high water mark of Australia's engagement with the views of the UN treaty bodies. As at March 2017, the treaty bodies have heard 113 cases concerning Australia, seventy of which have been upheld by the relevant Committee.⁹⁵ Australia's violations of human rights have been found to include the mistreatment of children in immigration detention, inhumane treatment of prisoners, the denial of the right to family life, and undue trial delay. The standard Australian response to the views of the human rights treaty bodies is to note first that Committees are not courts and that their views are non-binding, and to then simply reject the relevant Committee's views on the application of the law. Sometimes Australia explicitly invokes its sovereignty as a reason to reject Committee findings. This antagonistic approach is at odds with Australia's formal recognition of the competence of the treaty bodies to consider communications through its acceptance of the relevant mechanisms. It is noteworthy that Australia does not publish or publicize adverse views of the human rights treaty bodies.

While Australian governments have generally been willing to accept international human rights obligations by becoming party to treaties, they have been less interested in legislation to implement these obligations into Australian law. For example, while the Commonwealth government has enacted laws dealing specifically with race, sex, and disability discrimination, based on the relevant international instruments, it has not implemented broader catalogues of rights, such as those contained in the ICESCR, the ICCPR, and the CROC.

p. 443 There have been attempts over the past four decades to adopt an Australian bill of rights based on international standards. All have failed because of intense political opposition, based either on preservation of State legislative powers and/or on a faith in Parliament's capacity to protect human rights.⁹⁶ International human rights law has had a direct impact at State and Territory level through the adoption of the ACT's *Human Rights Act 2004* and the Victorian *Charter of Human Rights and Responsibilities 2006*. These legislative bills of rights largely implement the rights contained in the ICCPR, although the ACT *Human Rights Act* has been amended to include some rights protected by the ICESCR.⁹⁷

Successive Australian governments have argued that international human rights principles are protected adequately under existing State and Commonwealth laws or implied that Commonwealth legislative power is limited in this field. From an international legal perspective, a State's internal organization cannot justify breaches in international law. This principle is codified in the Vienna Convention on the Law of Treaties.⁹⁸ Nevertheless, Australia has regularly invoked its federal structure as an impediment to its interactions with the international legal order. This practice was launched when Australia became a member of the ILO in 1919, but considered itself unable to ratify many ILO conventions as they covered matters within the jurisdiction of the Australian States. An agreement between the States and the Commonwealth provided that all States must agree to ratification before the Commonwealth formally committed to the relevant convention.⁹⁹ Australia was, however, prepared to ratify conventions that were clearly within the competence of the Commonwealth government, including treaties dealing with seamen and the inspection of emigrants.

A modern manifestation of Australia's deference to its federal structure is Australia's 'federal clause' attached to the ICCPR. Australia included this 'declaration' along with a set of specific reservations at the time of ratification in 1980. The declaration states:

Australia has a federal constitutional system in which legislative, executive and judicial powers are shared or distributed between the Commonwealth and the constituent States. The implementation of the treaty throughout Australia will be effected by the Commonwealth, State and Territory authorities having regard to their respective constitutional powers and arrangements concerning their exercise.

p. 444 The status of the declaration is unclear at international law, unlike a reservation, which modifies a party's obligations under a treaty.¹⁰⁰ In any event, since the Australian High Court's decisions in *Koowarta* and *Tasmanian Dams*, the declaration has lost any salience as the Commonwealth's power to enter into treaties that impinge on the powers of the Australian States is now undoubted.

Perhaps the most explicit Australian rejection of the international human rights system can be found in the area of refugee protection. In the wake of High Court decisions that international obligations under the Convention Relating to the Status of Refugees,¹⁰¹ even if unincorporated in Australian law, could nevertheless shape the interpretation of the *Migration Act 1958*, the Commonwealth government legislated to allow decision-making that violates international law.¹⁰² Thus the Minister's exercise of discretion in respect of asylum-seekers may be inconsistent with Australia's obligations under the Convention. For example, amendments to the *Migration Act* stipulate that Australia's *non-refoulement* obligations are irrelevant to decisions made under section 198, which provides for the removal of unlawful non-citizens in Australia.¹⁰³

Despite Australia's history of support for the international human rights system, the implementation of international human rights standards in Australia forms a bedraggled patchwork. It is coloured by a form of exceptionalism, suggesting that human rights standards are relevant for other countries, but not for the 'gold-plated' version of democracy enjoyed in Australia.¹⁰⁴

D. Conclusion

p. 445 Australia's constitutional fabric has been affected by the country's international legal life, with its enthusiasms, its cautions, and its selectivity. And features of the Australian Constitution, such as federalism and the paucity of references to human rights, in turn have shaped Australia's ventures beyond its borders. Since federation the possibility of international regulation of migration policies has been a particularly sensitive issue for Australia.

Australia's interest in the international legal system has tended to vary according to the political party in power. Generally speaking, Labor governments have taken a cosmopolitan attitude and Liberal-National

Coalition governments a sceptical one towards international institutions and laws. Conservative governments have been more attracted to bilateralism. They often invoke the language of sovereignty and national interest to keep the international arena at bay.¹⁰⁵ But there are also significant exceptions to this, for example the Coalition government's support for the ICC, described above. In 2015 the Turnbull government announced campaigns for election to the UN Human Rights Council for the 2018–20 term and to the UN Security Council for the 2029–30 term. Coalition governments have also contemplated far-reaching incursions into Australian life, particularly in the area of bilateral and multilateral trade agreements, such as the Trans-Pacific Partnership.¹⁰⁶ This prompted the Chief Justice of the High Court, Robert French, to warn against the ousting of the jurisdiction of Australian courts in foreign investment disputes and to emphasize concerns of national sovereignty.¹⁰⁷

With respect to recourse to international courts, Labor governments initiated the two cases brought by Australia to the ICJ—the *Nuclear Test* and *Whaling* cases—while Coalition governments have typically expressed a preference for diplomacy to resolve international disputes. Again, there are notable exceptions to this, including litigation against Japan to protect southern bluefin tuna stocks in the UN Law of the Sea Tribunal¹⁰⁸ and participation in the World Trade Organization's dispute settlement system during the life of the Howard Coalition government.¹⁰⁹

p. 446 Australia's relationship with the international legal order overall is marked by a deep strand of ambivalence. It has played both the part of a good international citizen as well as that of an international exceptionalist. In some fields, Australia has engaged creatively in international institution-building, even if with a wary eye to protect certain Australian interests. In other areas, particularly human rights, the relationship is distinctly uneasy, with Australia appearing to believe that international standards should regulate others and that it is somehow above scrutiny.

Notes

- 1 James R Crawford, *The Creation of States in International Law* (2nd edn, OUP 2007) ch 2.
- 2 Melissa Conley Tyler, Emily Crawford, and Shirley V Scott, 'Australia's International Personality: Historical, Legal and Policy Perspectives' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (3rd edn, Lawbook Co 2017) 1.
- 3 *ibid* 3–4.
- 4 A D Ellis, *Australia and the League of Nations* (Macmillan 1922) 10.
- 5 Treaty of Peace between the Allied and Associated Powers and Germany (opened for signature 28 June 1919, entered into force 10 January 1920) [1920] ATS 1, pt I ('The Covenant of the League of Nations') art 1 (hereafter Covenant of the League of Nations).
- 6 Ellis (n 4) 14.
- 7 *ibid*.
- 8 Conley Tyler et al (n 2) 5–7.
- 9 *ibid* 7.
- 10 Dr H V Evatt, Minister for External Affairs, in the House of Representatives, quoted in Conley Tyler et al (n 2) 8.
- 11 Alison Pert, *Australia as a Good International Citizen* (The Federation Press 2014).
- 12 Gareth Evans, 'Good International Citizenship: Values and Interests in Foreign Policymaking' (Address to Sydney Law School, 27 August 2015).
- 13 See, eg, Fergus Hanson, Interview with Kim Beazley, Australian Ambassador to the United States (Australian Naval Institute, 27 June 2016). Conley Tyler et al (n 2) note that, in 2014, Foreign Minister Julie Bishop shifted from middle power language to describe Australia as a 'top 20 nation': at 9.
- 14 See Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 423, 424–25, 434.
- 15 Conley Tyler et al (n 2) 10–11.
- 16 J C Rookwood Proud, *World Peace, The League and Australia* (Robertson & Mullens 1936) 10.
- 17 W M Hughes, *Policies and Potentates* (Angus and Robertson 1950), quoted in J G Starke, 'Australia and Human Rights' in K W Ryan (ed), *International Law in Australia* (2nd edn, Law Book Co 1984) 140. The White Australia Policy was implemented

in the *Immigration Restriction Act 1901* and restricted ‘non-white’ immigration to Australia.

18 Rookwood Proud (n 16) 10.

19 *ibid* 36.

20 *ibid* 10, 37.

21 James Cotton, ‘Australia in the League of Nations: Role, Debates, Presence’ in James Cotton and David Lee (eds), *Australia and the United Nations* (Department of Foreign Affairs and Trade 2012) 2.

22 Covenant of the League of Nations (n 5), art 22.

23 Matthew Jordan, ‘Decolonisation’ in James Cotton and David Lee (eds), *Australia and the United Nations* (Department of Foreign Affairs and Trade 2012) 105.

24 *ibid*. See Antony Anghie, ‘“The Heart of My Home”: Colonialism, Environmental Damage, and the Nauru Case’ (1993) 34 *Harvard International Law Journal* 445.

25 Rookwood Proud (n 16) 14.

26 *ibid* 45.

27 Cotton, ‘Australia in the League of Nations’ (n 21) 1.

28 Timothy L H McCormack, ‘H.V. Evatt at San Francisco: A Lasting Contribution to International Law’ (1990–91) 13 *Australian Yearbook of International Law* 89, 93–94.

29 *ibid* 96. See also John Murphy, *Evatt: A Life* (New South Publishing 2016) 221–22.

30 Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16, ch X.

31 *ibid* arts 55, 56.

32 McCormack (n 28) 103–04; Murphy (n 29) 222, 227–28, 234–35.

33 McCormack (n 28) 103–04.

34 H V Evatt, *The United Nations* (OUP 1948) 19, quoted in McCormack (n 28) 100; Murphy (n 29) 235–36.

35 McCormack (n 28) 100.

36 UN Charter (n 30) art 12.

37 *ibid* art 2(7).

38 Annemarie Devereux, *Australia and the Birth of the International Bill of Human Rights 1946–1966* (The Federation Press 2005) 206–08; Murphy (n 29) 233–34.

39 Alison Pert and Hitoshi Nasu, ‘Australia and International Organisations’ in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (3rd edn, Lawbook Co 2017) 101–02.

40 These are words recorded by Mick Shann, Australia’s acting representative to the UN 1950–51, quoted in Jordan (n 23) 113.

41 See Pert and Nasu, ‘Australia and International Organisations’ (n 39) for a survey of approaches 103–15.

42 For accounts of the first four terms see David Lee, ‘Australia and the Security Council’ in James Cotton and David Lee (eds), *Australia and the United Nations* (Department of Foreign Affairs and Trade 2012) 66. On the 2013–14 term, see John Langmore and Jeremy Farrall, ‘Can Elected Members Make a Difference in the UN Security Council? Australia’s Experience in 2013–2014’ (2016) 22 *Global Governance* 59–77.

43 Roderic Pitty, ‘Australia and UN Reform’ in James Cotton and David Lee (eds), *Australia and the United Nations* (Department of Foreign Affairs and Trade 2012) 379.

44 Moreen Dee, ‘Australia and UN Peacekeeping: Steady and Unwavering Support’ in James Cotton and David Lee (eds), *Australia and the United Nations* (Department of Foreign Affairs and Trade 2012) 228.

45 See Richard Rowe, ‘International Law and Diplomacy: The Art of the Possible’ (2014) 15 *Melbourne Journal of International Law* 318, 320–21.

46 HR Deb 18 March 2003, 12508.

47 See, eg, Bill Campbell, Attorney General’s Department and Chris Moraitis, Department of Foreign Affairs and Trade, Memorandum of Advice on the Use of Force Against Iraq, 12 March 2003 (Australia); Advice from Lord Goldsmith, Attorney-General to Tony Blair, Prime Minister, 7 March 2003, and HL Deb 17 March 2003, vol 646, pt 65, cols WA2–3 (Lord Goldsmith) (UK); Authorization for Use of Military Force Against Iraq Resolution of 2002, Pub L 107–243, 116 Stat 1498 (2002) (US).

48 See also Interview with Kofi Annan, UN Secretary General (BBC World Service, New York, 16 September 2004).

49 Quoted in Hilary Charlesworth, Madelaine Chiam, Devika Hovell, and George Williams, *No Country is an Island: Australia and International Law* (UNSW Press 2006) 16.

50 ‘I’ll Act Without UN Approval: Howard’ *The Age* (16 September 2005).

51 See Rowe (n 45) 323–27.

52 See Charlesworth et al, *No Country is an Island* (n 49) for a detailed account of the lengthy process.

53 See Charlesworth et al, *No Country is an Island* (n 49) 80.

54 *ibid* 79.

55 See Andrew Byrnes, ‘Australia and International Criminal Law’ in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (3rd edn, Lawbook Co 2017) 221.

56 Covenant of the League of Nations (n 5) art 14.

57 Rookwood Proud (n 16) 29.

58 Statute of the Permanent Court of International Justice (opened for signature 13 December 1920, entered into force 16 December 1920) 6 LNTS 390 (amended by the Protocol of 14 September 1929) art 36.

59 The instrument ('Terms of Signature of Great Britain and Dominions to Optional Clause of the Permanent Court of International Justice') is contained in Appendix 2 in Rookwood Proud (n 16) 67–68.

60 Henry Burmester, 'Australia and the International Court of Justice' (1996) 17 Australian Yearbook of International Law 19, 31.

61 The one reservation entered by Australia was a procedural one, with respect to 'any dispute in regard to which the parties have agreed or shall agree to have recourse to some other method of peaceful settlement'.

62 Australian Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice (22 March 2002) <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=AU>> accessed 30 May 2017.

63 Agreement between Australia and the Republic of Nauru for the Settlement of the Case in the International Court of Justice concerning Certain Phosphate Lands in Nauru (entered into force 20 August 1993) 1770 UNTS 379.

64 Whaling in the Antarctic (*Australia v Japan: New Zealand Intervening*) (Judgment) [2014] ICJ Rep 226 [227].

65 *ibid* [245].

66 Japanese Declaration under Paragraph 2 of Article 36 of the Statute of the International Court of Justice (6 October 2015) <<http://www.icj-cij.org/jurisdiction/?p1=5&p2=1&p3=3&code=JP>> accessed 30 May 2017.

67 Stephanie Anderson, 'Turnbull uses Japan Speech to Voice "Disappointment" over Whaling Program' *ABC News* (18 December 2015) <<http://www.abc.net.au/news/2015-12-18/australia-disappointed-that-japan-has-resumed-whaling,-turnbull/7041052>> accessed 30 May 2017⁴¹.

68 International Court of Justice, 'Questions relating to the Seizure and Detention of Certain Documents and Data' (Timor-Leste v Australia) (Press Release, No 2015/15, 12 June 2015).

69 See, eg, Geoffrey Palmer, 'The ICJ in the Asia Pacific Region' in Margaret Brewster and Ivan Shearer (eds), *Colloquium to Celebrate the 50th Anniversary of the International Court of Justice* (International Law Association 1996) 55.

70 See, eg, Burmester, 'Australia and the ICJ' (n 60) 21: 'Australia's general commitment to acting in accordance with international law means that the possibility of [ICJ] action is usually not of major concern'. See also 32–33.

71 South West Africa (*Ethiopia v South Africa; Liberia v South Africa*) (Second Phase) [1966] ICJ Rep 6.

72 James Crawford, "'Dreamers of the Day": Australia and the International Court of Justice' (2013) 14 Melbourne Journal of International Law 520, 537; Burmester, 'Australia and the ICJ' (n 60) 28–29.

73 Sir Garfield Barwick (both Nuclear Test cases), Ian Callinan (Questions relating to the Seizure and Detention of Certain Documents and Data), Hilary Charlesworth (Whaling in the Antarctic), Sir Ninian Stephen (East Timor).

74 UN Charter (n 30) art 1(3).

75 Devereux (n 38) 180–88.

76 See *ibid*.

77 Devereux, *Australia and the Birth* (n 38); Colin Milner, 'Human Rights and International Law' in James Cotton and David Lee (eds), *Australia and the United Nations* (Department of Foreign Affairs and Trade 2012) 341, 344–49.

78 UNGA Res 61/295 (1 September 2007) UN Doc A/RES/61/295.

79 Megan Davis, 'To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous Peoples Five Years On' (2012) 19 Australian International Law Journal 17, 20–23.

80 Devereux (n 38) offers a detailed account of this period.

81 Dominique FJJ De Stoop, 'Australia's Approach to International Treaties on Human Rights' [1970–73] Australian Yearbook of International Law 27, 29–30.

82 For an overview of the actions of subsequent Australian governments in the field of human rights, see also Milner (n 77) 353–71.

83 International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR) (ratified by Australia 13 August 1980); International Covenant on Economic, Social and Cultural Rights (opened for signature 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR) (ratified by Australia 10 December 1975); International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 7 March 1966, entered into force 4 January 1969) 660 UNTS 195 (CERD) (ratified by Australia 30 September 1975); Convention on the Elimination of All Forms of Discrimination Against Women (opened for signature 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (CEDAW) (ratified by Australia 28 July 1983); Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (opened for signature 10 December 1984, entered into force 26 June 1987) 1465 UNTS 85 (CAT) (ratified by Australia 8 August 1989); Convention on the Rights of the Child (opened for signature 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3 (CROC) (ratified by Australia 17 December 1990); Convention on the Rights of Persons with Disabilities (opened for

signature 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3 (CRPD) (ratified by Australia 17 July 2008). It has not signed the International Convention on the Rights of All Migrant Workers and Members of their Families (opened for signature 18 December 1990, entered into force 1 July 2003) 2220 UNTS 3, or the International Convention for the Protection of All Persons from Enforced Disappearance (opened for signature 20 December 2006, entered into force 23 December 2010) 2176 UNTS 3.

- 84 *Commonwealth Constitution*, s 51(xxix); *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.
- 85 *Commonwealth v Tasmania* (1983) 158 CLR 1.
- 86 See, eg, Human Rights Committee, 'Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Concluding Observations of the Human Rights Committee (Australia)' (7 May 2009) UN Doc CCPR/C/AUS/CO/5; Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention: Concluding Observations of the Committee on the Elimination of Racial Discrimination' (13 September 2010) UN Doc CERD/C/AUS/CO/15-17; Committee on the Elimination of Discrimination against Women, 'Concluding Observations of the Committee on the Elimination of Discrimination against Women' (30 July 2010) UN Doc CEDAW/C/AUL/CO/7; Human Rights Committee, 'Report of the Special Rapporteur for Follow-Up on Concluding Observations of the Human Rights Committee' (27 April 2012) UN Doc CCPR/C/104/2; Committee Against Torture, 'Concluding Observations on the Combined Fourth and Fifth Periodic Reports of Australia' (23 December 2014) UN Doc CAT/C/AUS/CO/4-5.
- 87 Committee on the Elimination of Racial Discrimination, 'Consideration of Reports Submitted by States Parties under Article 9 of the Convention' (19 April 2000) UN Doc CERD/C/304/Add 101.
- 88 Daryl Williams (Attorney-General), 'CERD Report Unbalanced' (Press Release, 26 March 2000). See also Alexander Downer (Minister for Foreign Affairs), quoted in 'X. International Organisations: United Nations—Reform—Human Rights Treaty Bodies' in Tim Bolotnikoff (ed), *Australian Practice in International Law 2000* (2000) 21 Australian Yearbook of International Law 274.
- 89 Optional Protocol to the International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (Australia acceded 25 September 1991).
- 90 Australia made a declaration under art 14 of ICERD on 28 January 1993: see Steve McIntosh, 'IX. Individuals: Human Rights—Government Policy' in *Australian Practice in International Law 1993* (1994) 15 Australian Yearbook of International Law 528, 583.
- 91 Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women (opened for signature 6 October 1999, entered into force 22 December 2000) 2131 UNTS 83 (Australia acceded 4 December 2008).
- 92 Optional Protocol to the Convention on the Rights of People with Disabilities (opened for signature 13 December 2006, entered into force 3 May 2008) UN Doc A/Res/61/106 (Australia acceded 21 August 2009).
- 93 Human Rights Committee, 'Decision: Communication No 488/1992' (31 March 1994) UN Doc CCPR/C/50/D/488/1992 (hereafter *Toonen v Australia*).
- 94 Relevant provisions of the *Tasmanian Act* were ss 122(a) and (c), which were overridden by *Human Rights (Sexual Conduct) Act 1994* (Cth). Tasmania subsequently amended its laws to comply with those of the Commonwealth (Criminal Code Amendment Act 1997 (No 12 of 1997) (Tas)).
- 95 Forty-six of the claims were held inadmissible. See Office of the United Nations High Commissioner for Human Rights, *Jurisprudence Database* <<http://juris.ohchr.org/>> accessed 31 May 2017.
- 96 These are discussed in Hilary Charlesworth and Gillian Triggs, 'Australia and the International Protection of Human Rights' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (3rd edn, Lawbook Co 2017).
- 97 See *Human Rights Act 2004* (ACT), pt 3A.
- 98 Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, arts 27, 46 (VCLT).
- 99 Rookwood Proud (n 16) 43.
- 100 VCLT (n 98) arts 2(1)(d), 21; see also arts 19–20, 22–23.
- 101 Convention Relating to the Status of Refugees (opened for signature 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (ratified by Australia 22 January 1954).
- 102 See Stephen Donaghue's contribution to this volume, Chapter 10 'International Law'.
- 103 *Migration Act 1958* (Cth), s 197C. Another example is s 36(2) of the *Migration Act*, which sets out criteria for a protection visa.
- 104 A phrase used by John Howard, Prime Minister: 'UN's Committee Process "Out of Whack": Howard' 7.30 Report (30 August 2000) <<http://www.abc.net.au/7.30/stories/s169672.htm>> accessed 31 May 2017.
- 105 See *The Howard Government and International Law* (2008) 27 Aust YBIL (Special Issue).
- 106 Henry Burmester, Natalie Klein and Kate Miles, 'Australia and International Dispute Settlement' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (3rd ed, Lawbook Co 2017) 561, 577–80.

- 107 See, eg, Robert French, 'ISDS—Litigating the Judiciary' (Chartered Institute of Arbitrators Centenary Conference, Hong Kong, 21 March 2015) <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj21mar15.pdf>> accessed 31 May 2017⁵¹.
- 108 Southern Bluefin Tuna Cases (*New Zealand v Japan; Australia v Japan*) (*Provisional Measures*) (1999) 38 ILM 1624; (*Australia v Japan; New Zealand v Japan*) (*Jurisdiction and Admissibility*) (2000) 39 ILM 1359.
- 109 See Andrew D Mitchell, Elizabeth Sheargold and Tania Voon, 'Australia and International Trade Law' in Donald R Rothwell and Emily Crawford (eds), *International Law in Australia* (3rd ed, Lawbook Co 2017) 317, 322–34.