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Cambridge Legal Studies

Fourth Edition

INTERACTIVE TEXTBOOK INCLUDED

Paul Milgate, Daryl Le Cornu, Alisha Murphy, Ann Miller, Tim Kelly, Kevin Steed, Phil Webster and Sarah Hawke

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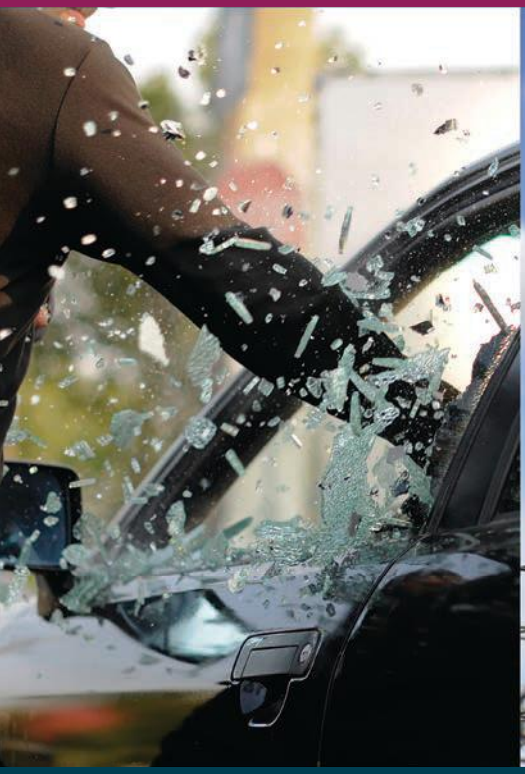

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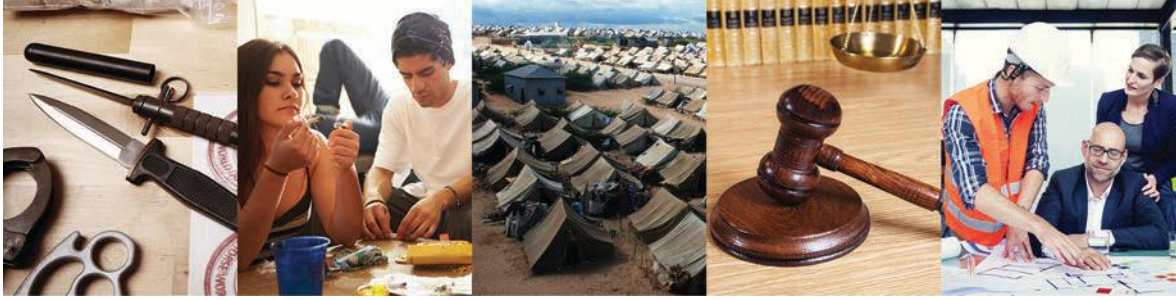

Contents

About the authors vi
Author acknowledgements viii
Introduction ix
How to use this resource x
Components of Cambridge Legal Studies HSC xii
Glossary of key words xiii
Publisher acknowledgements xiv

Part I Crime

Chapter 1 The nature of crime 2
1.1 The meaning of crime 4
1.2 Elements of crime 6
1.3 Strict liability offences 7
1.4 Causation 8
1.5 Categories of crime 8
1.6 Summary and indictable offences 22
1.7 Parties to a crime 22
1.8 Factors affecting criminal behaviour 23
1.9 Crime prevention: situational and social 26
Chapter summary 29
Questions 29

Chapter 2 The criminal investigation process 30
2.1 Police powers 32
2.2 Reporting crime 33
2.3 Investigating crime 34
2.4 Arrest, detention and charge 40
2.5 Court attendance notice, bail or remand 42
Chapter summary 45
Questions 45

Chapter 3 The criminal trial process 46
3.1 Court jurisdiction: criminal courts 48
3.2 The adversary system 54
3.3 Legal personnel in a criminal trial 55
3.4 Pleas and charge negotiation 57
3.5 Legal representation and Legal Aid NSW 58
3.6 Burden and standard of proof 59
3.7 Use of evidence, including witnesses 60
3.8 Defences to criminal charges 61
3.9 The role of juries, including verdicts 65
Chapter summary 69
Questions 69

Chapter 4 Sentencing and punishment 70
4.1 Sentencing and punishment 72
4.2 Statutory and judicial guidelines 72
4.3 The purposes of punishment 74
4.4 Factors affecting a sentencing decision 77
4.5 The role of the victim in sentencing 78
4.6 Appeals 80
4.7 Types of penalties 82
4.8 Alternative methods of sentencing 88
4.9 Post-sentencing considerations 90
Chapter summary 94
Questions 94

Chapter 5 Young offenders 96
5.1 Young offenders and the law 98
5.2 Age of criminal responsibility 100
5.3 The rights of children and young people when questioned or arrested 104
5.4 Children's Court – procedures and operation 109
5.5 Penalties for children 111
5.6 Alternatives to court 114
5.7 The effectiveness of the criminal justice system when dealing with young offenders 117
Chapter summary 122
Questions 122

Chapter 6 International crime 124
6.1 Defining international crime 126
6.2 Categories of international crime 127
6.3 Dealing with international crime 135
6.4 The effectiveness of measures dealing with international crime 143
Chapter summary 147
Questions 147

Themes and challenges for Part I Crime 148

Part II Human rights

Chapter 7 The nature and development of human rights 152
7.1 The definition of 'human rights' 154
7.2 The abolition of slavery 155
7.3 Trade unionism and labour rights 158

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7.4 Universal suffrage 160
7.5 Universal education 162
7.6 Self-determination 164
7.7 Environmental rights 166
7.8 Peace rights 167
7.9 Formal statements of human rights 169
7.10 Early development of domestic and international documents and treaties 173

Refer to additional digital-only material at the end of the book

Chapter summary 174
Questions 174

Chapter 8 Promoting and enforcing human rights 176
8.1 Introduction 178
8.2 Human rights in the international community 178
8.3 State sovereignty 179
8.4 The role of the United Nations 181
8.5 The roles of other international groups 186
8.6 Human rights in Australian domestic law 192
8.7 The role of the *Australian Constitution* 193
8.8 Other human rights roles in Australia 195
8.9 A charter of rights for Australia 199
Chapter summary 202
Questions 202

Chapter 9 Contemporary human rights issues 204

Issue 1: Human trafficking and slavery 206
9.1 Contemporary slavery 207
9.2 Human trafficking and slavery 208
9.3 Extent of human trafficking 209
9.4 Responses to human trafficking and slavery 211

Issue 2: Child soldiers 217
9.5 Defining the issue of child soldiers 218
9.6 Extent of the issue 219
9.7 Responses to the issue of child soldiers 222

Issue 3: Exploitation of workers – refer to additional digital-only material at the end of the book
9.8 Defining the issue of exploitation of workers
9.9 Extent of the issue
9.10 Responses to the issue of exploitation of workers
Issue 3 summary
Issue 3 questions

Issue 1 summary 231
Issue 1 questions 231
Issue 2 summary 232
Issue 2 questions 232

Themes and challenges for Part II Human rights 233

Part III Options

Chapter 10 Option 1: Consumers 236
10.1 The nature of consumer law 238
10.2 Contracts 240
10.3 Consumer protection 249
10.4 Consumer redress and remedies 257
10.5 Contemporary issue: Credit 264
10.6 Contemporary issue: Product certification 267
10.7 Contemporary issue: Marketing innovations 272
10.8 Contemporary issue: Technology 275
Chapter summary 279
Questions 279
Themes and challenges 280

Chapter 11 Option 2: Global environmental protection 282
11.1 The nature of global environmental protection 285
11.2 The development of global environmental law 288
11.3 The need for global environmental protection 290
11.4 The importance of ecologically sustainable development 294
11.5 The role of the state and state sovereignty in responses to global environmental protection 297
11.6 The role of the UN in response to global environmental protection 299
11.7 Other international responses to global environmental protection 302
11.8 Effects of Australia's federal structure in responding to global environmental protection 313
11.9 Contemporary issue: The law's role in relation to global environmental threats 316
11.10 Contemporary issue: The demand for resources and global environmental protection 319
11.11 Contemporary issue: Australia's responses to international initiatives 322
11.12 Contemporary issue: Barriers to achieving an international response to global environmental protection 324
Chapter summary 326
Questions 326
Themes and challenges 328

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Chapter 12 Option 3: Family 330
12.1 The nature of family law 333
12.2 Responses to problems in family relationships 348
12.3 Contemporary issue: Recognition of same-sex relationships 361
12.4 Contemporary issue: The changing nature of parental responsibility 365
12.5 Contemporary issue: Surrogacy and birth technologies 367
12.6 Contemporary issue: Care and protection of children 372
Chapter summary 376
Questions 376
Themes and challenges 378

Chapter 13 Option 4: Indigenous peoples – this additional digital-only chapter can be found at the end of the book
13.1 Definition of indigenous peoples
13.2 Rights and legal recognition
13.3 Responses to indigenous peoples
13.4 Australia's federal structure
13.5 Contemporary issue: Loss of cultural rights including language
13.6 Contemporary issue: Land rights
13.7 Contemporary issue: Legal rights to natural resources
13.8 Contemporary issue: Intellectual property rights
Chapter summary
Questions
Themes and challenges

Chapter 14 Option 5: Shelter – this additional digital-only chapter can be found at the end of the book
14.1 The nature of shelter
14.2 Purchasing shelter
14.3 Leasing
14.4 Securing other types of shelter
14.5 Dispute resolution mechanisms
14.6 Contemporary issue: Affordability
14.7 Contemporary issue: Discrimination
14.8 Contemporary issue: Homelessness
14.9 Contemporary issue: Social housing and community housing
Chapter summary
Questions
Themes and challenges

Chapter 15 Option 6: Workplace 382
15.1 The changing nature of workplace law over time 384
15.2 Contracts 388
15.3 Awards, agreements and statutory conditions 391
15.4 Regulation of the workplace 398
15.5 Contemporary issue: Discrimination 407
15.6 Contemporary issue: Safety 411
15.7 Contemporary issue: Termination of employment 416
15.8 Contemporary issue: Leave 419
Chapter summary 423
Questions 423
Themes and challenges 425

Chapter 16 Option 7: World order 428
16.1 The nature of world order 430

Refer to additional digital-only material at the end of the book

16.2 Responses to world order 437

Refer to additional digital-only material at the end of the book

16.3 Contemporary issue: The principle of 'Responsibility to Protect' (R2P) 456
16.4 Contemporary issue: Regional and global situations that threaten peace and security – the nuclear threat 458

Refer to additional digital-only material at the end of the book

16.5 Contemporary issue: The success of global cooperation in achieving world order – East Timor and UN intervention 463
16.6 Contemporary issue: Rules regarding the conduct of hostilities – international humanitarian law 467
Chapter summary 472
Questions 472
Themes and challenges 473

Answers to multiple-choice questions 477
Glossary 478
Index 491
Additional digital-only material 497

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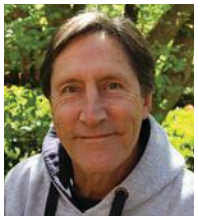

Kevin Steed BA LLB, BEd, MEd(Hons), DipTeach is a former Head Teacher and Deputy Principal with the New South Wales Department of Education, holding degrees in Arts, Law and Education. He is a highly experienced teacher of the social sciences having taught and programmed Legal Studies over a 25-year period. Kevin regularly contributes various articles for professional journals in the social sciences, particularly in the curriculum area of Society and Culture. Currently Kevin is working with the Macquarie University research community while completing his PhD.

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Sarah Hawke

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Introduction

To the student

Congratulations on choosing *Cambridge Legal Studies HSC Fourth Edition*. This edition has been updated to meet the changing processes of the legal system, while meeting the requirements of the current Stage 6 Legal Studies Syllabus in New South Wales.

Since the introduction of Legal Studies as a HSC discipline in 1989, the world has undergone incredible change. Predictions of increasingly 'disruptive' technologies will continue to challenge the ability of the law to balance the tension of individual and community rights. Regardless, Legal Studies continues to contribute to students completing their secondary schooling as better informed citizens, able to think more critically about the processes and institutions that shape their lives on a daily basis.

The rights people enjoy within democratic societies have at times been eroded by governments when citizens become apathetic about their rights, freedoms and liberties. Legal Studies will allow you to explore the power vested in our democratic institutions and wielded by our elected leaders. It explores issues that will change the way you view the world and how you understand the concept of achieving justice through legal and non-legal means.

Cambridge Legal Studies HSC Fourth Edition is a comprehensive resource that builds on the knowledge and skills introduced in the Preliminary course, as it thoroughly covers all key content areas of the HSC syllabus.

You will discover a wealth of engaging material that critically examines the core areas of crime and human rights, as well as a wide range of options in Part III. You will gain insight into how the law operates in practice in each of these contexts. A range of interesting, up-to-date cases, media articles and statistics is provided to bring the law to life. Updated review and research questions will assist you to revise and build on your knowledge, and a variety of HSC-style examination questions (in the Student Book and the Study Toolkit) will give you the best opportunity to succeed in your exam. We wish you the very best of luck and much success in Legal Studies.

Paul Milgate

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How to use this resource

Part and chapter openers

Each part and chapter of *Cambridge Legal Studies HSC* begins with an opener that contains:

- principal focus and themes and challenges from the Stage 6 Syllabus
- information relating to the HSC external examination.
- chapter objectives
- key terms/vocabulary
- relevant law (including important legislation and significant cases)
- legal oddity.

In Court

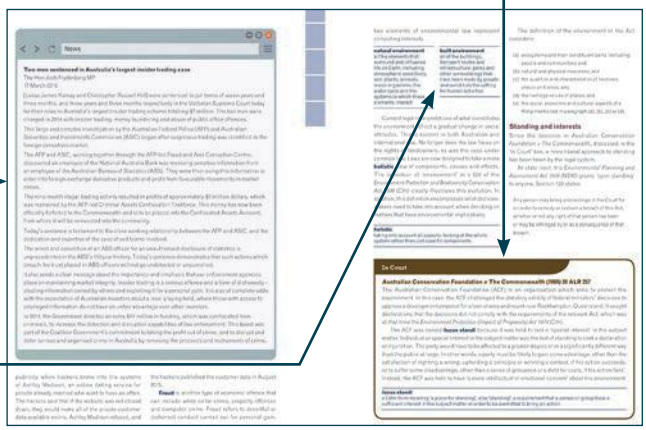
A number of relevant legal cases appear throughout the text. Each case allows you to apply your knowledge of the legal system to real-world situations. Many cases are followed by a range of questions to help you test what you've learnt.

Media articles

A range of current media articles is provided to help you understand how the law operates in real-world situations.

Glossary terms

Glossary terms are bolded in the text, and defined for you on the page in the print book, or as pop-ups in the interactive version. They are also gathered in the Glossary.

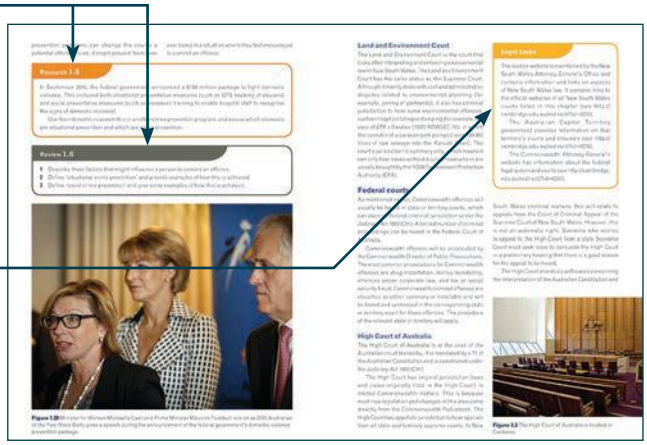


Review and research activities

Review activities are designed to help you test your knowledge of key concepts and skills. Research activities are designed to extend your knowledge by researching relevant cases or issues using source material.

Legal Links

In addition to the activities, there are a number of suggested links to internet resources and activities in each chapter. These will help you extend your knowledge and stay up to date with changes in the legal system.



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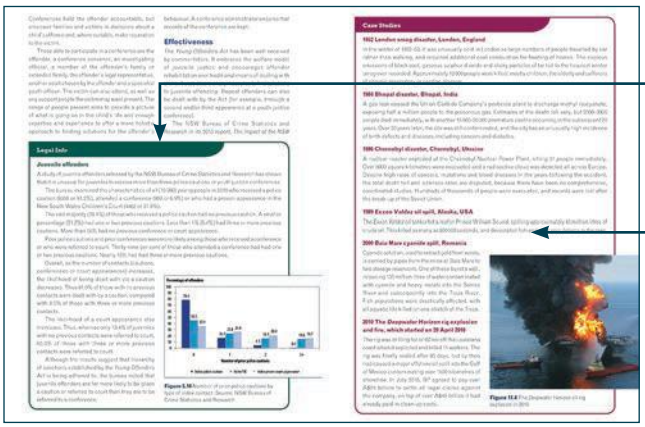
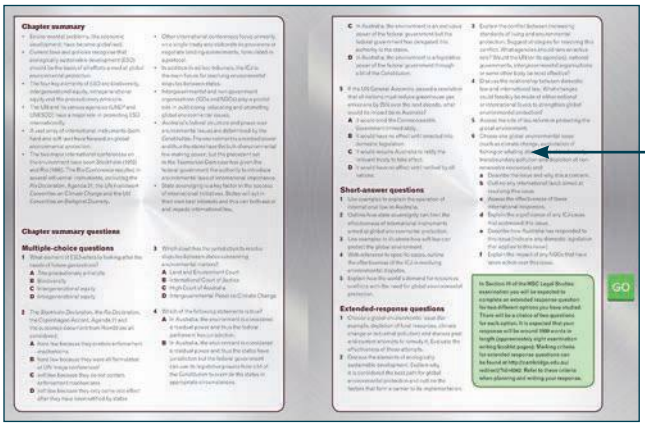


Legal Info

A number of relevant legal concepts are explored in order to give context to themes being explored.

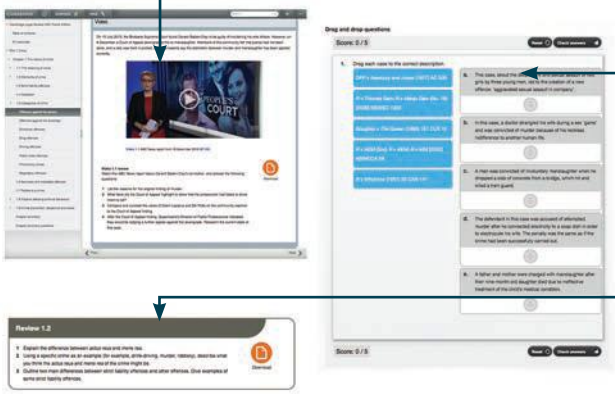
Case studies

Examples, or groups of examples, are examined in more depth to illustrate particular legal issues.



End-of-chapter sections

At the end of each chapter you will find a chapter summary and a set of questions to help you consolidate your learning from the chapter.



Video and audio

The interactive textbook contains video and audio items enrich the learning experience.

Interactive activities

Also included in the interactive textbook are automarked activities (for example, drag-and-drop questions) to assist recall of facts and understanding of concepts.

Downloadable Word documents

All review, research and end-of-chapter questions are available as downloadable Word documents, which can be accessed from within the interactive textbook or via Cambridge GO.

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Components of *Cambridge Legal Studies HSC*

The *Cambridge Legal Studies HSC* resource package consists of four components:

1 Student Book – print

The Student Book contains all topics in Part I and Part II (including a wide range of contemporary human rights issues), and five options in Part III.

2 Student Book – digital

Your purchase of the print book gives you access to the following digital resources on Cambridge GO:

- Downloadable PDF textbook
  A PDF of the print textbook, with additional digital-only content, including:
  - Chapter 9 – Contemporary human rights issues – Issue 3: Exploitation of workers
  - Chapter 13 – Option 4: Indigenous peoples
  - Chapter 14 – Option 5: Shelter.
- Online interactive textbook
  An online version of the textbook has a further host of interactive features to enhance the teaching and learning experience. These include:
  - video and audio
  - drag-and-drop activities
  - auto-marked multiple-choice quizzes
  - additional digital-only chapters from the PDF textbook.
- Other extra resources on the **Cambridge GO website** include:
  - all review, research and chapter questions in electronic format
  - marking criteria for the extended-response questions from the Study Toolkit
  - weblinks
  - additional resources.

To access all weblinks, go to http://cambridge.edu.au/hsclegal4weblinks

3 Teacher Resource Package

The Teacher Resource Package contains a wide range of material to support students and teachers with course, lesson, teaching plan, assessment and homework preparation.

Guide to icons

The Cambridge GO icon in the print book lets you know that there is additional material available in the digital versions.

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Glossary of key words

Syllabus outcomes, objectives, performance bands and examination questions have key words that state what students are expected to be able to do.

A glossary of key words has been developed to help provide a common language and consistent meaning in the HSC documents. Using this glossary will help students and teachers understand what is expected in responses to examinations and assessment tasks.

account
account for; state reasons for, report on; give an account of; narrate a series of events or transactions

analyse
identify components and the relationship between them; draw out and relate implications

apply
use, utilise, employ in a particular situation

appreciate
make a judgement about the value of

assess
make a judgement of value, quality, outcomes, results or size

calculate
ascertain/determine from given facts, figures or information

clarify
make clear or plain

classify
arrange or include in classes/categories

compare
show how things are similar or different

construct
make; build; put together items or arguments

contrast
show how things are different or opposite

critically (analyse/evaluate)
add a degree or level of accuracy, depth, knowledge and understanding, logic, questioning, reflection and quality to

deduce
draw conclusions

define
state meaning and identify essential qualities

demonstrate
show by example

describe
provide characteristics and features

discuss
identify issues and provide points for and/or against

distinguish
recognise or note/indicate as being distinct or different from; note differences between

evaluate
make a judgement based on criteria; determine the value of

examine
inquire into

explain
relate cause and effect; make the relationships between things evident; provide why and/or how

extract
choose relevant and/or appropriate details

extrapolate
infer from what is known

identify
recognise and name

interpret
draw meaning from

investigate
plan, inquire into and draw conclusions about

justify
support an argument or conclusion

outline
sketch in general terms; indicate the main features of

predict
suggest what may happen based on available information

propose
put forward (for example, a point of view, idea, argument, suggestion) for consideration or action

recall
present remembered ideas, facts or experiences

recommend
provide reasons in favour of

recount
retell a series of events

summarise
express the relevant details concisely

synthesise
put together various elements to make a whole

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Part I
Crime

30% of course time

Principal focus

Through the use of a range of contemporary examples, students investigate criminal law, processes and institutions, and the tension between community interests and individual rights and freedoms.

Themes and challenges

Themes and challenges covered in Part I include:

- the importance of discretion in the criminal justice system
- dealing with compliance and non-compliance in respect to criminal law
- the extent to which ethical and moral standards are reflected in the legal system
- how law reform is continually shaping the criminal justice system
- how the law works to protect the rights of victims, offenders and society
- achieving effective justice through legal and non-legal measures.

HSC external examination information

The HSC examination will be a written paper worth a total of 100 marks. The paper will consist of three sections.

Questions relating to Part I of the syllabus – 'Crime' – will appear in sections I and II of the examination.

Section I: Core 20 marks total (15 of the possible 20 marks will be based on 'Crime')

Section I will consist of objective response (that is, multiple choice) questions. Questions to the value of 15 marks will be drawn from 'Crime'. Some of these questions may be based on, or refer to, stimulus materials.

Section II: Core 30 marks total (15 of the possible 30 marks will be based on 'Crime')

Section II will be divided into two parts: Part A and Part B. Only Part B will relate to 'Crime'. There will be one extended-response question to the value of 15 marks. The question may refer to stimulus material. The expected length of the response is around 600 words (approximately four examination writing booklet pages).

Chapters in this Part

Chapter 1 **The nature of crime**

Chapter 2 **The criminal investigation process**

Chapter 3 **The criminal trial process**

Chapter 4 **Sentencing and punishment**

Chapter 5 **Young offenders**

Chapter 6 **International crime**

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Chapter 1
The nature of crime

Chapter objectives

In this chapter, students will:

- identify the meaning and nature of crime
- describe and recognise the different categories of crime
- define and discuss summary and indictable offences
- explore a range of factors that may lead to criminal behaviour
- discuss a range of social and situational crime prevention techniques
- discuss the effectiveness of the law in punishing offenders.

Key terms/vocabulary

accused
actus reus
affray
aggravated sexual assault in company
assault
attempt
beyond reasonable doubt
break and enter
causation
common assault
conspiracy
constructive manslaughter
crime
criminal negligence
criminology
Crown
embezzlement
fraud
homicide
indecent assault
indictable offence
infanticide
insider trading
involuntary manslaughter
larceny
manslaughter
mens rea
mitigating circumstances
murder
prosecute
provocation
recklessness
riot
robbery
sedition
sexual assault
sexual intercourse
state
strict liability offence
summary offence
tax evasion
trafficking
treason
voluntary manslaughter
white-collar crime

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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Customs Act 1901 (Cth)
Crimes Act 1914 (Cth)
Drug Misuse and Trafficking Act 1985 (NSW)
Summary Offences Act 1988 (NSW)
Criminal Code 1995 (Cth)
Crimes Amendment (Computer Offences) Act 2001 (NSW)
Anti-Terrorism Act (No. 2) 2005 (Cth)
Copyright Amendment Act 2006 (Cth)
National Security Legislation Amendment Act 2010 (Cth)
Road Transport Act 2013 (NSW)
Copyright Amendment (Online Infringement) Act 2015 (Cth)

SIGNIFICANT CASES

R v Whybrow (1951) 35 CAR 141
DPP v Newbury and Jones [1977] AC 500
Boughey v The Queen (1986) 161 CLR 10
R v AEM (Snr); R v KEM; R v MM [2002] NSWCCA 58
Wallace v Kam [2013] HCA 19

Legal oddity

In the 18th century BCE, the great Babylonian king Hammurabi had been expanding his empire by conquering new territories, each of which had their own laws and customs. In order to unify the empire, Hammurabi needed to come up with a single set of laws. He had a set of 282 laws drawn up, which became known as the Code of Hammurabi. They were carved into a large stone monument over seven feet high. At the top of the monument was a depiction of Hammurabi receiving the laws from the sun-god Shamash.

These laws are notable for a number of reasons. The punishments for breaking laws are often in the form of retribution; the Code of Hammurabi is the origin of the phrase 'an eye for an eye'. The Code is also one of the earliest records of the presumption of innocence, which the Babylonians took very seriously. If you brought a charge in front of the elders against another person, but did not prove the charge, you were put to death!

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1.1 The meaning of crime

The word '**crime**' is a broad term used to describe many unlawful activities, from the extreme, such as murder, to more minor offences, such as speeding. A crime includes any act or omission that results in harm to society at large and is punishable by the **state**, including the court system and state or Commonwealth bodies.

crime
an act or omission against the community at large that is punishable by the state

state
a government and the people it governs; a country

Figure 1.1 Culture, history, legal traditions, social attitudes, religious beliefs and political systems are factors in every society that combine to determine how crime is defined and punished.

A more detailed definition includes 'any conduct which violates the rights of the community at large, punishable by a recognised criminal sanction upon proof of guilt in a criminal proceeding initiated and presented by officers of the crown or its agencies' (S. Marantelli and C. Tikotin, *The Australian Legal Dictionary*).

But there is no definition that tells the community what actually constitutes criminal behaviour and activity. If a person wanted to know if certain behaviour was a violation of the law, they would be none the wiser by the definitions provided. This is because a crime is any act that law-makers in a particular society have deemed to be criminal, which in itself causes injustice.

Many countries and societies have different views about what kinds of acts society needs to be protected from and which acts should be considered criminal. Culture, history, legal traditions, social attitudes, religious beliefs and political systems are factors in every society that combine to determine how crime is defined and punished. In other words, what one society deems a crime, another may not; this in itself causes frustration for the legal system. For example, the act of murder is considered a crime throughout the world, though with varying definitions and qualifications. However, other acts, which are entirely legal in Australia, such as sex outside marriage, homosexual acts or the consumption of alcohol, are deemed crimes in some societies.

Therefore, most crimes are the result of moral and ethical judgements by society about an individual's behaviour. When a person commits a crime, it is deemed to be committed against all of society (as represented by the state; for example, the Director of Public Prosecution), as well as any victim of the act. The criminal act is seen as an attack on the ethical and moral standards of society, so it is the responsibility of all to punish those found guilty. This is why the state (acting on behalf of society) brings criminal cases, even though it is also attempting to redress an injustice committed against a specific victim or victims.

Crime is a constantly evolving area of the law. For example, for centuries the practice of witchcraft was considered a serious offence punishable by death throughout the British Empire. As society's attitudes evolved, the position was eventually reversed in Great Britain with the introduction of the *Witchcraft Act 1735*, 9 Geo II, c 5, which removed the offence of witchcraft and instead made it a crime to pretend to practise acts of witchcraft. In Australia today, such acts would be governed by consumer protection regulations that protect against fraudulent activity.

Similarly, new crimes are often created where none existed before. For example, the *Crimes Amendment (Computer Offences) Act 2001* (NSW) introduced a new part titled 'Computer Offences' to the *Crimes Act 1900* (NSW). The Commonwealth *Copyright Amendment Act 2006* (Cth) also introduced a number of new offences aimed at dealing with the growing problem of internet piracy and copyright infringement. The *Copyright Amendment (Online Infringement) Act 2015* (Cth), which commenced in June 2015, is a further amendment to the *Copyright*

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Act 1968 (Cth). It introduces new laws to give rights holders who discover infringing material online a way of requiring carriage service providers to take reasonable steps to block access to the content, via an injunction from the Federal Court.

The government, courts and other statutory bodies are constantly reviewing legislation to ensure that it meets the expectations of the community and is as relevant as possible to our rapidly developing and changing society. Sometimes some groups within our community are unhappy with these reforms and developments while others rejoice at their implementation. Criminal law is a particularly controversial area of the law because any changes will usually have wide-ranging effects on the rights and freedoms of all members of society. As a result there is often tension between various legal and non-legal resources when attempts are made to change or update aspects of the criminal law.

Criminal law

Criminal law is the area of law that deals with crime. It has many aspects, including investigation, enforcement, prosecution, defence, criminal trial, sentencing and punishment. Criminal law has a number of important characteristics that distinguish it from other areas of the law:

- Criminal law is about protecting society. A crime is punishable by the state because it is an offence against society as a whole. This differs from civil law, which relates primarily to rights and responsibilities between individuals.
- Criminal actions can include crimes against a person, the state and/or property. The law provides for the state to take legal action against an **accused**; that is, to **prosecute** them in a court of law to achieve some type of punishment or sanction.

accused
the person or alleged offender that the criminal action is being taken against

prosecute
when the Crown or state takes action against the accused person in a court of law

- The decision to prosecute the offender in court is made by the police and/or the Director of Public Prosecutions. They are known as the state or the **Crown**, and the offender is known as the defendant or the accused. This differs from civil law, where an action against the alleged perpetrator is brought before the courts by an individual who is affected (the plaintiff).

Crown
the state party that commences a criminal action in a court of law; in New South Wales, the action is usually commenced by the Director of Public Prosecutions; if the alleged crime is against a federal criminal law, the action is usually commenced by the Commonwealth Director of Public Prosecutions

- The Crown must prove its case **beyond reasonable doubt**. If any other reasonable conclusion besides proving the criminal charges can be drawn from the evidence, there is reasonable doubt. If there is any doubt as to the guilt of the defendant, a 'not guilty' verdict must be given. This differs from civil law, where a much lower standard of proof is required (the balance of probabilities).

beyond reasonable doubt
the standard of proof required in a criminal case for a person to be found guilty

- The aim of criminal law is to protect the community and to provide a sanction or punishment to an offender who is found guilty by a court of law. This differs from civil law, where the aim is to address the defendant's wrong by way of a remedy or court order in favour of the plaintiff.

Broadly speaking, the distinction between criminal and civil law depends on the legal

Figure 1.2 New crimes are often created to address changes in society.

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proceedings that may follow from the act. If the act is a crime, then the offender faces investigation by the police and prosecution. The case is heard in the criminal courts, and the accused may be convicted and punished. If the act is a breach of civil law, then the wrongdoer (the defendant) will be sued in a civil court by the person bringing the action (the plaintiff). The plaintiff will be trying to gain a remedy such as compensatory damages or a court order prohibiting the conduct.

Review 1.1

1. Define the term 'crime'.
2. Use one or more examples to describe a new type of crime and an act that is no longer a crime.
3. Identify the similarities and differences between criminal and civil law.

1.2 Elements of crime

Before a criminal act can be brought to trial, the police and prosecutors need to prove that the elements of the particular offence are present. There are two fundamental elements applicable to most offences:

- that the accused person actually committed the crime (***actus reus***)
- that the accused person sufficiently intended to commit the crime (***mens rea***).

actus reus
a Latin term meaning 'guilty act' that refers to the physical act of carrying out a crime

mens rea
a Latin term meaning 'guilty mind', meaning that the accused intended (to some degree) to commit the crime, knowing their actions were wrong

Actus reus

Actus reus is a Latin term meaning 'guilty act' and refers to the physical act of carrying out the crime. The prosecution must prove that the accused did in fact carry out the relevant act required for the crime. Physical evidence and witness testimony can help the prosecution prove that it was the accused that carried out the act. This is often the easiest element for the prosecution to prove.

The *actus reus* must be a voluntary act but can also include an omission or failure to act, particularly in cases of criminal negligence, if the accused failed to take a course of action when they had a duty to do so.

Mens rea

Mens rea is a Latin term meaning 'guilty mind' and refers to the mental state of the accused. In order for the prosecution to succeed, it must be able to prove that, to the necessary degree, the accused intended to commit the crime.

There is no widely accepted definition for *mens rea*. One common understanding, however, is that it is the state of mind of a defendant and their knowledge of the facts that make the conduct criminal. In other words, the defendant understood what was happening when the act was committed. Another view is to regard *mens rea* as the conscious and willing mind that was present in performing a crime. Often, if the police or Crown cannot prove that the defendant acted intentionally, fraudulently, maliciously, negligently, recklessly or willfully, the charge will not be proved. For example, when a person intentionally shoots someone, that person has probably intended to commit a criminal act and cause harm. Whether that person intended to kill or only injure the victim is something that will need to be established. Another situation is when a defendant knows what will happen if they continue certain behaviour, but recklessly carries on. For example, the shooter may have been reckless as to whether the victim might die from the injuries inflicted. In all cases, except for strict liability cases (see below), the prosecution must prove that the accused was aware (at least to some degree) that their actions would result in the likelihood of a crime being committed.

The degree of intention required to prove a crime can differ and will often be specified in the legislation where the crime is defined. The three main levels of *mens rea* are:

- intention – a clear, malicious or wilful intention to commit the crime. This is the highest and usually most difficult level of *mens rea* for the prosecution to prove.
- **recklessness** – an intermediate level of intent. This means that the accused was aware that their action could lead to a crime being committed, but chose to take that risk anyway.

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Figure 1.3 Theft is often an example of *mens rea*.

Perhaps the accused wanted to show off or was unable to make a sensible decision. In the case of recklessness the prosecution will attempt to prove that the risk was obvious to a reasonable person and although the accused knew the risk they were taking, they didn't care about the consequences.

recklessness
when the accused was aware that their action could lead to a crime being committed, but chose to take that course of action anyway

- **criminal negligence** – where the accused fails to foresee the risk where they should have and so allows the avoidable danger to occur, usually resulting in harm to or the death of another person that the accused had a duty to protect. This is the lowest level of intention for *mens rea*, but it is still a much higher standard than the civil law requires for negligence to be considered criminal. An example of a case involving criminal negligence is *R v Thomas Sam*, referred to in the 'In Court' box below.

criminal negligence
where the accused fails to foresee the risk when they should have and so allows the avoidable danger to occur

1.3 Strict liability offences

Not all offences require the prosecution to prove *mens rea*. For some offences, only the element of *actus reus* will need to be shown. These offences are known as strict liability offences.

A **strict liability offence** is one where the prosecution only needs to prove that the accused carried out the act, and is not required to show that the accused intended to commit the crime. Because strict liability offences dramatically lower the level of proof required to achieve a criminal conviction, and so lessen an accused's rights in the criminal process, they are generally restricted to minor offences,

In Court

***R v Thomas Sam; R v Manju Sam (No. 18)* [2009] NSWSC 1003**

In this case, a father and mother were charged with manslaughter by criminal negligence. The case revolved around the death of the couple's nine-month-old daughter, who suffered from eczema. The parents had repeatedly rejected conventional medical treatment, and instead relied on ineffective homeopathic treatments, despite the child constantly crying in pain, with broken skin oozing fluid.

The court found that the condition was medically treatable, yet because treatment was denied the child had unnecessarily suffered and died from it. The court found that both parents were well educated and should have known to seek appropriate medical treatment for their daughter, which they failed to do. The court also found that the father had a higher duty of care, as he was a trained homeopath with a higher degree of medical knowledge. The judge in the case, Justice Peter Johnson, concluded that it was the 'most serious case of manslaughter by criminal negligence' he had ever dealt with.

The parents were both found guilty of manslaughter and sentenced to imprisonment. On appeal, both sentences were increased, with the father receiving eight years' imprisonment and the mother receiving five years and four months.

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Figure 1.4 Some acts are considered crimes, even if they weren't intentional. Speeding is one example.

such as traffic offences or breaches of regulations. For example, a speeding offence is a strict liability offence and as such the police do not need to show that a person intended to break the speed limit (that is, had *mens rea*); they only have to show that the person did so (committed the *actus reus*). That is, a person only has to be caught speeding to incur a fine.

Another example of strict liability offences is selling alcohol or cigarettes to people under the age of 18 – it doesn't matter whether or not the seller knew the buyers were underage; the only thing that matters is that they *were* underage. Strict liability is applied to offences because of its administrative advantages – for example, to assist the legal system in coping with the daily volume of traffic violations – or to put a greater onus on society to comply with a particular law. In some cases, there can be a defence to strict liability: if the accused can prove the act was an 'honest and reasonable mistake'.

strict liability offence
an offence where the *mens rea* does not need to be proved; only the *actus reus* (the guilty act) needs to be proved

1.4 Causation

A further consideration that is relevant when establishing the elements of a crime is **causation** – proving that there is sufficient causal link between the actions of the accused and the result. This will often be relevant in proving the *actus reus* and requires the prosecution to prove a substantial link between the act and the crime.

causation
the link between the behaviour of the accused and the result (that is, that the behaviour of the accused actually caused the criminal act alleged)

In Court

***Wallace v Kam* [2013] HCA 19**

Dr Kam was a neurosurgeon charged with medical negligence and the question of causation was raised. The plaintiff, Mr Wallace, had been injured during surgery. He alleged that Dr Kam had not warned him about the two risks of the surgery, and that if he had known about these risks, he would not have agreed to the surgery and so would not have been injured. Thus, negligent failure to disclose had caused his injury. In a unanimous decision the High Court stated that there needed to be higher scrutiny of the application of causation and while the matter might establish factual causation it does not suggest that the doctor should be held liable (scope of liability).

Review 1.2

1. Explain the difference between *actus reus* and *mens rea.*
2. Using a specific crime as an example (for example, drink-driving, murder or robbery), describe what you think the *actus reus* and *mens rea* of the crime might be.
3. Outline two main differences between strict liability offences and other offences. Give examples of some strict liability offences.

1.5 Categories of crime

There are many different crimes and they can be categorised in numerous ways. These categories

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Legal Links

A range of recorded criminal incidents in New South Wales can be accessed at the NSW Bureau of Crime Statistics and Research. Refer to http://cambridge.edu.au/redirect/?id=6228.

will often affect the way an offence is investigated, prosecuted or punished, and include:

- type of offence, such as offences against the person or drug offences
- jurisdiction, including whether it is a New South Wales or a Commonwealth crime
- seriousness of the offence, or whether it is a summary or indictable offence
- parties to a crime (for example, whether the accused is the principal offender of the crime or assisted in some way).

In New South Wales, the *Crimes Act 1900* (NSW) is currently divided into roughly 16 parts relating to the main types of offences. These parts are further divided into hundreds of divisions, sections and subsections. Offences are also included in numerous other New South Wales Acts and Regulations. Commonwealth offences have a similar regime.

trafficking
dealing or trading in something illegal, particularly drugs

Research 1.1

The complete version of the *Crimes Act 1900* (NSW) is available at http://cambridge.edu.au/redirect/?id=6229. Find the Act on the website and look at the categories of offences listed under the Act. How many of the categories and offences listed in Table 1.1 can you find in the Act?

Offences against the person

Offences against the person involve some form of harm or injury to an individual. Because there are so many ways that someone can cause injury to another person, these types of crime are divided into three distinct areas, each including numerous offences: homicide, assault and sexual offences.

Homicide

In the criminal justice system, **homicide** is defined as the unlawful killing of another person. This includes both deliberate and accidental acts of killing, with varying degrees of *mens rea* applicable. In a homicide case, causation must be established between the actions of the accused and the death of the victim. There are four main categories of homicide in New South Wales law: murder, manslaughter, infanticide and dangerous driving causing death.

homicide
the unlawful killing of a human being

Table 1.1 Examples of offences

Type of offences	Examples
Offences against the person	Homicide, assault, sexual assault
Offences against the sovereign	Treason, sedition
Economic offences	Property offences, white-collar crime, computer offences
Drug offences	**Trafficking**, possession, use
Driving offences	Speeding, drink-driving, negligent driving
Public order offences	Offensive conduct, obstructing traffic, affray, bomb hoaxes
Preliminary offences	Attempts, conspiracy
Regulatory offences	Breach of water restrictions, fire restrictions or public transport rules

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Figure 1.5 Homicide is the unlawful killing of another person.

Figure 1.6 Popular depictions of the murder genre, such as *CSI: Crime Scene Investigation*, give the impression that murder is a common crime in society when, in fact, it is not.

Murder

Murder is the most serious homicide offence and is punishable by life imprisonment. In order to prove in court that a killing was murder (that is, directly related to the actions of the accused), the prosecution must show that at least one of the following exists:

- the accused intended to deliberately kill the victim
- the accused set out to inflict serious bodily harm, which resulted in death
- the act was done with reckless indifference to another human life; that is, the accused did not care that the act might end a human being's life
- the act was done while committing or attempting to commit another serious crime punishable by life or 25 years' imprisonment.

The third of these elements is usually the hardest to prove. In *Boughey v The Queen* (1986) 161 CLR 10, a doctor strangled his wife during a sex 'game'. The court held that there was a substantial or good chance of harm, that Boughey had the knowledge and capacity to know better, and that the act constituted a 'reckless indifference to human life'. Boughey was convicted of the murder.

Murder is one of the most heinous crimes possible and attracts some of the harshest penalties. As a result, murder cases often receive a great deal of media attention. Television programs such as *How to Commit the Perfect Murder*, *CSI* and *Castle* have also popularised the murder genre, giving the impression that murder is a common crime. In reality, however, the opposite is true. The number of recorded murder victims in New South Wales during 2013 was 86, compared with 29 070 domestic violence-related assaults for the same period. According to the Australian Institute of Criminology (AIC), most murder victims are killed by a family member or friend, and up to 40% of all homicides are domestic-violence related.

murder
the deliberate killing of a person

Manslaughter

Manslaughter is the second type of homicide. It differs from murder in the intent of the accused. Manslaughter involves a reduced level of intent and is punishable by up to 25 years' imprisonment. A person may be charged with manslaughter where it cannot be proved that they intended to kill the victim to the degree required for murder. There are three main types of manslaughter:

manslaughter
the killing of a person in a manner that is considered to be less intentional than murder

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- **Voluntary manslaughter** occurs when a person kills with intent, but there are mitigating circumstances (such as the defence of **provocation**) which reduce their culpability. For the crime to be classed as voluntary manslaughter, not murder, there must be **mitigating circumstances**.
- **Involuntary manslaughter** is the killing of a person where the death occurred because the accused acted in a reckless or negligent way, but without intention to kill the person. In *DPP v Newbury and Jones* [1977] AC 500 the accused deliberately dropped a slab of concrete from a bridge and the concrete hit and killed a train guard. This act was held to constitute involuntary manslaughter because there was no intention to kill or harm anyone.
- **Constructive manslaughter** is the killing of a person while the accused was carrying out another dangerous or unlawful act. The manslaughter is 'constructed' from the other unlawful act. For example, where a person assaults another person without intention to kill or inflict serious bodily harm, but death results, then the death may be construed as manslaughter by the accused.

voluntary manslaughter
the killing of a person where the accused did intend to kill or was reckless about killing someone but there were mitigating circumstances

mitigating circumstances
circumstances that make an offence less severe; they can lead to a reduced sentence

provocation
the defence where the defendant claims that their actions were a direct result of another person's actions, which caused them to lose control of their own actions

involuntary manslaughter
the killing of a person where the death occurred because the accused acted in a reckless or negligent way without intention to kill

constructive manslaughter
the killing of a person while the accused was carrying out another dangerous or unlawful act

infanticide
the death of a baby under the age of 12 months at the hands of its mother

Infanticide

Infanticide is a special category of manslaughter that applies to the death of a baby under the age of 12 months at the hands of its mother. The *Crimes Act 1900* (NSW) requires that the court take into account the state of mind of the mother at the time she committed the crime. Many women suffer from a condition called post-natal depression after the birth of a child. If the accused is found to have been suffering from this condition when she killed her baby it can be seen as a mitigating circumstance.

Dangerous driving causing death

Dangerous driving occasioning death is another type of manslaughter. It occurs when a person drives in an unsafe and reckless way, such as under the influence of alcohol or a drug, or at excessive speed, and in so doing causes the death of another human being. A conviction for this crime carries a maximum penalty of 10 years in prison. However, if the offence is aggravated by certain circumstances the penalty can be as much as 14 years' imprisonment.

Research 1.2

Go online and search for five recently closed homicide cases. Draw up a table and identify the following:

- the case name and court reference
- the charges brought against the defendant
- some case details, such as the ruling and the sentence.

Assault

Assault is the most common form of crime against the person. Assault includes the offence of causing physical harm to another person and of threatening to cause physical harm to another person (known as **common assault**).

assault
a criminal offence involving the infliction of physical force or the threat of physical force

common assault
assault where there is no actual physical harm to the person assaulted, including threatening to cause physical harm to another person

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Figure 1.7 Assault can be both the act of harming someone or threatening to cause harm.

Physical assault is a direct act in which force is applied to another person's body unlawfully and without their consent and is punishable by up to five years' imprisonment (or seven years' imprisonment, depending on the location of the assault and the identity of the victim). A threat to cause physical harm can also be a form of assault where it causes the victim to fear immediate and unlawful violence; threatening phone calls, text messages or emails might constitute such a form of assault.

Sexual offences

Sexual assault is a type of assault where someone is forced into **sexual intercourse** against their will and without their consent. It was formerly known in common law as 'rape'. The definition of sexual assault includes where consent is withdrawn during the act of sexual intercourse. Sexual intercourse is defined broadly in the *Crimes Act 1900* (NSW) to include different types of sexual acts including oral sex and penetration. Sexual assault can occur to both men and women. Although the vast majority of such assaults are against women, it is suggested that there are more male victims than is shown by statistics. Victims' fear of reporting the crime is a serious problem in cases of sexual assault.

sexual assault
when someone is forced into sexual intercourse against their will and without their consent

sexual intercourse
broadly defined in the *Crimes Act 1900* (NSW) to include oral sex or penetration of the vagina or anus by any part of another person's body or by an object manipulated by another person

Lack of consent is central to the crime of sexual assault and is defined in detail in the Act. It states that a person is not consenting where they are:

- substantially intoxicated by drugs and alcohol and therefore lack the capacity to consent
- intimidated or coerced into the act, or
- if the accused is abusing their position of trust or authority over the victim.

Sexual assault is one of the least reported crimes, and has a low conviction rate due to the difficulty of proving consent.

The crime of aggravated sexual assault will be applicable where there are aggravating circumstances, such as where violence is used, the victim is under 16 years old or the victim has a serious physical or intellectual disability. It must be noted that a child under the age of 16 is not legally able to give consent.

Indecent assault is another type of sexual offence, where the accused commits an assault and 'act of indecency' on or in the presence of another person without their consent. 'Indecent act' is not defined in the *Crimes Act 1900* (NSW), but it includes assaults with a sexual element. This offence covers many sexual acts that are not included under the offence of sexual assault, such as touching the genitals or other parts of the body in a sexual manner without the person's consent.

indecent assault
an assault and 'act of indecency' on or in the presence of another person without their consent

The most serious sexual offence in New South Wales is **aggravated sexual assault in company**. Punishable by the highest criminal sanction life imprisonment, the offence is viewed by the law as equivalent in seriousness to murder. The offence includes the elements of sexual assault, but is

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In Court

***R v AEM (Snr); R v KEM; R v MM [2002]* NSWCCA 58**

The catalyst for change in the New South Wales law of aggravated sexual assault in company was the case of *R v AEM*. Three young men (two brothers and their cousin, who were 19, 16 and 16 years old respectively at the time of the crime) lured two 16-year-old girls to the offenders' home in Villawood. The girls were then forcibly detained and sexually assaulted over a period of several hours. The girls were threatened with knives and verbally with death.

At the time the only applicable crime was aggravated sexual assault: the highest penalty for this was 20 years' imprisonment. The men were originally sentenced to five to six years' imprisonment each.

The abhorrent nature of these crimes led to a public outcry over the existing laws of rape, which were thought by a large segment of the public to be too lenient given the nature of the crime. Following the case, the New South Wales Parliament moved quickly to introduce new laws and tougher penalties, creating a new offence of 'aggravated sexual assault in company' in s 61JA of the *Crimes Act 1900* (NSW). The new offence carries a maximum penalty of life imprisonment, equivalent to that for murder.

Notably, on appeal by the Crown in 2002, the judges decided to significantly increase the offenders' original sentences, substituting them with 13 to 14 years' imprisonment each.

performed with another person or people present together with either depriving the victim of their liberty or the infliction or threatened infliction of bodily harm. The offence of aggravated sexual assault in company was introduced in New South Wales in 2001 following a series of so-called gang rapes across Sydney's inner west that led to a public outcry for reform of the law.

aggravated sexual assault in company
sexual assault performed with another person or people present together with aggravating circumstances

Legal Links

Watch the YouTube video *Aggravated Sexual Assault in Company* at http://cambridge.edu.au/redirect/?id=6230.

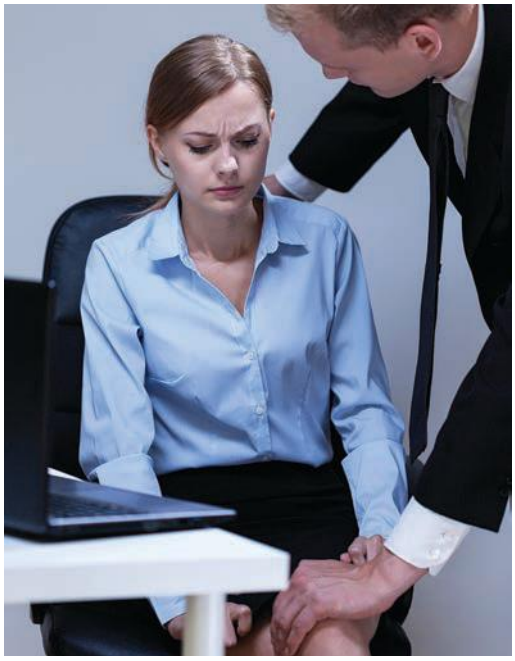

Figure 1.8 Indecent assault is touching parts of the body in a sexual manner without the person's consent.

Table 1.2 Number of reported cases of assault and sexual assault in New South Wales

Offence	2012	2013	2014
Assault – domestic-violence related	27 547	28 423	29 070
Assault – non-domestic-violence related	35 578	34 082	31 529
Sexual assault	4 732	4 644	4 737
Indecent assault, act of indecency and other sexual offences	5 774	6 377	6 376

Source: New South Wales Bureau of Crime Statistics and Research, 2012–14

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Offences against the sovereign

Offences against the sovereign are some of the oldest crimes, and include political offences against the state or heads of state, such as **treason** and **sedition**, which attract severe penalties. The laws are justified as protecting the structure, authority and integrity of the state and the citizens that it governs. Historically, such laws were more frequently used to prevent or punish attempts to overthrow or even criticise heads of state. Australia today is a stable parliamentary democracy, where objections are aired through protest, public comment, elections or law reform, and such laws have arguably fallen out of use.

treason
an attempt or manifest intention to levy war against the state, assist the enemy or cause harm to or the death of a head of state

sedition
promoting discontent, hatred or contempt against a government or leader of the state through slanderous use of language; in Australia, sedition includes the offences of urging force or violence against the government

Treason

Treason was a common law crime in England long before it was first codified by King Edward III in the *Statute of Treasons* in 1351. The offence was defined as acts directed against the sovereign. At that time, the sovereign was the monarch; this was later widened to include heads of state such as the Prime Minister and Governor-General. The crime of treason was imported into Australian law from the United Kingdom and later enacted in New South Wales under Part 2 of the *Crimes Act 1900* (NSW), and in the Commonwealth under the *Crimes Act 1914* (Cth) and later under s 80.1 of the *Criminal Code 1995* (Cth). Under the New South Wales *Crimes Act*, the 1351 Act is expressly continued in force. Treason involves any attempt or manifest intention to levy war against the state, assist the enemy, or cause harm to or the death of the Governor-General, the Prime Minister or the Queen of Australia. Treason was formerly a crime punishable by death. Today, it is punishable by up to 25 years' imprisonment (New South Wales) or life imprisonment (Commonwealth).

Sedition

Dating back to at least 1606, a seditious act historically involved any oral or written intention to bring the sovereign into hatred or contempt, and included inciting disaffection against the government or parliament. The laws were criticised as being open to abuse through silencing government opposition and public comment and endangering freedom of speech.

In Australia, sedition laws had fallen into disuse until 2005, when the then Commonwealth Government, under Prime Minister John Howard, introduced a range of controversial anti-terrorism laws in the *Anti-Terrorism Act (No. 2) 2005* (Cth), which included a revived sedition law. The Australian laws, under s 80.2 of the *Criminal Code 1995* (Cth), make it a crime to urge another person to use force or violence to a particular end, such as overthrowing the government or the *Constitution* or interfering in parliamentary elections. The offences are punishable by up to seven years' imprisonment.

The sedition laws received widespread public criticism as being unnecessary, against the times, and a danger to freedom of expression, particularly in relation to commentary and critique by the media and the arts.

When a Labor government was elected to power in November 2007, it immediately commissioned a

Research 1.3

The Australian Law Reform Commission's report *Fighting Words: A Review of Sedition Laws in Australia* contains a history of sedition laws and various recommendations about reforming Australia's laws. The report can be found online at http://cambridge.edu.au/redirect/?id=6231.

Look at the report and complete the following tasks.

1. In what circumstances have Australia's sedition laws been used in the past?
2. What were some of the dangers of our sedition laws that were identified by the ALRC?
3. What are some of the recommendations of the ALRC report?
4. Find out which recommendations were implemented by the *National Security Legislation Amendment Act 2010* (Cth).

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review of the laws by the Australian Law Reform Commission (ALRC) with a view to amending them. Among the ALRC's recommendations were to remove any reference to the term 'sedition' from the laws and to amend various elements of the offences and available defences. A majority of these recommendations were implemented by the *National Security Legislation Amendment Act 2010* (Cth).

Economic offences

'Economic offence' includes a wide range of crimes that can result in a person or people losing property or sums of money. It is the largest area of criminal law because it encompasses some of the most common types of crime. Economic offences fall into three main categories:

- crimes against property
- white-collar crime
- computer offences.

Crimes against property

In New South Wales, there are three main types of offence against property: **larceny**, **robbery** and **break and enter**.

larceny
when one or more people intentionally take another person's property without consent and without intention of returning it

robbery
when property is taken directly from a victim, usually forcefully

break and enter
commonly known as burglary, break and enter offences usually occur when a person enters a home with intent to commit an offence

Larceny is the most common property offence and is more commonly known as 'theft' or 'stealing'. It is also one of the economic offences that people are most likely to fall victim to at some time in their lives. Larceny occurs when one or more people intentionally take another person's property without their consent and without the intention of returning it. One of the most common forms of larceny is shoplifting. The offence of larceny is punishable by up to five years' imprisonment, depending on the type of larceny involved.

Figure 1.9 Burglary is a common crime.

Robbery is a more serious offence than larceny. Robbery occurs when the use of force is present in the act of stealing goods or when property is taken directly from a victim. If the robbery is accompanied by the use or threatened use of a weapon, the crime is called 'armed robbery' and will carry an even higher sentence.

Break and enter is another very common economic crime, more commonly known as 'burglary'. The term refers to a series of offences in the *Crimes Act 1900* (NSW) that generally occur when a person or people enters a room or building, such as a private residence, with the intention of committing an offence. Usually the offender will be doing so with the intention to commit another property offence, such as larceny.

Table 1.3 Number of reported cases of break and enter in New South Wales

Offence	2012	2013	2014
Break and enter dwelling	40 600	35 264	33 932
Break and enter non-dwelling	16 294	14 605	12 734
Steal from dwelling	21 884	21 647	22 335
Steal from retail store	22 021	21 843	20 483

Source: New South Wales Bureau of Crime Statistics and Research, 2012–14

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White-collar crime

White-collar crime is a general term given to various non-violent crimes associated with businesspeople or professionals. White-collar crime is often difficult to detect and can be time-consuming and expensive to investigate. Three of the most common white-collar crimes are **embezzlement**, **tax evasion** and **insider trading**.

white-collar crime
a general term for various non-violent crimes associated with professionals or businesspeople, such as embezzlement, tax evasion or insider trading

embezzlement
when a person steals money from a business over a period of time while they are employed at the workplace

tax evasion
an attempt to avoid paying the full amount of taxes due by, among other things, concealing or underestimating a person or business's income or assets

insider trading
when a person illegally trades on the share market to their own advantage using confidential information

Embezzlement

Embezzlement is when a person misappropriates another person's property or money that they have been entrusted with. Embezzlement usually occurs when an employee steals money from their employer, such as by transferring sums of money to the employee's own account or stealing money from the cash register or petty cash tin. It might involve a large-scale corporate embezzlement, sometimes with more than one offender, or a small amount stolen from a local business. Money will often be embezzled in small amounts at a time, sometimes with accounts or records modified in an attempt to hide the conduct. Embezzled money can be difficult to recover, even when pursued through the courts, as it may be untraceable or the offender may be unable to repay the money they have stolen.

Tax evasion

Tax evasion is a common white-collar crime and occurs when a person or company tries to avoid paying taxes to the government. Often it involves people fraudulently filling out tax returns stating that their income is lower than it actually is, or organising a business or property in a way that hides income or assets from the tax authorities. Tax evasion can incur high penalties when discovered.

Insider trading

Insider trading is an offence related to the buying and selling of company shares. It occurs when a person (usually a stockbroker or company director) obtains confidential inside information about a company that will affect that company's share price. The information will usually relate to the share price significantly increasing or dropping, which the offender will then take advantage of (for example, by buying or selling their own shares to reap the benefits or avoid the losses).

Research 1.4

Search newspapers or go online and find five articles about white-collar crime. Make sure they are current and different cases. Write a short annotation for each of the cases and attempt to identify the reasons for the accused committing the offence, the defence presented by the accused, and any other interesting or relevant facts of the cases.

Computer offences

Computer offences include various crimes related to hacking and unauthorised access or modification of data. The *Crimes Act 1900* (NSW) lists a number of computer offences, including unauthorised access to, modification or impairment of restricted data, and more serious crimes, such as impairment of electronic communication or unauthorised access or modification of restricted data with intent to commit a serious offence. The more serious computer crimes can incur a penalty of up to 10 years' imprisonment.

Computer crimes might occur where the offender breaks through the security firewalls of a company's computer and alters or steals the company's data. Such crime might result in private financial data (such as that related to people's personal bank accounts or credit cards) being made available to people who could use it unlawfully. An employee of the target company will sometimes commit computer crimes. In 2015, there was a lot of global

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News

Two men sentenced in Australia's largest insider trading case

The Hon Josh Frydenberg MP

17 March 2015

[Lukas James Kamay and Christopher Russell Hill] were sentenced to jail terms of seven years and three months, and three years and three months respectively in the Victorian Supreme Court today for their roles in Australia's largest insider trading scheme totalling $7 million. The two men were charged in 2014 with insider trading, money laundering and abuse of public office offences.

This large and complex investigation by the Australian Federal Police (AFP) and Australian Securities and Investments Commission (ASIC) began after suspicious trading was identified in the foreign derivatives market.

The AFP and ASIC, working together through the AFP-led Fraud and Anti-Corruption Centre, discovered an employee of the National Australia Bank was receiving sensitive information from an employee of the Australian Bureau of Statistics (ABS). They were then using this information to enter into foreign exchange derivative products and profit from favourable movements in market prices.

The nine-month illegal trading activity resulted in profits of approximately $7 million dollars, which was restrained by the AFP-led Criminal Assets Confiscation Taskforce. This money has now been officially forfeited to the Commonwealth and is to be placed into the Confiscated Assets Account, from where it will be reinvested into the community.

Today's sentence is testament to the close working relationship between the AFP and ASIC, and the dedication and expertise of the specialised teams involved.

The arrest and conviction of an ABS officer for an unauthorised disclosure of statistics is unprecedented in the ABS's 110 year history. Today's sentence demonstrates that such actions which breach the trust placed in ABS officers will not go undetected or unpunished.

It also sends a clear message about the importance and emphasis that our enforcement agencies place on maintaining market integrity. Insider trading is a serious offence and a form of dishonesty – stealing information owned by others and exploiting it for a personal gain. It is also at complete odds with the expectation of Australian investors about a level playing field, where those with access to privileged information do not have an unfair advantage over other investors.

In 2014, the Government directed an extra $14 million in funding, which was confiscated from criminals, to increase the detection and disruption capabilities of law enforcement. This boost was part of the Coalition Government's commitment to taking the profit out of crime, and to disrupt and deter serious and organised crime in Australia by removing the proceeds and instruments of crime.

publicity when hackers broke into the systems of Ashley Madison, an online dating service for people already married who want to have an affair. The hackers said that if the website was not closed down, they would make all of the private customer data available online. Ashley Madison refused, and the hackers published the customer data in August 2015.

Fraud is another type of economic offence that can include white-collar crime, property offences and computer crime. Fraud refers to deceitful or dishonest conduct carried out for personal gain.

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It is often an element of other offences, such as fraudulent misappropriation, fraudulent personation or obtaining credit by fraud.

fraud
deceitful or dishonest conduct carried out for personal gain

Fraudulent crimes are becoming increasingly relevant with advances in technology, especially relating to internet use and electronic facilities such as automatic teller machines (ATMs). Common types of fraud include identity theft, internet phishing (fraudulently posing as a legitimate website), or requesting funds or account details by email under fraudulent pretences. Nigerian email scams or ATM skimming devices are two of the most well-known scams.

Identity crime might involve a person using another person's personal details to apply for credit cards or loans, or open bank accounts to deposit fraudulently gained funds. Identity crime is one of the fastest growing areas of crime in Australia. In 2013–14, approximately 9% of respondents to surveys by the Australian Institute of Criminology had suffered misuse of their personal information in the preceding 12 months, with 5% having financial losses. The Attorney-General's Department estimated that identity crime cost Australia approximately $2 billion.

Legal Links

The Australian Government has established a website with information about current fraudulent scams. It can be viewed at http://cambridge.edu.au/redirect/?id=6232.

Drug offences

Drug offences relate to acts involving prohibited or restricted drugs. There are many crimes that may be associated with drug abuse or addiction, such as larceny, robbery, break and enter, or prostitution. Drug offences focus on the movement of the drugs themselves, including, for example, the growing, selling and use of the drug.

People have access to many different types of drugs, both legal and illegal. Legal or unrestricted drugs include paracetamol and caffeine. Illegal drugs are drugs that have been prohibited by law because law-makers have deemed them unsafe for general use; they include cannabis and heroin. Restricted drugs or controlled substances include drugs that are available via prescription only, such as cold and flu tablets or anti-depressant medications, and drugs that are restricted to particular scientific or medical uses.

In New South Wales, the *Drug Misuse and Trafficking Act 1985* (NSW) outlines numerous offences related to prohibited or restricted drugs, with some additional offences included in the *Summary Offences Act 1988* (NSW). The main federal legislation relating to drugs is the *Customs Act 1901* (Cth), which will most often apply where there is an international element to the offence, such as cross-border drug trafficking. The most common drug offences relate to prohibited drugs and focus on cultivation, production, supply and trade (trafficking), possession or use of the drug.

Some of the main offences are:

- possession of a prohibited drug – the drug must be in the accused's custody or control, and the accused must know about it; this offence includes shared ownership of the drug or simply minding the drug for another person

Figure 1.10 Estimated Australian direct and indirect cost of identity crime in 2013–14

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Figure 1.11 Andrew Chan and Myuran Sukumaran

- use of a prohibited drug – the intentional consumption of the drug by any means (this will not apply if the use occurs in a medically supervised injecting centre)
- cultivation – applies to the growth or cultivation of a prohibited plant, such as cannabis
- supply of a prohibited drug – this is a broad offence including offering or agreeing to supply, whether or not the actual drug or money really changed hands; it can also include having drugs in your possession for the purpose of supply, and single or multiple instances of supply.

Drug offences often carry severe penalties. Users may often face penalties such as attending a drug rehabilitation program or complying with a good behaviour bond; some cases may be heard in dedicated youth or adult drug courts. Suppliers, or those who make drugs, are dealt with much more severely, as their actions are deemed to have a greater impact on the community as a whole.

Drug traffickers face lengthy jail sentences in Australia, particularly for international trafficking. In some countries (including Indonesia, Singapore and Malaysia), traffickers may face the death penalty. Australian citizens Andrew Chan and Myuran Sukumaran were drug 'mules' (couriers) arrested in Indonesia with other members of the 'Bali Nine' drug-trafficking operation. They were put on trial in Bali and sentenced to death on 14 February 2006. Despite calls for clemency from then Prime Minister Tony Abbott, Foreign Minister Julie Bishop and tens of thousands of Australians, on 29 April 2015 Chan and Sukumaran were shot by a firing squad on the island of Nusakambangan.

Driving offences

Driving or traffic offences are some of the most commonly committed offences in New South Wales. Driving offences are included in both the *Road Transport Act 2013* (NSW) and the *Crimes Act 1900* (NSW).

The police enforce and process many driving offences through the imposition of on-the-spot fines. Such fines will generally relate to strict liability traffic offences such as speeding. These offences are easier to process as they only require the police to show that the offender committed the act; they do not need to consider the individual's intention or state of mind. Traffic offences are regulated by New South Wales Roads and Maritime Services (RMS), which controls the demerit system through which offenders lose points from their driver's licences if they are caught committing certain traffic offences.

The most common traffic offences are:

- exceeding the speed limit
- driving without a licence or while disqualified
- ignoring road signs
- driving above the legal blood alcohol limit of 0.05.

Serious driving offences are punishable by significantly higher penalties. Such offences will be dealt with through the courts and may result in the imposition of large fines, suspended or cancelled licences, or imprisonment. Serious offences include furious or reckless driving, negligent driving causing death or serious bodily harm, and failing to stop and give assistance at an accident involving death or injury. They also include driving under the influence of proscribed drugs or with an excessive blood-alcohol level.

Public order offences

Public order offences relate to acts that are deemed to disturb the public order in some way, such as a disturbance in or in sight of a public area. There are a number of public order offences listed in the *Summary Offences Act 1988* (NSW) and under Part 3A of the *Crimes Act 1900* (NSW). Public order offences

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Figure 1.12 Driving under the influence of proscribed drugs or with an excessive blood-alcohol level is considered a serious driving offence and incurs high penalties.

Figure 1.13 Knives were banned in public in an attempt to reduce attacks.

are often acts that society deems inappropriate or offensive when conducted in public, although they may be perfectly legal or acceptable within the confines of one's own home.

Some of the most common public order offences are:

- obscene, indecent or threatening language or behaviour in public
- possessing a knife in a public place without reasonable excuse
- obstructing traffic or ignoring a reasonable police direction to 'move on'
- damaging public fountains or protected places.

These offences will usually incur a fine or other lesser penalty.

However, some public order offences are more serious crimes that will usually be heard in court and can result in significantly higher penalties. More serious public order offences are listed in the *Crimes Act 1900* (NSW). For example, the offence of **affray** involves using or threatening to use unlawful violence on another that would cause a person of reasonable firmness to fear for their safety. It is a charge often laid as a result of a public fight or brawl where people nearby could have feared for their safety, and is punishable by up to 10 years' imprisonment. **Riot** is a similar public order offence but involves 12 or more people using or threatening to use unlawful violence for a common purpose. Other serious public order offences include explosives and firearms offences, bomb hoaxes or participation in criminal organisations.

affray
using or threatening to use violence on another that would cause a reasonable person present at the scene to fear for their safety

riot
similar to affray, but with 12 or more people using or threatening to use unlawful violence for a common purpose

The use of police discretion in public order offences often results in higher incidences of discrimination, with Indigenous and young people more likely to be targeted.

Preliminary crimes

Preliminary crimes refer to offences that precede the commission of a crime or where the crime has not been completed for some reason; for example, it may have been interrupted or unsuccessful. Preliminary crimes fall into two main categories: **attempts** and **conspiracy**.

attempt
an offence where a principal crime was attempted but failed or was prevented for some reason despite the intention to complete it

conspiracy
when two or more people plot to commit a crime together

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Attempts

An attempt to commit a crime is considered an offence and will usually be punishable by the same penalty as if the crime had taken place. Section 344A of the *Crimes Act 1900* (NSW) states that 'any person who attempts to commit an offence for which a penalty is provided … shall be liable to that penalty'. However, certain attempts, such as attempted murder, are dealt with specifically in the Act and may carry a lower penalty.

Because the penalty for an attempt is so high, the prosecution will need to show that the offence was all but completed, or failed for some reason despite an intention to complete it. The accused may have a lawful reason for the conduct in question or have had no real intention of completing the apparent crime. For example, in *R v Whybrow* (1951) 35 CAR 141 a husband connected electricity to the soap dish in the family bath in order to electrocute his wife. His plan did not work and when his wife came into contact with the soap dish she received only a shock. The court found him guilty of attempted murder because his intention for the act to result in death was clear, despite the fact that it had failed.

Conspiracy

Conspiracy occurs when two or more people jointly conspire to commit a crime. The conspiracy is complete where an agreement (the act) is reached between the parties, with the intention also shown by each person's explicit agreement to commit the offence. It may be difficult for a prosecutor to prove conspiracy without the aid of a confession or record, such as a signed document or phone tap, because the crime allegedly agreed to did not take place.

Regulatory offences

Regulatory offences are usually set out in delegated legislation, such as regulations or local laws that address a range of day-to-day situations and standards. They differ from more serious offences set out in statute or common law, which can only be modified by parliament (or in some cases the courts), in that they are considered more minor offences with lesser penalties. They are usually determined by the government department or agency responsible for that area of law and policy and require faster or more frequent change than parliamentary legislative processes allow.

Regulatory offences include:

- watering the garden despite water restrictions being in place
- breaching workplace health and safety regulations
- travelling on public transport without a valid ticket
- lighting a fire or barbecue on a day of total fire ban.

Regulatory offences are usually strict liability offences, so they do not require any intention to be proved. Government officers or local law enforcement officers will usually enforce regulatory offences. In the case of a corporation or a business, a breach of a regulatory offence will usually incur a fine or loss of a particular licence; in extreme cases it may result in more serious criminal charges being laid. An example is the negligent or illegal disposal of hazardous materials or a breach in licensing laws at a pub or club. The fines imposed are usually in the thousands or hundreds of thousands of dollars.

Review 1.3

1. Using offences as examples, describe some of the differences between offences against the person and economic offences. What types of crime do they include? What are the main effects of the crimes? Why do you think these acts are deemed criminal?
2. A number of driving offences and regulatory offences are strict liability offences. Using examples, describe why you think these crimes are strict liability. What are the advantages and disadvantages for society of such offences being strict liability?
3. Attempts and conspiracies often carry penalties as high as if the crime was actually committed. Discuss why this might be and describe some of the possible difficulties in prosecuting an attempt or conspiracy.

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1.6 Summary and indictable offences

All criminal offences are separated into two important categories, according to their severity: **summary offences** and **indictable offences**. Whether the offence is summary or indictable will be crucial to the way the case is prosecuted and heard in court.

summary offence
a less severe offence that is heard and sentenced by a magistrate in a Local Court

indictable offence
a more severe offence that is heard and sentenced by a judge in a District Court or tried before a judge and jury

Summary offences are considered less serious offences and will usually incur lesser penalties than indictable offences, although they may still have serious consequences. They will be heard and sentenced in a Local Court before a magistrate and not tried in front of a jury. Penalties may range from a bond or fine to a jail sentence of up to two years, or five if a person is convicted of more than one offence. Many summary offences are listed in the *Summary Offences Act 1988* (NSW); they include regulatory offences.

Indictable offences are more serious offences, such as assault, and are generally heard in the District Court. An initial committal hearing will be held in the Local Court, where a magistrate will determine whether the prosecution's evidence is sufficient to go to trial. Indictable offences will then be heard and sentenced by a judge or, where a 'not guilty' plea is entered, before a judge and jury.

Many indictable offences will also be 'triable summarily'. This means that the accused will be able to choose to have the case heard by a magistrate in the Local Court or a judge and jury in the District Court. Cases heard in the Local Court can have significant administrative advantages, such as an earlier hearing date, a faster hearing, less formality and cost, and the possibility of a lesser sentence due to Local Court restrictions on maximum sentences. However, where a 'not guilty' plea is entered, the District Court offers the advantage of a jury trial, which might be more inclined to acquit, although this would not be guaranteed.

The main differences between summary and indictable offences are outlined in Table 1.4.

Figure 1.14 The Supreme Court of Western Australia

Review 1.4

1. Describe the key characteristics of a summary offence and an indictable offence.
2. Identify some of the advantages and disadvantages for an offender of having their case heard as a summary instead of an indictable offence.

1.7 Parties to a crime

Any person who has been involved in any way in committing a crime may become a 'party' to the crime. The level of punishment that a court metes out to a party is usually determined by that person's level of involvement in the crime. There are four main categories:

- *Principal in the first degree* – this is the principal offender, or the person who actually commits the criminal act. For example, in an armed robbery this would be the person who actually pointed the weapon and took the money. The principal offender will be directly responsible for the crime being carried out and so is likely to receive the highest sentence.
- *Principal in the second degree* – this is a person who was present at the crime and assisted or encouraged the principal offender to perform the offence. For example, in the scenario above, this may be the person who kept a lookout by the door. The presence need not be immediate

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Table 1.4 A comparison of summary and indictable offences

Summary offence	Indictable offence
Less serious offence tried by a magistrate in the Local Court	More serious offence (such as murder or rape), tried by a judge and jury
Judgement and punishment determined by a magistrate	Judgement determined by a jury; punishment determined by the judge
Charge usually laid by a police officer or a government officer	Charge brought by a public prosecutor working for the state
Punishment usually less severe, such as a fine, good behaviour bond or community service	Punishment usually imprisonment or a hefty fine

physical presence; assisting the principal may be sufficient, such as by providing instructions over the phone. The principal in the second degree may be given a lesser sentence, depending on the circumstances.

- *Accessory before the fact* – this is someone who has helped the principal to plan or carry out the crime. An accessory before the fact is a person who has helped in planning or preparation before the actual act is carried out.
- *Accessory after the fact* – this is someone who has assisted the principal after the actual act is committed, such as by driving a getaway car or disposing of evidence.

Figure 1.15 Several people can be involved in the one crime.

Review 1.5

1. Describe the four possible parties to a crime.
2. Use a real or fictional example of a crime to illustrate the different parties to an offence.

1.8 Factors affecting criminal behaviour

People commit crimes for all types of reasons. One person may commit the same crime as another person but for an entirely different reason. People have studied crime and the reasons or patterns behind it for centuries. Numerous theories have been developed to attempt to explain criminal behaviour, some less convincing than others. The scientific study of crime and criminal behaviour is known as **criminology**.

criminology
the scientific study of crime and criminal behaviour

Some of the main reasons behind a person's committing an offence might include psychological or pathological factors, social factors, economic factors and political factors. Genetics, according to one of the more extreme theories of criminal behaviour, can also have a role in crimes. On the other hand, some crimes may be committed purely out of self-interest. This may involve diagnosed or undiagnosed pathological elements. In some instances, crimes may be committed simply because

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Figure 1.16 Peers can sometimes influence or encourage others to participate in or tolerate a criminal act.

the particular area of law may be out of date and in need of legal reform.

Psychological factors

Psychological or pathological factors will often be relevant to the commission of an offence, with many forms of mental illness affecting a person's behaviour. These factors will often be important during the criminal process, as early as the time of arrest or charge, or relevant to the accused's state of mind and raised by either prosecution or defence during a criminal trial. Psychological factors contributing to the offence will also be relevant during sentencing, and particular sentencing programs, such as drug rehabilitation programs, will often focus on the accused's psychological rehabilitation.

Social factors

Social factors influencing a person's attitude towards crime may include their family situation or personal relationships. The social groups that people associate with will often influence a person's attitudes and views of acceptable behaviour. This

Research 1.5

The AIC is a research and knowledge centre on crime in Australia that publishes various crime-related statistics. Access the latest edition of *Australian Crime: Facts and Figures* at http://cambridge.edu.au/redirect/?id=6233. View the 'Selected Offender Profiles' for the most recent year available and answer the following questions.

1. What are the main age and sex profiles of offenders in Australia?
2. What are the main areas of income, non-criminal and criminal, recorded by offenders?
3. What percentage of offenders have been arrested in the past 12 months?
4. What are the main types of crimes committed?

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may be particularly relevant, for example, in the area of drug offences or public order offences. In other areas of crime the environment that a person has been raised in could influence their behaviour as an adult. For example, a person brought up in an abusive home may have experienced certain traumas (such as assault or sexual assault, or instances of drug abuse) that may be replayed in their adult life unless the person has effective treatment.

Economic factors

Economic factors present one of the most substantial reasons for the committing of crimes in New South Wales. People from disadvantaged backgrounds are more likely to commit crimes and front our courts than any other group. For example, statistics released by the AIC show that one-third of male and one-half of female offenders receive a welfare or government payment as their main source of income. Poor education and lack of skills are often closely related to economic factors, with such criminals often habitually unemployed and unskilled. Even if someone is gainfully employed, menial or poorly paid jobs may increase their likelihood of committing an offence. In some instances, offenders may view criminal acts resulting in a financial benefit, such as larceny or robbery, as necessary.

Political factors

Although not the most influential factors in criminal offences, political factors have played a role in criminal behaviour for centuries. Offences against the sovereign or the state are likely to have political factors influencing their commission. Some public order offences, such as riots, may also have political aspects, especially in situations where public political protests become intense. Examples include the annual protests at the G8 Summit, or protests leading up to the 2014 G20 Brisbane Summit. Of course, protesting itself is not an illegal activity; it is only when it is coupled with public disorder or dangerous behaviour that it becomes a criminal matter. Terrorism-related offences are some of the most extreme political offences, where the use of violence or intimidation will usually have explicit political aims.

Figure 1.17 A police car on fire during a protest at the G20 Summit in Toronto in 2010. A protest can become a criminal matter when coupled with public disorder or dangerous behaviour.

Genetic theories

Genetic theories surrounding criminal behaviour have long been a topic of interest for scientists and criminologists. For example, in the early 19th century the science of 'phrenology' was born. Under this approach, criminals had their heads measured to determine whether there were any physical characteristics that could allow scientists to pick people as potential criminals. Fortunately, recent studies have been more advanced. They have investigated and compared the DNA of prisoners to see if there is any one common genetic marker that can predict criminal behaviour.

None of these genetic studies has been conclusive in showing that individuals with certain genes are more likely than those without them to commit crimes. This suggests that the external factors listed above play the greatest role in criminal activity.

Self-interest

Self-interest will usually play some role in the committing of a crime, from drug offences committed for profit or for use, to property offences for profit, offences against the person for revenge, and white-collar crimes such as embezzlement or insider trading. White-collar crimes are good examples of criminal activity being driven by greed and self-interest rather than by underlying socioeconomic or political factors.

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1.9 Crime prevention: situational and social

Understanding the factors and motivations behind crime is also important in crime prevention. But one thing is certain – crime has existed as long as laws have been in place, and it will continue to do so.

Society is always looking for ways to prevent crime. For example, uniformed police officers patrolling trains, shopping centres and the streets may contribute to the prevention of certain crimes, as do community-based organisations such as Neighbourhood Watch. However, as society and crime evolve and criminals become more sophisticated, other methods of crime prevention need to be employed. Two main areas of crime prevention are situational crime prevention and social crime prevention.

Situational crime prevention

Situational crime prevention aims to make it more difficult for criminals to carry out a crime, and therefore stops the crime before it is committed. It usually involves one of two approaches:

- planning and architectural design, which considers the influence of physical environments upon crime
- focused (situational) approaches, which rest on rational choice theory, which views offenders as actors who weigh up potential gains, risks and costs.

Planning and architectural design, for example, may revolve around security, such as installing bars or an alarm system at home to ward off would-be thieves, or using computer passwords or internet firewalls to deter the theft of data.

Strategies such as avoiding crime 'hot spots' like poorly lit alleyways and car parks can assist in preventing crime. More unusual tactics have included shopping centres playing classical music to deter groups of young people from congregating and causing trouble. Closed-circuit television (CCTV) cameras are another important method of crime prevention and have been installed in many retail stores and in known trouble spots throughout major cities. Although they will not always prevent crimes from being committed, people may be deterred from committing a crime when they know

Figure 1.18 A situational crime prevention measure

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Figure 1.19 Many councils put on concerts in order to engage and entertain youth.

they are at risk of being impeded or caught. They can also provide valuable evidence in the event that an offence is committed.

Decreasing the rewards of crime is another form of situational crime prevention. An example of this approach is the use of colour tags attached to clothing in shops. The tag sets off a detector at the door of the shop if someone tries to walk out with the item without purchasing it. If the tag is removed by force, it releases blue dye all over the stolen item, rendering it useless. Other methods include magnetic strips embedded in items that will set off a detector at the shop door.

Other crime prevention initiatives by local councils have aimed at removing opportunities for crime (for example, designating no-alcohol zones in an attempt to curb alcohol-related incidents, improving lighting in areas such as car parks and walkways, and installing blue fluorescent lights in public toilets to prevent drug injecting in public areas).

Social crime prevention

Social crime prevention attempts to address the underlying social factors that may lead to criminal behaviour. These factors include:

- poor home environment and parenting
- social and economic disadvantage
- poor school attendance
- early contact with the police and other authorities.

The government spends millions of dollars in different areas to try to combat these social problems. For example, funding is put into educational programs in schools to raise the education levels of students deemed to be 'at risk'. Schools, TAFEs and private organisations have also formed partnerships to provide better opportunities for students who find the school setting inappropriate. Parenting workshops are run for mothers and fathers who come from disadvantaged backgrounds and lack the skills to empower themselves and their children to make better life choices.

Youth programs are also run to teach dispute resolution skills and social skills that will encourage potential offenders to make better choices about their actions and their futures. If such early crime

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prevention programs can change the course a potential offender is on, it might prevent them from ever being in a situation where they feel encouraged to commit an offence.

Research 1.6

In September 2015, the federal government announced a $100 million package to fight domestic violence. This included both situational preventative measures (such as GPS tracking of abusers) and social preventative measures (such as increased training to enable hospital staff to recognise the signs of domestic violence).

Use the internet to research this or another crime prevention program, and assess which elements are situational prevention and which are social prevention.

Review 1.6

1 Describe three factors that might influence a person to commit an offence.
2 Define 'situational crime prevention' and provide examples of how this is achieved.
3 Define 'social crime prevention' and give some examples of how this is achieved.

Figure 1.20 Minister for Women Michaelia Cash and Prime Minister Malcolm Turnbull look on as 2015 Australian of the Year Rosie Batty gives a speech during the announcement of the federal government's domestic violence prevention package.

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Chapter summary

- A crime is an act or omission committed against the community at large and that is punishable by the state.
- The criminal law is constantly changing.
- Criminal offences include an *actus reus* (guilty act) and *mens rea* (guilty mind), except for strict liability offences.
- Offences against the person include murder and manslaughter, assault and sexual assault.
- Offences against the state are old laws, but have recently returned to parliament's attention.
- Economic offences range from theft to computer hacking and insider trading.
- Crimes can be punishable even if they do not succeed (for example, attempt and conspiracy).
- Indictable offences are more serious offences than summary offences.
- There can be more than one party to a crime who may be punishable.
- Offenders commit crimes for different reasons, influenced by many factors.
- Crime prevention ranges from situational approaches to broader social approaches.

Questions

Multiple-choice questions

1 Selling alcohol to a minor is best described as which of the following?

A A public order offence
B A strict liability offence
C An offence against the person
D An offence against the sovereign

2 Involuntary manslaughter is best described as which of the following?

A A person causing the death of another human being because they acted in a criminally negligent way
B A person taking their own life
C A murder reduced to manslaughter due to mitigating circumstances
D A person causing the death of another and they intended to do so

3 What is larceny?

A A white-collar crime that is on the increase
B Using force when stealing goods
C The act of breaking into a private residence to steal something
D The intentional taking of another person's property without their consent

4 Writing a book calling for the violent overthrow of the government might be prosecuted as what type of offence?

A A crime against humanity
B A crime against a person
C A crime against property
D A crime against the sovereign

5 A person who helps a criminal hide out at their house might be charged as:

A an accessory before the fact
B an accessory after the fact
C principal in the first degree
D principal in the second degree

Chapter summary questions

1 Define what a crime is and describe the elements of criminal law.

2 Using examples, explain the difference between murder and manslaughter.

3 Explain the difference between summary offences and indictable offences and list some examples of each.

4 Describe what regulatory offences are and how they differ from other crimes.

5 Explain some of the factors contributing to crime and provide examples of some crime prevention techniques that might be used to combat them.

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Chapter 2
The criminal investigation process

Chapter objectives

In this chapter, students will:

- identify the rights of suspects during the interrogation process
- describe the purpose, use and types of police powers
- discuss the role of technology in investigating crime
- explain the process of a criminal investigation
- describe the different types of evidence collected during an investigation
- communicate the relevant legislation in the investigation process.

Key terms/vocabulary

arrest
bail
caution
charge
court attendance notice
DNA evidence
evidence
inadmissible evidence
in situ
interrogate
interrogation
investigate
reasonable force
remand
search and seizure
subpoena
surety
warrant

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Evidence Act 1995 (NSW)
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
Terrorism (Police Powers) Act 2002 (NSW)
Bail Act 2013 (NSW)

SIGNIFICANT CASES

Darby v Director of Public Prosecutions [2004] NSWCA 431

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Legal oddity

It is not only the police who are allowed to arrest people.

In New South Wales, you are allowed to arrest another person without a warrant if that person is in the act of committing a crime, has just committed a crime, or has previously committed a crime but has not yet been tried. If these conditions are met, you can make a 'citizen's arrest' if you use only reasonable force as is required to arrest and detain the person, and that you inform the person that you are arresting them and why.

A citizen's arrest happened on live television in August 2012. Northern Territory politician John Elferink was giving a press conference when a man walked up behind him and kicked him. Elferink, a former policeman, grabbed the attacker and detained him, saying 'I'm apprehending you and I'm waiting for the police to arrive.' The man was later charged and fined $2200; it turned out he had been drunk at the time and had accepted a bet of $200 to walk up and kick Elferink.

Coincidentally, the topic of the press conference during which the assault occurred was changes to assault laws in the Northern Territory.

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2.1 Police powers

The law defines what a crime is and whether a particular act constitutes an offence. But laws alone would be ineffective without any means to enforce them. The responsibility for enforcing criminal laws and ensuring that they are adhered to lies with the police.

Police form part of the executive arm of government and so are separate from the legislature, which makes the laws, and the courts, which make enforceable legal decisions and judgements. Police are responsible for the prevention and detection of crime and for the maintenance of public order. Importantly, it is the police that are responsible for ensuring the criminal laws are observed.

The role of the police in the criminal investigation process is to **investigate** crimes, make **arrests** if necessary, **interrogate** suspects and gather **evidence** against the accused. Police will then present the evidence for judgement to a court on behalf of the state, either directly or through a prosecutor. The challenge for all communities is to balance the extent of powers required by police against the rights of ordinary citizens.

investigate
for the police, carrying out research to discover evidence and examine the facts surrounding an alleged criminal incident

arrest
to seize a person by legal authority and take them into custody

interrogate
to formally question a suspect in relation to an alleged crime

evidence
information used to support facts in a legal investigation or admissible as testimony in court

In New South Wales, crimes will be investigated by the NSW Police Force (state) or the Australian Federal Police (AFP) (Commonwealth), depending on whether the offence is a state or a Commonwealth offence. In some circumstances, offences may be enforced by other government officials or local law enforcement officers, particularly in the case of regulatory offences.

The NSW Police Force is given special legal powers under the law to enable it to carry out its duties effectively. The majority of these powers are contained in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), but they can also be found in other legislation. Police may occasionally be given greater powers in specific areas in order to combat particular threats or perceived threats to the community. Some of the main police powers include the power to:

- detain and question suspects
- search property and seize evidence (commonly known as **search and seizure**)
- use **reasonable force** if necessary to carry out their duties
- use particular technologies to assist an investigation, such as phone taps, surveillance or DNA samples
- arrest and interrogate suspects
- recommend whether or not bail should be granted.

Figure 2.1 Crimes in New South Wales will be investigated by either the NSW Police Force or the Australian Federal Police (AFP).

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search and seizure
the power to search a person and/or their possessions and seize and detain items that are discovered

reasonable force
such force as is reasonably necessary for the officer to perform the function; the officer must honestly believe that it was justified and not excessive

The special powers can be controversial because they will often directly conflict with the ordinary rights of citizens. For example, if one citizen were to use force to detain another in public, they may be criminally liable for offences such as assault, false imprisonment and affray. However, society and law-makers deem such police powers lawful and necessary to ensure that criminal laws can be effectively enforced and public order maintained. Police will sometimes need to seek a **warrant** from a court to be able to use a particular power, such as making an arrest or using a phone tap. This is one type of check that is put in place in order to ensure that special powers are used appropriately and not abused.

warrant
a legal document issued by a magistrate or judge authorising an officer to perform a particular act, such as make an arrest, conduct a search, seize property or use a phone tap

The NSW Police Force also follows a specific code of behaviour called the *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*, which sets out the rights of suspects and the manner in which investigations should be carried out. Police are expected to treat all members of the community in a fair and ethical manner regardless of age, sex, religious or ethnic background, or the severity of the crime they are suspected of having committed. Where a suspect believes their rights have been abused, there are complaints procedures available. The NSW Police Force is also overseen by the NSW Ombudsman and the Police Integrity Commission.

2.2 Reporting crime

Citizens have an important role to play in the criminal justice system: reporting crime. Community programs have been established to encourage the public to report information about criminal activity. These programs can assist police work and help promote a sense of community participation in solving crimes. For example, Crime Stoppers is a national community-based program that encourages people to report information on unsolved crimes or unknown offences, or suspicious or unusual activity. It is particularly valuable where people may want to remain anonymous or not become directly involved in a police investigation. From July 2014 to June 2015, Crime Stoppers New South Wales alone reported receiving 83 000 phone calls with a total of 25 894 information reports being created for investigation by the local police. This led to the arrest of 1180 offenders resulting in 440 charges being laid. Crimes will usually be reported by a person who has knowledge of the crime or someone who has witnessed the crime. People may be hesitant about reporting a crime for a number of reasons, such as:

- reluctance to become involved or to appear as a witness
- fear of the consequences if the crime is reported
- inability to report the crime
- the dispute has already been settled with the offender, such as a brawl or theft by a person known to the victim
- the perceived time or administrative burden of reporting a crime.

Research 2.1

The NSW Police Force's *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* can be found at http://cambridge.edu.au/redirect/?id=6234. Look at the website and complete the following tasks.

1. Describe the aims of the *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)*.
2. Outline the processes the code covers.
3. Identify the values of the NSW Police Force that the code is based on.
4. Find a case where NSW Police Force's *Code of Practice for CRIME (Custody, Rights, Investigation, Management and Evidence)* has been investigated.

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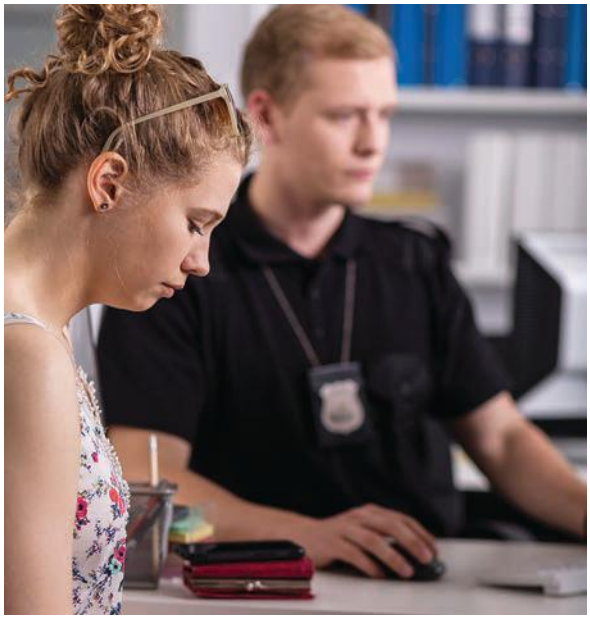

Figure 2.2 Community programs have been established to encourage the public to report information about criminal activity.

Some crimes are more widely reported than others – property offences such as car theft, for example. Such crimes may be reported in an attempt to recover the property or because the victims cannot claim on their insurance unless a police report is filed. Other crimes, such as domestic violence or sexual assault, more frequently go unreported. It is estimated that up to 85% of sexual assaults in Australia are not reported. This is often due to the shame and embarrassment victims feel and their unwillingness to go through the ordeal of reliving the experience while being questioned in front of a judge and jury with the offender present. This is so even though legislation that allows victims in sexual assault matters to give evidence by CCTV, rather than being in the room face to face with the accused, has recently been passed.

Review 2.1

1. Describe the role of police in society.
2. Outline some of the special powers police are given to perform their duties.
3. Describe what a person can do if they believe the police have not treated them properly.
4. Explain how a crime is reported.

2.3 Investigating crime

Once police receive information about a crime, they will make a decision about whether to pursue an investigation or take no further action. These decisions could be based on the severity of the offence, the likelihood of success and the available resources or priorities. Not all reported crimes are fully investigated and prosecuted, as resources are often directed to more serious or high-priority crimes. The investigation process can be long, as it often includes establishing that a crime has been committed, finding the offender and gathering enough evidence to be able to prove a case against the offender in court.

Gathering evidence

When a crime has been committed, it is the role of the police to gather evidence to further the investigation and to support a **charge** in court at a later date. This may involve taking witness statements at the scene of the crime and crime scene detectives looking at any evidence left behind. This part of the investigation will usually need to happen quickly, before witnesses forget what they saw or heard and before evidence is compromised or interfered with.

charge
formal accusation of a person of committing a criminal offence

Crime scenes and evidence will be preserved where possible until specialists and detectives arrive. Evidence is then documented ***in situ*** using video and photography, and is meticulously recorded and handled to maintain its integrity as evidence. Evidence that has been contaminated or compromised is **inadmissible evidence**. Organic samples such as hair and blood are particularly vulnerable to being contaminated.

in situ
a Latin term meaning 'in the place'; used to describe the place in which a piece of evidence is found or situated

inadmissible evidence
evidence that cannot be considered by a judge or jury in court (for example, confessions that were obtained by force)

It is important that the evidence gathered is sufficiently relevant to the case, and is the best possible evidence available to secure a conviction

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in court. All evidence must be obtained in a proper and lawful manner, as required by the *Evidence Act 1995* (NSW). If it is not, it may be considered inadmissible at trial, and that may reduce the chance of conviction.

The law imposes certain limits on the way police can gather evidence, and the types of evidence that can be used, to help ensure that the collection of evidence is legitimate and does not interfere with the rights of ordinary citizens. In certain circumstances strict procedures will need to be followed by police and in some situations a court warrant may be required before police can search for or seize evidence. Some of these limits and procedures are discussed below.

The types of evidence that may be gathered by police are varied, and include the oral testimony of the accused, police and witnesses, as well as physical evidence such as objects or weapons. Witness accounts will usually be recorded as statements for future reference. Documents, fingerprints, DNA samples, tape recordings, video surveillance and electronic information stored on hard drives can also be tendered as evidence in a case. The evidence may be handled by several people during the investigation, including the police who gather it initially and experts who may examine it. Great care is taken to ensure that the items of evidence are handled with extreme care and not interfered with in any way.

Gathering appropriate evidence is a complex task. Police officers may be specially trained, or independent experts may be contracted to assist in gathering or examining evidence. For example, the police force has specialised fingerprint and ballistics experts, as well as special teams of crime scene investigators who are trained to search for evidence at the place where a crime took place. In New South Wales, the police investigate the scene first, before the experts are called in to collect evidence. This system provides more room for error due to crime scene contamination. The evidence gathered is often sent on to specialists to be analysed; they may then give evidence in court.

Use of technology

Technology is frequently used by the police in order to gather evidence and prove charges. However, it can often be difficult for the law to keep up with new technology in law enforcement. Any new technology needs to be extremely reliable, because if there is any doubt about its reliability it risks being inadmissible in court or, worse, resulting in a wrongful conviction.

Figure 2.3 The types of evidence that may be gathered by police are varied.

For example, scientific and technological advances have now made the processing and cross-checking of criminal databases easier and more effective for day-to-day policing. State-of-the-art fingerprint and DNA databases make it easy for police to share information across states and internationally. Police surveillance teams are able to record video and audio footage using digital methods, which allow that material to be easily stored and copied. Cybercrime units are often able to locate criminals through their internet activity and track down people committing crimes such as computer hacking, internet scams and international pornography rings.

DNA evidence is an important advance in technology that has been particularly helpful in gaining some difficult convictions in both current and 'cold' (unresolved) cases. DNA evidence has been used in Australia for the past 20 years and has often been relied on in court as a dependable form of evidence. It has been a decisive factor in many cases. Jurors find forensic evidence compelling and persuasive even if they do not entirely understand

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News

NSW Police take DNA from hundreds of ex-offenders to build crime-solving database

Angela Lavoipierre

ABC website, 24 August 2015

New South Wales police are collecting DNA samples from thousands of criminals with spent convictions to help solve cold cases and future crimes.

Police are planning to take a further 2000 samples over the next 12 months, adding to 1000 already collected, to build a comprehensive DNA database.

Civil liberties advocates have criticised the program for casting too wide a net and taking samples from people who were, in many cases, rehabilitated.

David Porter from the Redfern Legal Centre, a state-wide service, said there had been a dramatic increase in the use of the practice throughout the year and public resources were being wasted.

'These are people who aren't under suspicion of any crime,' he said.

'The police are taking the time to seek their DNA, we are taking our time to advise them in relation to it, the police are taking further time to lodge an application with the local court, the local court is taking time to hear that application.

'I'm not sure what evil it is addressing.'

Officers have had the power to request DNA samples from past offenders for seven years, but the practice has been relatively rare until recently, when it was made a priority.

Under the program police can visit the homes of past offenders to request a DNA sample if they meet specific criteria.

The offenders must have served prison time for a crime that has a maximum sentence of more than five years and have been charged with a further offence, although not necessarily convicted.

Former offenders receive a letter stating that if they decline to provide a sample a court order will be obtained to compel them to.

NSW Police Assistant Commissioner Peter Cotter said the database would help police solve old and new crimes.

'Across the whole spectrum of crime types from minor property type crimes where no-one has been hurt all the way through to the real serious types of crimes such as serious assaults, sexual assaults,' Assistant Commissioner Cotter said.

He said the program focused on past offenders who had a 'fair chance' of becoming repeat offenders.

But solicitor David Porter said the program was catching people who, in some cases, had only spent days in prison.

'Generally speaking, I think most members of the public would agree that we don't need to be performing DNA tests on serial shoplifters,' he said.

NSW Greens MP David Shoebridge said the program was an attack on civil liberties.

'At a minimum, we should be having the Ombudsman overseeing this process,' Mr Shoebridge said.

'This has been a very secretive operation by the New South Wales Police that we've only really obtained evidence from anecdotally and that is not good enough when you're talking such a substantial use of police resources and such a significant attack on civil liberties.'

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the evidence being presented. However, the presence of DNA at a crime scene only establishes that an offender could have been responsible for a crime; it is still up to the police to provide a brief of evidence in order to convict the accused beyond a reasonable doubt.

DNA evidence
genetic material (such as hair, blood and saliva) that can be used to link a suspect with a crime scene or criminal offence, or to clear a suspect

In New South Wales, police are allowed to take forensic samples such as blood or mouth swabs to test against evidence found during an investigation. A person must consent to the sample being taken – if they refuse, the police can apply to a magistrate for an order to take the sample by using reasonable force. However, there have been concerns over the reliability of DNA testing. DNA testing is a lengthy process. An Auditor-General of New South Wales's report in 2012 highlighted the issue of backlogs in DNA testing. In some criminal cases, the wait is up to 12 months. The backlog in New South Wales ranged from 3500 cases to over 10 200. The turnaround for more serious offences such as murder, manslaughter, rape and sexual assault is much quicker: one to three months. The danger of relying too heavily on DNA technology was highlighted in 2009, when a number of wrongful convictions were discovered in both New South Wales and Victoria – they had been caused by errors in the DNA testing process. DNA samples can also be seen as an effective crime prevention strategy as seen in the media article on page 36 where NSW Police took DNA samples from ex-offenders in the hope to solve both cold and future cases.

Search and seizure

Two of the special powers given to police to assist in investigating crime are search and seizure. Under Part 4 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), police are given powers to 'search people and seize and detain things' in certain circumstances. One of the most important of these is the power to search and seize without a court warrant.

Powers of search and seizure are often the most controversial of police powers because they represent an intrusion into people's privacy or personal space. Search and seizure can also be confronting or embarrassing, especially when conducted in a public place.

Police in New South Wales have broad powers to stop and search any person where they 'believe on reasonable grounds' that the person is carrying anything stolen or used in commission of an indictable offence or another specified offence, a prohibited plant or drug, or a dangerous article in a public place. Police can then seize and detain any of these objects, if discovered. Challenges to police searches will often revolve around whether the officer had 'reasonable grounds' to believe that they could conduct the search.

Police may search anything in a person's 'possession or control', including, for example, a person's body, bag, clothes and possessions. Generally, police will ask for a suspect's cooperation and ask the suspect to turn their pockets out and remove bulky clothing. Police may also 'pat down' a suspect's body to feel for any concealed items. Police can also require a person to open their mouth or shake out their hair if they have reasonable grounds to believe that the suspected object is concealed there.

Powers of search and seizure and the rules around them will differ where they involve, for example, a search of premises, a search on school grounds or a search of a person already under arrest or in custody, or where a strip search is required. The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) also contains a number of procedures for police to follow when conducting a personal search or strip search. These relate to the preservation of a person's privacy and dignity during a search, informing them of the reason why the search is necessary and asking for their cooperation.

Limits and process requirements help safeguard the rights of ordinary citizens when police are gathering evidence, but in New South Wales police powers of search and seizure are still broad. In most circumstances reasonable suspicion will not be a difficult standard for police to meet. In some situations, however, the law will require police to obtain a court warrant before exercising their powers. This is outlined below.

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In Court

***Darby v Director of Public Prosecutions* [2004] NSWCA 431**

The case of Darby illustrates some of the difficulties in the legal definitions of a search and reasonable grounds. In the case, the police were using a sniffer dog, named Rocky, outside a nightclub to detect drugs. The dog would sniff the air to indicate to the police that drugs were present. In Darby's case, the dog sniffed the air, then sniffed 'bunting and ferretting' towards Darby, sniffed his genital area and trousers, and then touched his nose directly on Darby's pocket and stayed there until police came over and searched Darby. The police discovered amounts of cannabis and methyl amphetamine on Darby, who was charged and tried in the Local Court.

The magistrate in the Local Court ruled that the actions of the dog in sniffing so closely and making contact with Darby constituted an unlawful search. Only police officers are entitled to search and only when they make a judgement that there are reasonable grounds – the dog was not entitled to make or capable of making such a judgement. Consequently, the evidence of finding the substances was not admissible because it was gained following an illegal search.

The case was appealed to the Supreme Court, which ruled that the magistrate had erred in law and that the dog's search was not a search and that the police officers' own search was legal because it was formed on reasonable grounds – on the basis of the information conveyed by Rocky's sniffing.

Darby then appealed the judgement to the Court of Appeal, in an attempt to reinstate the magistrate's original judgement. Two out of three justices found that Rocky's actions did not, in fact, constitute a search.

Use of warrants

A warrant is a legal document issued by a magistrate or judge and authorises a police officer to perform a particular act (for example, make an arrest, conduct a search, seize property or use a phone tap). In New South Wales, certain searches or seizures cannot be performed without a valid warrant. For example, in New South Wales police can use sniffer dogs without a warrant to search for illegal drugs at pubs or clubs, on public transport or at certain public events, but would require a warrant before using dogs for general searches in any other public places. This judicial oversight helps ensure that those special police powers are used only when appropriate, and provides an additional layer of protection for ordinary citizens against misuse of that power. Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) sets out the circumstances in which a search warrant can be used.

When applying for a search warrant, the police must give substantial reasons or evidence to the magistrate or judge to justify the granting of the warrant. Emergency warrants can be obtained over the phone when time is of the essence in an investigation or an officer is unable to see a magistrate or judge in person, such as in the middle of the night.

New South Wales police are usually required to have a valid warrant before they can enter and search any premises, residential or business, without the consent of the occupier or owner. The warrant will state the reason for the premises

Figure 2.4 Police require a warrant to enter and search a premises without the owner's consent.

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An example of a search warrant

(Clause 6(1)(a))

(Law Enforcement (Powers and responsibilities) Act 2002)

This search warrant expires at [Time] on [Date] and must not be used after that time. On [Date], an eligible issuing officer empowered to grant search warrants under Division 2 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* granted this search warrant authorising [Name and rank] of [Place of work] (the applicant), a police officer, and all other police officers, as follows:

1 To enter the premises known as [Address] being a [Description of premises (e.g. dwelling house)].

2* To search those premises for any of the following things: [List and describe the things to be searched for with particularity. If space is insufficient, continue overleaf or attach a separate sheet.]

The applicant has reasonable grounds for believing that those things are connected with the following searchable offences: [Specify relevant offences.]

3* To search those premises in connection with the following child prostitution offence(s): [Specify the offences under the *Crimes Act 1900* (NSW) in relation to which the search is to be made.]

This search warrant may be executed:

(a)* only by day (i.e. between 6am and 9pm)

(b)* by day (i.e. between 6am and 9pm) or night (i.e. between 9pm and 6am).

[* Delete if inapplicable.]

In executing this search warrant a police officer may exercise the powers provided by the *Law Enforcement (Powers and Responsibilities) Act 2002*. These include the following powers:

(a) to enter the named premises,

(b) to search for the things (if any) mentioned in this warrant,

(c) to use any persons necessary to assist in the execution of the warrant,

(d) to use such force as is reasonably necessary to enter the premises,

(e) to break open any receptacle in or on the premises for the purposes of the search of the premises if it is reasonably necessary to do so,

(f) to search any persons found in or on the premises who are reasonably suspected of having a thing mentioned in this warrant,

(g) to arrest any persons found in or on the premises whom a police officer suspects on reasonable grounds of having committed an offence,

(h) to seize, detain, remove from the premises or guard anything mentioned in this warrant and any other thing found by a police officer in the course of executing this warrant that the police officer believes on reasonable grounds is connected with any offence,

(i) if the warrant is issued in relation to a child prostitution offence – to make in the premises inquiries relating to any such offence,

(j) to disable any alarm, camera or surveillance device at the premises,

(k) to pacify any guard dog at the premises,

(l) to render safe any dangerous article found in or on the premises,

(m) to operate electronic and other equipment brought to the premises or at the premises to examine a thing found at the premises,

(n) to move a thing found at the premises to another place for examination in order to determine whether it is or contains a thing that may be seized,

(o) to operate equipment at the premises to access data (including data held at premises other than the subject premises),

(p) to do anything that it is reasonably necessary to do for the purpose of preventing the loss or destruction of, or damage to, any thing connected with an offence that the police believe on reasonable grounds to be at those premises, including by blocking any drains at or used in connection with the premises.

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Signed [Insert signature.]
Date
[The eligible issuing officer should sign and date the warrant and initial any corrections. In the case of a telephone search warrant, in circumstances where the warrant is issued but not furnished to the applicant (for example, because facsimile facilities are not available), the applicant is to complete this Form of warrant in the terms dictated by the eligible issuing officer and write on it the date and time when the warrant was signed.]

being searched and identify what articles are being searched for. When any premises are to be searched, the police must identify to the occupier the reason for the search and give a copy of the warrant to the occupier. Usually the occupier is present (or they can nominate a person to be present). Police may videotape the search in order to use it later in court and to guard against claims of improper procedures or the planting of evidence.

Police will usually remove any items relevant to the investigation and keep them until after the case is prosecuted. Some items may be returned to the rightful owners, and others, such as weapons and drugs, will be destroyed after they have been used as evidence in a trial.

Police may require a person to attend a police station if they have been placed under arrest. The arrest and charging of an offender is one of the most important steps in the criminal process. If the proper procedures are not followed, the validity of the entire case may be jeopardised.

Review 2.2

1. Create a list of 20 types of evidence that could be collected in a criminal case. You may like to categorise them.
2. Describe some of the types of technology available to police when investigating crime.
3. Discuss the circumstances in which a police officer may search a person. Do you think the search powers are necessary or too broad? Explain.
4. Describe the use of a search warrant and how one is obtained.

2.4 Arrest, detention and charge

Arrest

The police are not allowed to detain a person unless they have good reason to do so. The conditions under which the police may lawfully arrest a person are contained in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) and include:

- catching a suspect committing an offence
- believing on reasonable grounds that a suspect has committed or is about to commit an offence
- where that person has committed a serious indictable offence for which they have not been tried
- possessing a warrant for that person's arrest.

During the course of an investigation the police may decide they wish to arrest someone for the crime they are investigating. Normally, the courts will issue the police with a warrant stating that the person is being arrested for a particular offence. The document authorises police or law enforcement officials to apprehend an offender and bring that person before the courts. Arrest warrants require police to justify their suspicions based on reasonable evidence – they act as court declarations that the suspect has a case to answer in relation to the alleged crime and authorise police to use their special powers to bring that person before the courts. Warrants provide a judicial safeguard for ordinary citizens against misuse of police powers of arrest. However, arrest should be used only as a last resort, and there is some criticism that arrests can be applied too early in the investigative process, merely as a means of furthering an investigation.

In order for the procedure to be legal, the police must state to the person that they are under arrest and why they are under arrest. By law, police are able to use whatever reasonable force is necessary

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Figure 2.5 The arrest of an offender is one of the most important steps in the criminal process.

to arrest a person. This may even include shooting the suspect if, for example, the suspect threatens the police with a weapon. However, the police are required to inform the suspect that they have their weapon out and are willing to use it. If a police officer does use excessive force, that officer can face charges.

Once a suspect has been arrested they may only be held for a specified period of detention before they must be either charged with committing an offence or released. This is discussed further below.

Detention and interrogation

The *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) sets out the lawful conditions under which a suspect can be detained for questioning and for the purpose of further investigation. Police can only detain a suspect for four hours, by which time that person must be either charged or unconditionally released. They may apply to a magistrate for a warrant to extend the investigation period up to a further eight hours. During this time, the offender would be held in either a police cell or an interview room.

There are, however, many rest periods within the four hours, which might not be included in the total time. Examples of periods of time that might not be included are:

- transport from the point of arrest to a police station
- waiting for the relevant law enforcement officers to arrive to conduct the interview
- waiting for a legal practitioner, family member, guardian of a dependent person or an interpreter to arrive at the police station
- time required by the suspect to talk to a friend, relative or lawyer and the time it takes that person to arrive at the police station
- medical treatment for the person in custody
- refreshment periods such as eating, showering or toileting
- recovering from the effect of drugs or alcohol
- taking part in an identity parade
- charging procedures.

Usually, as soon as the police have a suspect in custody, the suspect is questioned. This is known as **interrogation**. The police must issue a **caution** to the suspect as soon as practicable after the person has been detained, to inform them of the maximum period of detention and that they do 'not have to say or do anything but that anything the person does say or do may be used in evidence'. The caution must be given to the suspect orally and in writing.

interrogation
the act or process of questioning a suspect, carried out by the investigating officers

caution
a statement issued by police to a suspect when they are detained to inform the suspect of their rights

The suspect has the right to silence, which means they do not have to answer any of the police's questions, whether in the company of their legal representative or on their own. This can make the investigation difficult for the police if they want the suspect to fill in gaps in the information in their evidence. However, many suspects voluntarily answer questions.

Any suspect under 18 years of age has the right to have a responsible adult present with them at the interrogation. Usually this adult will be the suspect's parent or guardian. If the suspect lies to the police about their age and says they are over 18 and the interrogation begins, the evidence they provide is admissible in court.

The interview is recorded on videotape and on two audiotapes: one for the police records and one for the defendant. These recordings are made to ensure that all policies and guidelines are adhered to by the police and as a record to be used in court.

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Figure 2.6 If a person is not charged, they must be released.

Release or charge

At the end of the maximum detention period, the police must either charge the suspect with a specific offence or release them unconditionally. If charged, the police must either release the accused or bring them before a magistrate or authorised officer as soon as practicable after the end of the maximum detention period. Those kept in custody will be brought before the court for a bail hearing (see below). The exception to this rule is the *Terrorism (Police Powers) Act 2002* (NSW), which allows police to make an application to the Supreme Court to detain a person in custody for a maximum period of 14 days without charge if they reasonably believe the suspect will otherwise engage in a terrorist act. This is also known as preventive detention.

Review 2.3

1. Describe the circumstances under which police can make an arrest.
2. How long can a person be detained without charge? What do you think are some of the advantages and disadvantages of a longer or shorter detention period?
3. What must a police officer do before commencing an interview?
4. Explain the process of what occurs when a person is charged.

2.5 Court attendance notice, bail or remand

Once a person is charged, they will be issued with a summons to appear in court or, if it is a serious matter, they will be further detained and a bail hearing will be set.

Court attendance notice (CAN)

A **court attendance notice** (CAN) is a legal document that states when and where a person must appear in court and the charge to which they must answer.

court attendance notice
a legal document that states when and where a person must appear in court and the charge to which they must answer

A CAN is a legal document that is delivered personally to the accused by a court-appointed person.

Witnesses may receive a **subpoena**, which requires them to appear in court on a specified date to give evidence. Failure to attend the appointed court session could result in the subpoenaed person being arrested and charged.

subpoena
a legal document issued by a court, requiring a person to attend and give evidence and/or to produce specified documents to the court

Bail

In more serious matters, the accused, once charged, may be further detained at the police station and be fingerprinted and photographed. The police are required to bring them before a court or authorised officer as soon as practicable for a **bail** hearing. At a bail hearing, the court or the authorised officer will determine whether the accused should be released on bail or remain in custody until their trial.

bail
the temporary release of an accused person awaiting trial, sometimes on particular conditions such as lodgement of a sum of money as a guarantee

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Bail is the temporary release of an accused person awaiting trial. Bail arrangements can take many forms. Sometimes there are conditions, such as the lodgement of a specified sum of money as a guarantee that they will appear at court when required. People can also be released on their own recognisance, which is where they promise to turn up, knowing that failure to do so will result in them being fined and arrested. Bail may also be in the form of **surety**, which is where someone else agrees to put up the money on behalf of the accused as an assurance that the accused will turn up at court. If the accused fails to show up, the bail money is forfeited.

surety
in bail, where another person agrees to provide a financial guarantee that the accused will return to the court for trial in exchange for the accused's release until that date

Other components of the bail system are the use of wrist- and ankle-monitoring devices and diversionary services, such as rehabilitation programs. In addition, the accused may need to show up at a police station on a regular basis to prove that they have not moved out of the area they have been restricted to. The accused may also have to surrender their passport if they have one.

It is difficult to obtain bail for certain offences, particularly violent offences or where there is some risk to the community or risk that the accused may commit another offence. Where there is any indication that the accused might attempt to flee to another state or country, bail is unlikely to be granted.

Restrictions on granting bail for drug trafficking and serious domestic violence had been added to the *Bail Act 1978* (NSW), which was in place until 20 May 2014. This was known as the 'presumption against bail', and it meant that it was up to the accused to prove to the court why bail should not be refused if one of these offences had been committed. Such presumptions were controversial, as the effect of denying bail can be severe, and may result in an extensive period of custody before a final trial verdict is reached, with the risk that the accused may in fact be innocent and eventually found not guilty.

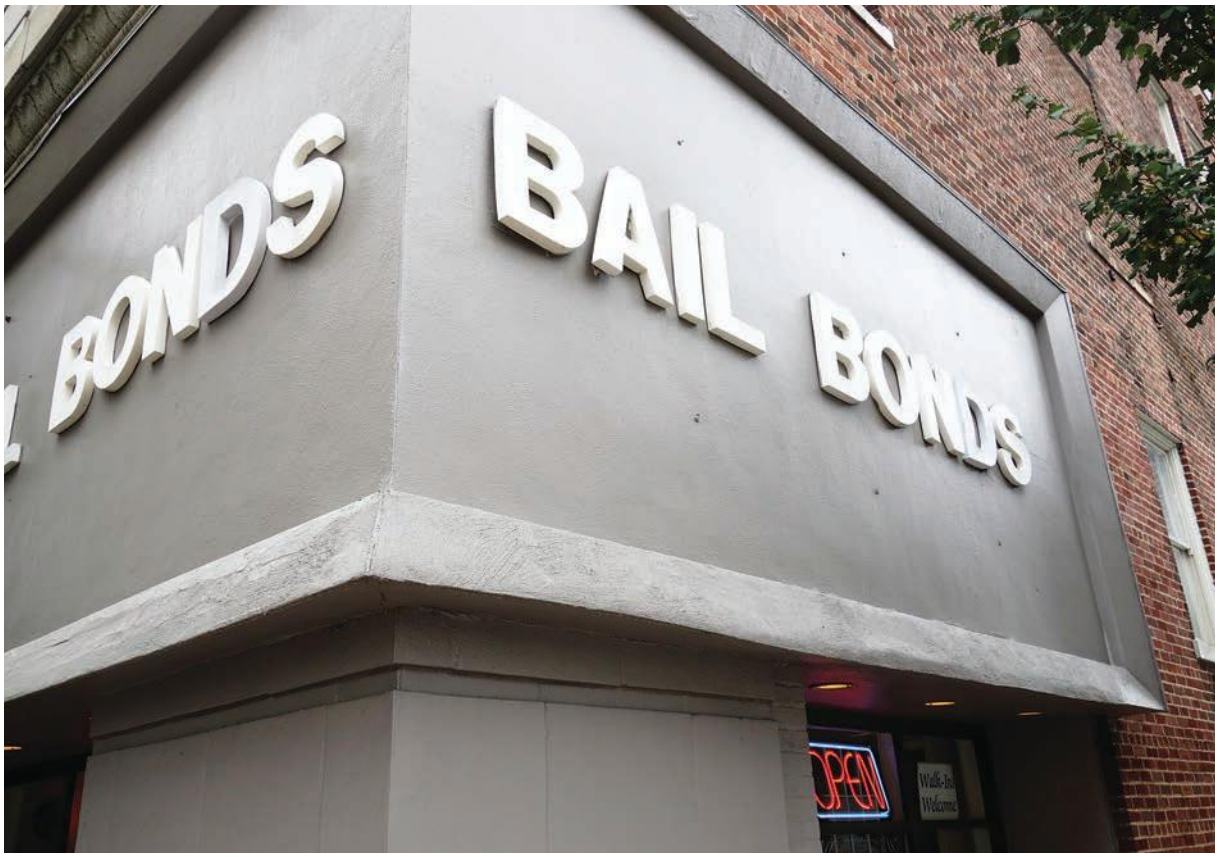

Figure 2.7 Bail often involves paying a sum of money in order to be released until the accused's trial.

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In 2013, the new *Bail Act 2013* (NSW) was introduced, and commenced on 20 May 2014. The New South Wales Government introduced the amendments to the *Bail Act* after community concerns were raised and Attorney-General John Hatzistergos gave recommendations in an internal review. The changes were as follows:

- Bail will be refused if the accused person is deemed an 'unacceptable risk'.
- Determining bail will include new risk factors, such as the views of victims, and whether the accused has criminal associations or a history of non-compliance with court orders.
- A previous bail decision cannot be reviewed purely on the basis of the new *Bail Act* – this is not, by itself, a 'change of circumstances'.

The need for law reform in the area of bail was further raised in the two recent criminal cases of the murder of Jill Meagher in Melbourne and the Sydney Lindt Café siege.

Recent independent and parliamentary papers have heavily criticised the presumption against bail legislation. The Bureau of Crime Statistics and Research (BOCSAR) has identified that in 2014 the prison population rose by 2.4% to 10 385 prisoners. The increase is attributed to the growth of the number of prisoners on remand (kept in custody). A growing number of children and young adults have also been affected by the changes to bail laws, with an increasing number being remanded rather than being released on bail. The BOCSAR report found that the average daily number of young people in custody was 434 in 2009 while it has decreased to 315 for the 2014 financial year. This still means that an alarming number of our youth are spending time in an unsavoury social environment, which could be to the detriment of their adult futures.

Research 2.2

Bail hearings in high-profile cases are often widely publicised in the media. Search the internet for three recent news articles relating to separate bail hearings in New South Wales and answer the following questions.

1. Was bail granted in the case?
2. Were any conditions set on granting bail?
3. Was there an amount of money required for bail and, if so, how much?
4. Do you think the decision on bail was fair in the circumstances?

Remand

If bail is denied and the magistrate or authorised officer determines that the accused should remain in custody until trial, the accused will be held on **remand** in police custody or at a remand centre. Remand is usually sought for people who have committed particularly violent crimes, dangerous criminals, repeat offenders or those thought to be a flight risk.

remand
a period spent in custody awaiting trial

The security level of the facility where they are to be detained is also determined by the above factors. The accused will remain in detention until the trial date, then throughout the trial and until they are sentenced. If the accused is found guilty and convicted, the time the offender has spent in remand is usually taken off the total time of their sentence and referred to as time already served.

Review 2.4

1. Explain what a court attendance notice is and describe what happens if someone ignores one.
2. Describe the purpose of bail.
3. Explain what happens to bail money if the accused fails to show up in court.
4. Explain how remand is different from imprisonment.

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Chapter summary

- The community is responsible for reporting crimes.
- Police are responsible for investigating crimes, making arrests and gathering evidence against suspected offenders.
- Police are given special legal powers to carry out their duties.
- Evidence may include many types of information.
- Processes must be followed by police in collecting evidence and investigating crimes.
- All suspects are to be treated fairly.
- Police have powers to search and seize on reasonable grounds.
- Police can arrest a person with a warrant or for specified reasons.
- A person can only be detained for four hours without charge; that can be extended, but only with court approval.
- Police must caution a detained suspect before conducting an interview.
- Everyone has the right to legal representation during a police interview.
- Interviews are videotaped and audiotaped.
- A person charged with an offence is either let go on bail or held on remand until the trial.

Questions

Multiple-choice questions

1 A court attendance notice is best described as:
- **A** a legal document which compels you to attend court to answer charges
- **B** a legal document permitting the search of your business
- **C** a legal document between two parties issued after a divorce is finalised
- **D** a legal document signed by you agreeing to adhere to bail conditions

2 Which of the following is not likely to be considered evidence?
- **A** Drugs
- **B** A gun
- **C** Witness testimony
- **D** None of the above

3 Which of the following must police usually have a search warrant for?
- **A** Your home
- **B** Your car
- **C** Your bag
- **D** You

4 Which of the following is a factor in why someone might not be held on remand?
- **A** They are a flight risk.
- **B** They committed a violent crime such as murder.
- **C** They committed a non-violent crime such as larceny.
- **D** They are a repeat offender who may go and commit another offence straight away.

5 How long may police hold a suspect without charge for if they do not have an extension from a judge/magistrate?
- **A** Four hours
- **B** Eight hours
- **C** Twelve hours
- **D** Indefinitely

Chapter summary questions

1 Outline some of the powers police have to conduct an investigation.

2 Describe when police are allowed to search a person, a person's bag and a person's home.

3 Explain how police go about obtaining a warrant.

4 Describe the different forms bail can take.

5 Outline the changes in the current *Bail Act* and what effect it will have for future criminals.

6 Discuss the reasons why a person may be held on remand rather than given bail.

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Chapter 3
The criminal trial process

Chapter objectives

In this chapter, students will:

- identify the different levels of courts in the New South Wales judicial system
- describe the different types of legal representatives
- discuss the importance of legal aid
- explain the different types of pleas available to a defendant
- describe the use of evidence in a criminal trial
- communicate the purpose and role of a jury in the adversarial system.

Key terms/vocabulary

acquittal
adversary system
appeal
appellate jurisdiction
beyond reasonable doubt
burden of proof
challenge for cause
charge negotiation
committal proceedings
consent
coroner
coronial inquest
court hierarchy
diminished responsibility
duress
inquisitorial system
involuntary behaviour or automatism
legal aid
magistrate
mental illness or insanity
mistake
original jurisdiction
peremptory challenge
plea
police prosecutor
provocation
public defender
public prosecutor
self-defence or necessity
standard of proof

Relevant law

IMPORTANT LEGISLATION

Judiciary Act 1903 (Cth)
Supreme Court Act 1970 (NSW)
District Court Act 1973 (NSW)
Jury Act 1977 (NSW)
Legal Aid Commission Act 1979 (NSW)
Children's Court Act 1987 (NSW)
Evidence Act 1995 (NSW)
Jury Amendment (Verdicts) Act 2006 (NSW)
Local Court Act 2007 (NSW)
Coroners Act 2009 (NSW)

SIGNIFICANT CASES

R v Williamson [1972] 2 NSWLR 281
R v Camplin [1978] AC 705
R v Zecevic (1987) 162 CLR 645
Dietrich v The Queen (1992) 177 CLR 292
EPA v Gardner (1997) NSWLEC 169
Wood v R [2012] NSWCCA 21

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Legal oddity

An attempted robbery at a Townsville petrol station failed to eventuate due to a few errors in judgement by the would-be robber.

The criminal released a strong metal chain attached to the back of a stolen truck. The chain was dragged into the petrol station and attached around an ATM. The purpose was to then drag it out but the chain broke once pressure was applied.

Initially the criminal did not notice that the chain had broken and drove off with it dangling behind the truck.

Eventually he did notice that he had failed in his quest and decided to go back and try again. However, this time he parked too far away and the chain wasn't long enough. He finally gave up and drove away.

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3.1 Court jurisdiction: criminal courts

Once a formal charge has been laid against a person, a hearing or trial of the accused will need to take place in an appropriate court. There are many courts that have jurisdiction to hear criminal offences. The right court for the matter to be heard will depend on a number of issues, including:

- the seriousness of the matter, in particular whether it involves a summary offence or an indictable offence
- whether the matter is being heard for the first time or involves an **appeal**
- the nature of the offence – some courts or divisions within courts have authority to hear particular types of offences
- the age of the accused, particularly where the accused is a child or young person under 18 years old
- the type of hearing (for example, whether it is a bail hearing, committal hearing or trial)
- whether the alleged crime is an offence under state law or federal law.

The case will then be heard at the appropriate place in the **court hierarchy**. The court hierarchy refers to the system of courts, from the lower courts, which deal with less serious offences such as summary offences, to intermediate and superior courts, which deal with more serious indictable offences as well as appeals from lower courts.

appeal
an application to have a higher court review a decision of a lower court

court hierarchy
the system of courts within a jurisdiction, from lower courts to intermediate and higher courts

In Australia, there are different streams of courts depending on the state or territory the offence relates to; for example, an offence under New South Wales law will be heard in the New South Wales court hierarchy.

If the offence relates to an offence under Commonwealth law, the offence will usually be prosecuted by the Commonwealth Director of Public Prosecutions in the courts of the state where the offence occurred. The *Judiciary Act 1903* (Cth) gives state and territory courts the power to hear federal criminal cases, and federal summary or indictable offences will be treated in a manner similar to the way they are treated under state laws. Some federal offences may also be heard in federal courts – the Federal Court of Australia has summary jurisdiction in some criminal matters.

Figure 3.1 summarises the court hierarchy for New South Wales, the Australian Capital Territory and federal courts.

The authority for a court to hear a matter for the first time is known as the court's original jurisdiction. A court's **original jurisdiction** will usually be defined in the relevant court Act; for example, the *Local Court Act 2007* (NSW). The authority to review matters on appeal from another court is known as the court's **appellate jurisdiction**.

original jurisdiction
the authority for a court to hear a matter for the first time

appellate jurisdiction
the authority for a court to review matters on appeal from another court

In the Australian court hierarchy, a higher court can usually review a decision of a lower court, but a lower court cannot review a decision of a higher

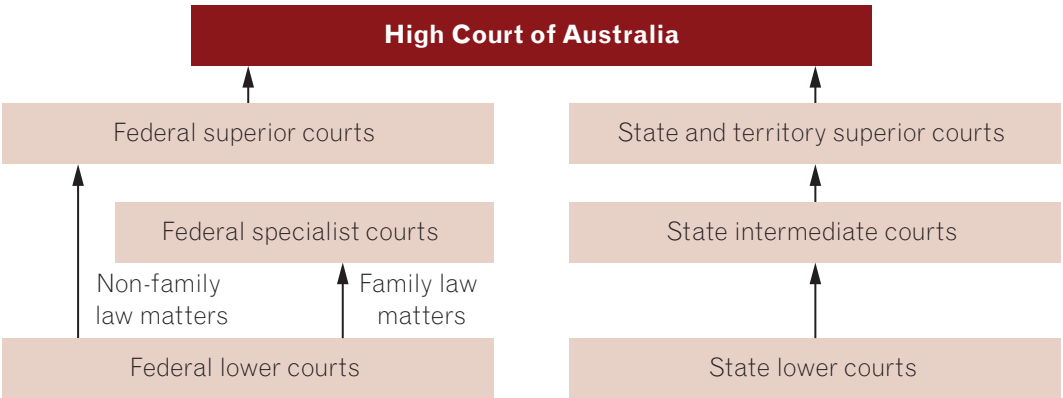

Figure 3.1 State/territory and federal court hierarchy

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court. The arrows in Figure 3.1 show the specific courts that can hear appeals from each of the lower courts.

Each court is responsible for various duties within the legal system. Over the next few pages the role of the various courts in criminal matters is considered in more detail.

Review 3.1

1. Outline some of the considerations that will determine which court a case will be heard in.
2. Define the term 'court hierarchy'.
3. Define the terms 'original jurisdiction' and 'appellate jurisdiction'. Outline the difference between the terms.

State and territory courts

The criminal court system in New South Wales operates under the following hierarchy:

- lower courts – including the Local Court of New South Wales, the Coroner's Court and the Children's Court
- intermediate courts – the District Court of New South Wales
- superior courts – the Supreme Court of New South Wales and the High Court of Australia.

Each court has its own jurisdiction, or area over which it has authority to hear matters. Minor matters such as summary offences are dealt with lower in the court hierarchy; the higher courts are reserved for more serious matters, indictable offences, and appeals from the lower courts. The Australian Capital Territory does not have an intermediate court but it is otherwise similar.

Lower courts

Local Court of New South Wales

The Local Court is the first point of call for most criminal matters in New South Wales and as such has original jurisdiction. It also has jurisdiction to hear civil law matters up to the value of $100 000. The *Local Court Act 2007* (NSW) sets out the jurisdiction and operation of the Local Court of New South Wales.

The Local Court sits at many different locations across New South Wales and deals with the majority of criminal prosecutions in New South Wales. It was previously known as the Court of Petty

Figure 3.2 Cooma Court House, New South Wales

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Sessions because it dealt with what used to be known as 'petty' or minor crimes. The Local Court has jurisdiction to deal with summary offences and conducts **committal proceedings** to determine whether or not indictable offences are to be heard in the higher district and supreme courts. It can also hear indictable offences that are triable summarily if the accused consents.

There is no jury in the Local Court. Local Court matters are tried solely in front of a **magistrate**. In New South Wales, a magistrate is a qualified Australian lawyer or judicial officer who has been appointed as a magistrate by the Governor of New South Wales. The magistrate is referred to as 'Your Honour' by parties in court and by court staff.

committal proceedings
proceedings in which a magistrate determines if there is enough evidence for a case to proceed to trial in a higher court

magistrate
a judicial officer in the Local Court; in New South Wales they are appointed by the Governor

In criminal matters, the Local Court is where bail hearings are usually held and where committal proceedings for serious offences are held. In a committal proceeding, a magistrate will hear the prosecution's evidence and determine whether it is sufficient to support conviction by a jury. If satisfied that there is a case to answer, *prima facie* (a Latin term meaning 'establishing the facts') has been established and the accused will be ordered to stand trial in a higher court; if not, the accused is discharged.

The Local Court offers several advantages over the higher courts. Criminal matters dealt with in the Local Court will usually be heard and determined much faster than in superior courts, as fewer formalities are required. The cost of a hearing will also be significantly lower for the accused and for the state. However, the Local Court does not have jurisdiction to conduct jury trials or to hear appeals. The Local Court also has limits on the sentences that it can pass. For these reasons, more serious matters will be tried in higher courts to ensure that justice for all parties is achieved.

In the Australian Capital Territory, the equivalent of the Local Court is the Magistrates Court, which has similar jurisdiction and characteristics.

Coroner's Court

The Coroner's Court is a local court that deals with the manner and cause of a person's death, and with fires and explosions where property has been damaged or a person has been injured. The powers of the State Coroner's Court of New South Wales are outlined in the *Coroners Act 2009* (NSW).

The role of a **coroner** is to ascertain the deceased person's identity, and the place, date, manner and medical cause of death. Information from medical practitioners and police personnel as well as evidence from the scene is usually evidence that is relied upon. The Coroner's Court may investigate disappearances, deaths where a medical certificate has not been issued, or deaths that occur in unusual or suspicious circumstances, such as deaths occurring:

- in a violent or unnatural way
- suddenly and with unknown cause
- after an accident (up to one year and one day) that may have contributed to the death
- in police custody or in a prison or detention centre
- while receiving care or medical treatment, or within 24 hours of administration of an anaesthetic.

coroner
a judicial officer appointed to investigate deaths in unusual circumstances

A **coronial inquest** into a death is a court hearing where a coroner looks at information to help determine the manner and cause of a death. The coroner can call witnesses to give evidence at the inquest. A coroner may also conduct a post-mortem examination of a body (an autopsy) to help determine the time and/or cause of death. This may involve uncovering physical evidence, such as bullets, and taking samples to test for DNA or to produce drug and toxicology reports, for example. The findings of the coroner will often be used as evidence in a later criminal or civil trial. A coroner cannot find someone guilty of a crime. However, if a coroner comes to believe, during the coronial inquiry, that a known person has perpetrated an offence, they can refer the matter to the Director of Public Prosecutions (DPP). It is then up to the DPP to decide if any

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Research 3.1

Coronial inquests sometimes attract a lot of media attention – particularly in high-profile accidents, deaths or disappearances. Search the internet for a recent coronial inquest that received publicity and answer the following questions.

1. Outline what death or incident the inquest related to.
2. What were the findings by the coroner?
3. Identify any consequences of the inquest (for example, any criminal prosecutions or changes in the law).

criminal proceedings will be brought against that person.

coronial inquest
a court hearing conducted by a coroner to help determine the manner and cause of death

Children's Court

The Children's Court of New South Wales was established in 1987 under the *Children's Court Act 1987* (NSW). The Children's Court deals with cases connected with the care and protection of children and young people, and also with criminal matters concerning children and young people who are under the age of 18 years, or who were under 18 at the time of an alleged offence.

One of the most important characteristics of the Children's Court is that it is a closed court. This means that when there is a Children's Court session the general public is prohibited from viewing the proceedings. This is in order to protect the identity of children and young people. The Children's Court is presided over by a magistrate, and has no jury.

Children's Court magistrates have specialised training in dealing with youth matters, and proceedings, formalities and available sentences are different from those applicable in other courts. The Children's Court and issues relating to young offenders are considered in more detail in Chapter 5.

Review 3.2

1. Outline the types of cases that can be heard by the Local Court. Find an example of a Local Court case.
2. Identify the circumstances under which the Coroner's Court may inquire into a person's death.
3. Describe some of the characteristics of the Children's Court and outline its role.

Intermediate courts

District Court of New South Wales

The District Court of New South Wales is the intermediate court in the state's court hierarchy. It is established under the *District Court Act 1973* (NSW).

The District Court is a trial court where matters can be heard before a judge and a jury. This is in contrast to the Local Court where matters are heard by a magistrate alone. The District Court also has an appellate jurisdiction, which means it can hear appeals of decisions made by lower courts such as the Local Court and the Children's Court. The District Court sits at most large population centres in New South Wales and has jurisdiction to hear serious criminal matters, as well as civil matters up to $750 000 (or higher in some cases).

In its criminal jurisdiction, the District Court may hear all indictable offences except murder and treason, which can only be heard by the Supreme Court of New South Wales. District Court trials will often involve a jury of 12 people who are chosen by the court. The jury will decide whether the accused is guilty or innocent, based on the evidence presented in the trial. The judge will control proceedings and decide on questions of law. If the accused is found guilty by the jury, the judge will also determine the accused's sentence.

The types of matters dealt with by the District Court include:

- offences against the person such as manslaughter (but not murder), sexual or indecent assault, assault occasioning actual bodily harm and assault of police officers
- property offences such as larceny, robbery, embezzlement, break and enter, and steal

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Figure 3.3 A range of offences is heard in the District Court, including drug offences.

- drug offences such as supply, manufacture or production of a prohibited drug
- driving offences such as dangerous or negligent driving causing death or serious bodily harm.

The District Court involves significantly more formality than the Local Court, and thus matters will usually take longer to be heard and result in greater cost to both the accused and the prosecution.

Superior courts

Supreme Court of New South Wales

The Supreme Court of New South Wales hears the most serious criminal cases, as well as civil matters beyond the jurisdiction of the Local and District Courts. The Supreme Court is constituted under the *Supreme Court Act 1970* (NSW) and sits nearly exclusively in Sydney. However, matters are also heard in regional centres if the need arises.

Matters that are heard by the Supreme Court in its original criminal jurisdiction include:

- murder, manslaughter and attempted murder
- major conspiracy and drug-related charges
- Commonwealth prosecutions for serious breaches of the Corporations Law.

Criminal matters in the Supreme Court are heard by a judge and a jury of 12 people selected by the court. Matters in the Supreme Court have the highest level of formality, with cost, time and consequences being much greater.

The Supreme Court also has appellate jurisdiction to hear criminal appeals from lower New South Wales courts. Criminal appeals from the Supreme Court are heard in the Court of Criminal Appeal.

Figure 3.4 The Supreme Court of New South Wales

Court of Criminal Appeal

The Court of Criminal Appeal is the appellate branch of criminal jurisdiction of the Supreme Court of New South Wales in relation to criminal cases. It is the state's highest court for criminal matters. The Court of Criminal Appeal can hear appeals from a person convicted or sentenced by a District Court or Supreme Court judge. Criminal appeals can also be brought from the Land and Environment Court.

Appeals in the Court of Criminal Appeal are usually heard by three Supreme Court judges, with the majority view prevailing. Where significant legal issues are being considered this may be increased to five judges. Grounds for appeal to the Court of Criminal Appeal might include a question of law, a question of fact, or a challenge to the severity or adequacy of a sentence.

The Court of Criminal Appeal is the highest court of appeal in criminal matters in New South Wales. The High Court of Australia has jurisdiction to hear appeals from state and territory supreme courts, but only where it grants special leave to appeal.

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Land and Environment Court

The Land and Environment Court is the court that looks after interpreting and enforcing environmental law in New South Wales. The Land and Environment Court has the same status as the Supreme Court. Although it mainly deals with civil and administrative disputes related to environmental planning (for example, zoning of parklands), it also has criminal jurisdiction to hear some environmental offences, such as illegal polluting or dumping (for example, the case of *EPA v Gardner* (1997) NSWLEC 169, in which the operator of a caravan park pumped over 120 000 litres of raw sewage into the Karuah River). The court's jurisdiction is summary only, which means it can only hear cases without a jury. Prosecutions are usually brought by the NSW Environment Protection Authority (EPA).

Federal courts

As mentioned earlier, Commonwealth offences will usually be heard in state or territory courts, which can exercise federal criminal jurisdiction under the *Judiciary Act 1903* (Cth). A limited number of criminal proceedings can be heard in the Federal Court of Australia.

Commonwealth offences will be prosecuted by the Commonwealth Director of Public Prosecutions. The most common prosecutions for Commonwealth offences are drug importation, money laundering, offences under corporate law, and tax or social security fraud. Commonwealth criminal offences are classified as either summary or indictable and will be heard and sentenced in the corresponding state or territory court for those offences. The procedure of the relevant state or territory will apply.

High Court of Australia

The High Court of Australia is at the peak of the Australian court hierarchy. It is mandated by s 71 of the *Australian Constitution* and is constituted under the *Judiciary Act 1903* (Cth).

The High Court has original jurisdiction (laws and cases originally filed in the High Court) in limited Commonwealth matters. This is because most new legislation and changes in this area come directly from the Commonwealth Parliament. The High Court has appellate jurisdiction to hear appeals from all state and territory supreme courts. In New South Wales criminal matters, this will relate to appeals from the Court of Criminal Appeal of the Supreme Court of New South Wales. However, this is not an automatic right. Someone who wishes to appeal to the High Court from a state Supreme Court must seek leave to persuade the High Court in a preliminary hearing that there is a good reason for the appeal to be heard.

The High Court also deals with cases concerning the interpretation of the *Australian Constitution* and

Legal Links

The Justice website is maintained by the New South Wales Attorney-General's Office and contains information and links on aspects of New South Wales law. It contains links to the official websites of all New South Wales courts listed in this chapter (see http://cambridge.edu.au/redirect/?id=6235).

The Australian Capital Territory government provides information on that territory's courts and tribunals (see http://cambridge.edu.au/redirect/?id=6236).

The Commonwealth Attorney-General's website has information about the federal legal system and courts (see http://cambridge.edu.au/redirect/?id=6237).

Figure 3.5 The High Court of Australia is located in Canberra.

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the constitutional validity of laws, which may include criminal laws.

The High Court will only hear matters on appeal when it grants special leave to the appellant to do so. Special leave is granted for questions of law of public importance, conflict between courts or in the interests of the administration of justice.

Review 3.3

1. Describe the types of cases that can be heard in the District Court. Outline a recent District Court matter heard in your region.
2. Explain the types of cases that can be heard by the Supreme Court and the Court of Criminal appeal. Find an example of each.
3. Explain the role of the High Court of Australia in the court hierarchy. Create a case study of a recent High Court precedent.

3.2 The adversary system

The criminal justice system in Australia is based on an adversarial system of law. The **adversary system** relies on a two-sided structure of opposing sides ('adversaries'), each presenting its own position, with an impartial judge or jury hearing each side and determining the truth in the case. The adversary system applies to both civil and criminal matters, but it is in relation to criminal law that the adversarial system is often most controversial. In criminal law the adversary system pits the prosecution against the accused, who will usually be represented by a lawyer. The judge, or jury in indictable offences, acts as an impartial observer who determines the accused's guilt or innocence based on the evidence and arguments presented.

Australia, like many other countries, inherited the adversarial system of law with the English common law system. An alternative to the adversarial system is the **inquisitorial system**. This is a system of law in which a judge or group of judges plays a role in investigating the case or calling for evidence or testimony that has not been requested by either side. Versions of the inquisitorial system are used in many other countries, as well as in some areas of Australian law (in coronial inquests and royal commissions, for example).

adversary system
a system of law where two opposing sides present their cases to an impartial judge or jury

inquisitorial system
a system of law where two sides present their cases to a judge who directs the cases and can call for particular evidence

Figure 3.6 The Royal Courts of Justice in London. Australia inherited the adversarial system of law with the English common law system.

Supporters of the adversarial system often claim that it is a fairer system because it allows each party an equal opportunity to present its case and is less prone to abuse or bias by the official determining the case. Cases are carefully prepared before trial and lawyers have an equal opportunity to present the truth. The jury is an impartial observer, uninfluenced by outside factors. Critics of the system argue that in many cases the competing sides are not equal before the law, with potential imbalances in resources, skills or knowledge. Even where additional evidence or testimony would assist the case, the judge or jury is not in a position to request this. The jury system has also been criticised due to the complex nature of cases. Some suggest that the cases might be misunderstood due to a lack of general understanding of the evidence presented and because the reasons for the jury's decision are not disclosed to either side.

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3.3 Legal personnel in a criminal trial

Criminal trials often involve a large number of participants, both behind the scenes and in the courtroom itself. They are involved in various aspects of the case from the beginning of the investigation through to the end of the trial. The non-legal participants in a criminal trial include the accused, any witnesses called to testify and the police responsible for investigating the case. Most criminal trials will also involve a number of legal personnel some of the most important are outlined below.

Judges and magistrates

Judges and magistrates are judicial officers who preside over court cases and make determinations in court based on the evidence presented. Judges and magistrates are legally qualified professionals who have considerable experience in the law. They act as the umpires of court cases, making sure that the rules are followed and that a fair trial is carried out (procedural fairness). Whether a case is heard by a judge or a magistrate will depend on the jurisdiction under which the crime which the suspect commits.

Judges

Judges are the judicial officers who preside over the intermediate and superior courts – the District Court and the Supreme Court. Judges oversee proceedings, maintain order in the courtroom and ensure that the procedures of the court are followed. Judges will make decisions about points of law and give instructions to the jury to make sure they understand the proceedings and the evidence presented to them. Once the jury has reached a verdict, the judge will hand down sentences and rulings. In some cases the judge will sit without a jury – in such cases the judge will determine the verdict, either guilt or innocence.

Magistrates

Magistrates are the judicial officers who preside over hearings in the Local Court. Specialised magistrates also hear cases in the Children's Court. In criminal law, magistrates will hear summary proceedings in the Local Court, as well as indictable offences triable summarily where the accused has consented to the case being heard by a magistrate. Magistrates oversee proceedings and make a determination on the basis of the evidence presented. Once a

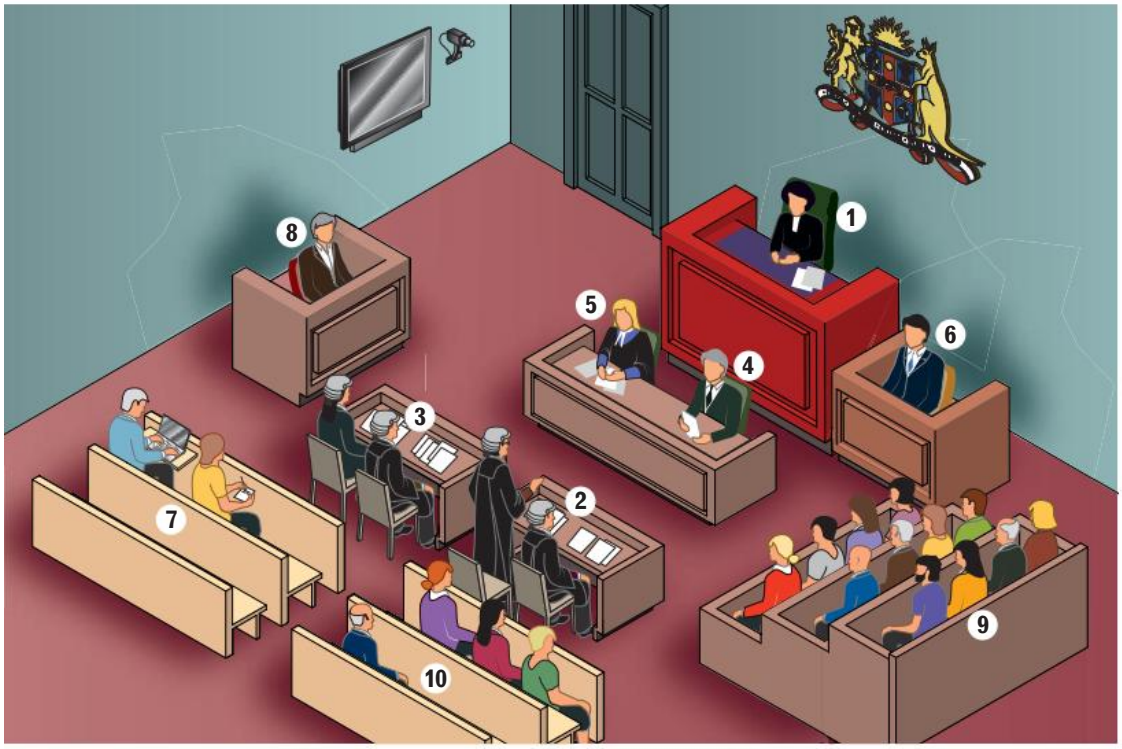

Figure 3.7 Court cases involve a number of key participants, including 1 judge or magistrate; 2 prosecutor (for example, police prosecutor or Director of Public Prosecutions); 3 accused's barrister or solicitor; 4 judge's associate; 5 court reporter; 6 accused; 7 media; 8 witness; 9 jury; and 10 public gallery.

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magistrate has found an accused person guilty, they will also pass sentence. Magistrates will also conduct committal proceedings for indictable offences to be tried, and will usually hear bail proceedings.

Prosecutors

In criminal trials, the state or 'Crown' is represented by a prosecutor who brings the action against the accused. It is the prosecutor's role to prosecute the offender in a court of law and obtain an appropriate form of sanction or punishment for the offence. There are two types of prosecutors in criminal trials: **police prosecutors** and **public prosecutors**.

police prosecutor
a NSW Police Force officer trained in prosecution, usually used to prosecute summary offences

public prosecutor
a legal practitioner employed by the Director of Public Prosecutions, usually used to prosecute indictable offences

Police prosecutors

Each criminal investigation begins with the police and they are an essential part of any criminal case. The police must undertake an intensive and exhaustive investigation of the matter and gather all the evidence and information that will be used at trial to form the case against the accused. The police will often also be required to give testimony at the trial to aid the prosecution's case.

For summary offences in the Local Court and Children's Court, cases will usually be prosecuted by police prosecutors. Police prosecutors are members of the NSW Police Force with specialised legal training to conduct prosecutions. Police prosecutors handle most summary cases in New South Wales. More serious offences are dealt with by the public prosecutors (see below).

Director of Public Prosecutions

For indictable offences and some summary offences, cases will be prosecuted by the NSW Office of the Director of Public Prosecutions (DPP). The DPP will also conduct some committal proceedings for indictable offences. The DPP is an independent authority that prosecutes all serious offences on behalf of the New South Wales Government.

Prosecutors employed by the DPP are barristers or solicitors and have numerous years of experience in the criminal justice system. It is their job to prosecute the case using the evidence gathered by the police. In court their role is to ask questions of the witness on the stand and draw out the truth from the evidence and testimony given by the witnesses.

The DPP does not investigate crime – that is the responsibility of the NSW Police Force – but it prosecutes cases once sufficient evidence has been gathered. The DPP operates independently of the government in deciding which matters to prosecute. It reviews cases proposed by the police to determine if there is enough evidence to succeed. The DPP will prosecute a case where it is in the public interest to do so. The independence of the DPP from government is vital to ensure that cases selected for prosecution are chosen on their merits and not because of political interference or public pressure.

The decision to prosecute will depend on many factors, including:

- whether the evidence is sufficient to establish the elements of the offence
- whether the evidence is sufficient to gain a conviction by a reasonable jury
- certain discretionary factors that relate to the public interest. These include the seriousness of the offence, the special circumstances of the offence, accused or victim, the need to maintain public confidence, the likely length and expense of the trial, and the likely outcome and consequences of a conviction.

Barristers and solicitors

A person charged with an offence will usually contact a solicitor, who will be able to give the accused advice on a range of matters, including the charge, the alleged offence and the procedures surrounding a trial, and will assist in interactions with the police investigating the case. The solicitor may also advise on any available defences, the likelihood of conviction and possible sentences. Many solicitors specialise in criminal law or particular areas of criminal law.

A solicitor may also represent the accused in court, or engage (employ) a barrister to represent the accused. It is common to see solicitors appearing in the Local Court, but it is more common to see barristers in the higher courts. This is due to the fact that barristers are specialists in their field and deal specifically with criminal law, for example,

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every day. Barristers have two main roles in court proceedings: to provide legal advice for the accused on the likely outcome of the case and to present that case in court.

Public defenders are paid public barristers who are independent of the government and perform the same duties as other barristers. They will appear or advise in relation to criminal trials, sentencing matters and appeals in the District Court or Supreme Court, and may be briefed (instructed) by a private solicitor, through the Legal Aid Commission or through a community-based legal group.

Public defenders

Where an accused cannot afford to pay for a barrister or solicitor, they may be granted access to a **public defender**. Public defenders are barristers who appear in serious criminal matters for an accused who has been granted **legal aid**.

public defender
a public barrister who can appear for an accused in a serious criminal matter where legal aid has been granted

legal aid
a subsidised legal service provided by the state for those on low incomes

If an accused has been charged with a serious indictable offence and is eligible to receive legal aid, they may be granted a public defender to represent them in court.

3.4 Pleas and charge negotiation

After an accused is charged with an offence and the trial process proceeds, the law requires the accused to enter a **plea** of either guilty or not guilty. At a plea hearing the accused will state their plea in front of a judge. If they enter a 'no plea', it is written on the record as a 'not guilty' plea.

plea
a formal statement of guilt or innocence by the accused

The plea entered by the accused will have a significant impact on how the charges are dealt with. A guilty plea will be dealt with quickly, going straight to a sentencing hearing at a higher court, and does not require witnesses to give testimony.

If the accused pleads not guilty, the case will be defended in court. The dates of the trial will be set. This may be a long time away, and the accused will be granted bail or remanded in custody until that date. If an accused pleads not guilty and is found guilty, they may find the sentence that they are given is affected.

An often controversial tactic used in criminal proceedings is **charge negotiation**. This is where the accused agrees with the prosecution to plead guilty to a particular charge or charges. It usually involves pleading guilty to a lesser charge in exchange for other higher charges being withdrawn, or pleading guilty in exchange for a lesser sentence. Charge negotiation is sometimes known as 'case conferencing' and can be conducted at many stages of the criminal process. It will usually result in a faster and less expensive case for the prosecution, the

Review 3.4

1. Explain the difference between the adversary and inquisitorial systems of law.
2. Explain why the inquisitorial system of law could be seen as biased.
3. Describe the types of cases heard by a magistrate and by a judge.
4. Explain the role of the prosecution in a criminal trial.

Figure 3.8 The accused is expected to enter a plea.

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accused and the court. Charge negotiation cannot guarantee a particular sentence – this can only be determined by the judge, based on the nature of the offence and sentencing guidelines – but the charge negotiation may be taken into account.

charge negotiation
an agreement between the DPP and the accused that involves the acceptance of a guilty plea, usually in exchange for something else

Some of the arguments for and against charge negotiation include:

- It decreases costs and time delays, which is beneficial to all parties.
- It increases the rate of criminal convictions.
- Conviction on a lesser charge is better than no conviction at all.
- Crimes may go unpunished or the admitted crime may be insufficiently punished.
- An accused may plead guilty to a crime of which they are innocent.
- It may lead to bullying or manipulation of the accused to forfeit their right to a trial.
- Prosecutors may threaten more serious charges to intimidate the accused into pleading guilty to the lesser charge.

Research 3.2

Create a PMI (Plus Minus Interesting) about charge negotiation. Consider all parties involved in the process and those on whom charge negotiation has an impact, including the family of the victim(s) of the crime, the victim and the accused, and the criminal justice system itself.

3.5 Legal representation and Legal Aid NSW

In the Australian legal system, a defendant has the right to a fair trial, and Australian courts have ruled that a trial will rarely be fair for an accused if they do not have adequate legal representation. If a case goes to trial, it is unlikely that the defendant will have a fair trial if they represent themselves or arrange for an unqualified person to defend them. The High Court recognised this in a 1992 decision, *Dietrich v The Queen* (1992) 177 CLR 292, which for the first time established a limited right to legal representation in Australia. Access to justice is crucial to ensure that the legal system functions fairly and equally for everyone who comes before it. This is particularly so in criminal matters, where the price of inadequate representation for an accused can be high.

Many defendants are able to afford adequate legal representation and will pay for a barrister or solicitor to advise them and present their case in court. The quality of legal services varies, though, and not all lawyers have much experience representing people before a court. Some defendants may be able to ensure that they receive the best possible defence to the charges against them (for example, by hiring the most expensive specialised and experienced barristers). In most cases this advice and representation will cost a significant amount of money.

In rare circumstances an accused may even elect to represent themselves in court, but due to the complexities of court processes and the consequences of inadequate representation in criminal matters, this is not advised unless the offence relates to a very minor matter. Often a magistrate or judge will advise the accused to adjourn the matter until they obtain legal representation. The courts prefer people to be represented by solicitors or barristers, so that they will receive a fair trial.

Not everyone has the money to pay for, or the skill to find, proper legal representation. This can result in injustices in the courtroom and denial of a fair trial. In 1979, the New South Wales Government created the Legal Aid Commission, under the *Legal Aid Commission Act 1979* (NSW). The commission provides legal assistance and representation to people who are socially and economically disadvantaged to ensure that they have equitable access to the law. It aims to safeguard people's rights in the legal system and to improve their access to justice.

Legal Aid NSW is usually accessed by marginalised and disadvantaged groups in society such as disabled people, women, people of Aboriginal and Torres Strait Islander background and people who are financially disadvantaged through unemployment, and/or are low-income earners.

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The Legal Aid Commission provides free brief legal advice sessions to anyone. However, to access subsidised legal representation in court, the defendant must be means-tested. A means test assesses the defendant's income and assets to determine whether or not they have the means to pay for legal representation. Along with the means test there is also a merits test, although for criminal matters the commission does not usually assess the merits or likelihood of the case succeeding, except for matters on appeal.

Also, not all matters can be covered by Legal Aid NSW, so the cases it takes on must fall within specific areas of law in order to be eligible.

For those matters that Legal Aid NSW takes on, it will either provide a legal representative or contribute towards the cost of a private lawyer. Unfortunately, even a grant of legal aid is not free, and in most cases the user must make a contribution. Initial contributions are calculated using the means test.

Legal Aid NSW is largely funded by the Commonwealth and New South Wales governments and the NSW Law Society, but funding is limited and is often considered inadequate to meet the demand. There are many instances where people who are in need of assistance are unable to receive it.

3.6 Burden and standard of proof

Central to the criminal justice system is the principle that a person is innocent until proven guilty in a court of law. In practice, this means that it is the responsibility of the prosecution to prove in court that the accused committed the offence they have been charged with. This is known as the **burden of proof**: the burden (or onus) is on the prosecution to prove the case.

The prosecution must also meet the **standard of proof** for criminal matters: they must prove the case **beyond reasonable doubt**. This means that, to succeed, the prosecution must show that there is no reasonable doubt that the accused in fact committed the offence. The burden and standard of proof are essential to criminal proceedings and essential in achieving justice in criminal law. Due to the severe consequences if an innocent person is found guilty, the standard for criminal law is much higher than the standard for civil law. These matters only require a standard of the balance of probabilities: that one explanation is more likely than another.

burden of proof
in criminal matters, the responsibility of the prosecution to prove the case against the accused

standard of proof
the level of proof required for a party to succeed in court

Research 3.3

Visit the Legal Aid NSW website at http://cambridge.edu.au/redirect/?id=6238. Read the information there and answer the following questions.

1. How many clients were represented by Legal Aid NSW in the last financial year?
2. What percentage of Legal Aid NSW expenditure was spent on criminal law? How does this compare with other areas of law?
3. How many calls were made to the Legal Aid Youth Hotline?
4. Research using the internet to determine if there are to be any future funding cuts to Legal Aid NSW.

Figure 3.9 Legal Aid NSW provides legal assistance and representation to people who are socially and/or economically disadvantaged.

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Figure 3.10 Real evidence is physical evidence that may take the form of photographs, fingerprints, DNA tests and exhibits such as weapons and clothing.

beyond reasonable doubt
the standard of proof required in a criminal case for a person to be found guilty

Generally, the Director of Public Prosecutions will not bring a case before the courts unless it feels that a jury will be convinced by the evidence and convict the accused. Criminal trials cost time, money and other resources, so it is important that the case is winnable. The evidence and arguments must be sufficient to convince all 12 jurors of the case beyond any reasonable doubt. If any juror is not convinced, the standard of proof has not been met and the case may not succeed.

3.7 Use of evidence, including witnesses

During a criminal investigation the police will gather a wide range of evidence that will be used in court to prosecute the accused. The use of evidence in a court case is bound by the *Evidence Act 1995* (NSW). For evidence to be admissible in court it needs to be relevant to the case and legally obtained by the investigating police. Evidence that the police have obtained illegally is generally inadmissible unless the judge makes a special exception. Any evidence that is obtained later and that relies on that illegal act may also be inadmissible: it is described as the 'fruit of the poisoned tree'. Evidence will also be inadmissible if it is deemed irrelevant, and generally if it is not direct evidence (directly heard or seen and testifies to that) but is indirect evidence, or hearsay (you are told about an event but do not personally see or witness it), or simply relates to a person's opinion (unless it is the opinion of an expert or professional who has been asked to be a witness because of their expertise).

Evidence used in court can take the form of real evidence, documentary evidence and witness testimony. Real evidence is physical evidence, which can be presented to the jurors in a trial. This may take the form of tape recordings, charts to help explain evidence, photographs, fingerprints, DNA test results, and exhibits such as weapons and clothing.

Documentary evidence may involve original documents gathered during the investigation. One of the most important types of evidence is that of a witness. Witnesses can be called to give evidence in court by either the prosecution or the defence and may be examined by either in court. A witness might be someone who saw some aspect of the crime take place, or someone who simply has some relevant knowledge about an aspect of the case that supports the prosecution's or defendant's argument. Anyone who witnessed a crime or was interviewed by police may be subpoenaed to appear later in court. A subpoena is a formal court document ordering a person to attend at court at a certain time and place, and cannot be ignored – if it is, it may result in a charge of contempt of court.

A witness giving evidence will be asked to take an oath to tell the truth and will be asked a series of questions, usually by both the prosecution and the defence. There are rules around the order and type of questions that a witness can be asked. The information the prosecution and the defence seek is about the witness's factual first-hand knowledge or eyewitness testimony, and will often be supported by an earlier statement made by the witness and recorded. Witnesses must answer questions truthfully; if not, they may be guilty of perjury, which is telling an untruth to a court.

Another type of witness evidence is that of an expert witness. This is a person who has studied some element of the evidence as an independent expert during the investigation (for example, someone who examined DNA, blood spatter or handwriting,

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or someone who assessed the defendant, such as a psychiatrist). Their job is to give testimony based on their expert or specialised knowledge and give an opinion or interpretation of the evidence. The evidence of an expert witness can often be valuable.

However, it is not always the case. A recent court case which highlights the fallibility of expert witnesses is *Wood v R* [2012] NSWCCA 21. Gordon Wood had been convicted of the 1995 murder of his then girlfriend Caroline Byrne. At the trial an expert witness provided testimony that Wood could have caused the death of his girlfriend by throwing her body off The Gap at Sydney's Watsons Bay. This conviction was overturned on appeal in February 2012, after the New South Wales Court of Criminal Appeal agreed that his testimony was flawed and that there was reasonable doubt about his scientific proof relating to Ms Byrne's death.

Review 3.5

1. Evaluate the importance of the burden of proof in criminal law.
2. Describe some of the types of evidence that may be presented in court.
3. Outline under what circumstances evidence will be classified as inadmissible.

3.8 Defences to criminal charges

A defendant may have a legal defence available to them. Most defences involve some denial, justification or excuse for the accused's act. The majority revolve around the *mens rea* of the offence: in effect, that the accused could not have had the level of intention required for the offence. Legal defences help achieve justice by allowing the court to consider circumstances that might justify the accused's act or reduce their culpability. They limit the risk of an unjust conviction by permitting reduced liability in certain situations, such as for an accused person who has a serious mental illness or whose behaviour was involuntary. Defences can sometimes be controversial, especially in cases where a victim is involved. Whether a defence ultimately succeeds will usually be a question of fact to be determined by the judge or jury, based on the evidence that the accused presents.

Defences may be complete defences, which result in the complete acquittal of the accused, or partial defences, which may result in the charge or sentence being reduced.

Complete defences

Complete or absolute defences are used to justify the defendant's actions and, if successfully proven, will result either in charges being dropped

Legal Info

The M'Naghten test

The M'Naghten test (also known as the M'Naghten rule) is an English rule established in 1843. It is used to determine whether a person is able to claim the defence of insanity. In the case, James M'Naghten (the accused) attempted to shoot Sir Robert Peel (the then Prime Minister of Britain). M'Naghten missed and instead shot Edward Drummond (the Prime Minister's Private Secretary). In the case, M'Naghten claimed that at the time he was suffering insane delusions of being persecuted by the government, and he was acquitted on the basis that, as he was insane, he did not know the nature of his act nor that it was wrong. The House of Lords developed the insanity rule in response to the case. The insanity plea only applies to situations where the accused was not aware of the nature or consequences of their actions when they committed the crime and cannot be held responsible for those actions. They must be able to prove that they were mentally ill at the time of the act. The M'Naghten rule has been under scrutiny in recent years by both independent groups and government bodies such as the NSW Law Reform Commission. Current concerns are that the idea of what constituted mental illness when the precedent was established, in 1843, is now outdated, and is not supported by current medical theory and knowledge.

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or, if the defence is presented during a trial, an **acquittal**.

Mental illness or insanity is a defence that is only available where the accused can prove that they were in fact mentally incapacitated when they committed the offence. This defence relates to the *mens rea* of the accused, and requires the accused to claim that they were not criminally responsible for their actions because they could not have formed the necessary intent. The defence of insanity is very difficult to prove but enables the accused to claim that they were not aware of, or able to comprehend, the nature or consequences of their act at the time the crime was carried out. Where the defence of mental illness succeeds, the accused may be found not guilty on the grounds of insanity.

acquittal
a judgement that a person is not guilty of the crime with which they have been charged

mental illness or insanity
mental incapacitation at the time of the act, meaning the accused cannot have formed the *mens rea* at the time of the offence

Involuntary behaviour or automatism is another defence relating to the *mens rea* of the accused. In this case, the argument is that the accused's actions were not voluntary or could not be controlled (for example, due to some involuntary action, such as an epileptic fit). If the act was involuntary, the *mens rea* element of the offence cannot be established.

Mistake is not generally a defence under the law and is difficult to prove. However, if it can be shown that the accused's action was an honest and reasonable mistake and that the act was not intended, the relevant *mens rea* may not be present and the offence may not be able to be established.

Self-defence or necessity is a self-explanatory defence. This defence may be used in certain circumstances if the accused can show they carried out a crime in the act of defending themselves or another person, while attempting to prevent a crime or in the defence of property. Using this defence can be risky for the defendant because what they may consider reasonable force and what the jury believes is reasonable force may be very different. In *R v Zecevic* (1987) 162 CLR 645 it was held that the defendant must have reasonable grounds to believe their life was threatened and they must use

Figure 3.11 Self-defence, or necessity, can be a complete defence.

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only 'proportional and reasonable force' to defend themselves. Zecevic's case stemmed from a dispute over a parking space. When a defendant uses this defence, the jury is compelled to either acquit the defendant or find them guilty of the crime. Particular rules apply to self-defence in relation to some offences, such as murder.

involuntary behaviour or automatism
an act that cannot be controlled or is not voluntary, such as an epileptic fit

mistake
the defendant acted under an honest and reasonable mistake and thus could not have formed the *mens rea*

self-defence or necessity
the defendant acted in defence of self, another or property; only accepted in limited circumstances and only for reasonable force

Under the defence of duress, the accused must be able to prove that they committed a crime against their own free will. **Duress** describes unlawful pressure that is applied by one person to induce another person to do something against their will. Although they knowingly carried out the crime, they did so because they believed that their life or someone else's was under threat. In *R v Williamson* [1972] 2 NSWLR 281 the defendant disposed of a body while under the threat of death and this threat was held to constitute duress.

Consent is the defence most often used as an absolute defence in sexual assault cases. If it can be shown that the alleged victim consented to the act, the accused may be acquitted. Consent is often hard to prove in sexual assault matters. In many trials it is not the act itself that is in question, especially when physical evidence is present; the problem for the prosecution is proving lack of consent. This is often hard, depending on the circumstances surrounding the event in question.

duress
coercion or pressure used by one party to influence another party

consent
it is a complete defence for some crimes if the accused can show the victim freely consented to the act in question

However, consent is not a valid defence for certain criminal offences, such as murder. For example, a doctor or family member who helped euthanise a terminally ill person cannot use the defence of consent even if the patient did want to die.

Partial defences to murder

There are a number of partial defences to murder. When a murder has been committed, the accused may claim that there were mitigating circumstances that caused them to carry out the act. While such a claim is not enough to absolve the defendant of blame, it may help reduce the sentence or even result in an acquittal.

Provocation is the defence in which the defendant claims that their actions were a direct result of the other person's actions, which caused them to lose control and commit the offence in question. Provocation is a controversial defence because it implies that the victim has some level of responsibility for the act – that they somehow provoked the accused to an extreme reaction resulting in a criminal act. Provocation as a defence has been abolished in Victoria, Western Australia and Tasmania, but still exists in New South Wales. For provocation to succeed, the accused must be able to prove that the victim caused the accused to act in a way that, given the same circumstances, any ordinary person would have acted. In New South Wales, the defence of provocation can only be used when attempting to have a murder charge reduced to manslaughter. In *R v Camplin* [1978] AC 705, a 15-year-old boy successfully argued provocation after he hit his uncle with a frying pan and killed him. The uncle had just sexually assaulted the boy and was mocking him about the incident. The court held that an 'ordinary person' in the position of the accused would have formed the intent to kill or inflict grievous bodily harm on the person who had assaulted them.

Substantial impairment of responsibility is another partial defence to murder, and can reduce a charge of murder to manslaughter. This defence is also referred to as **diminished responsibility**. The defendant must be able to prove that they suffer from a mental abnormality that caused them to act in a certain manner and carry out a crime. Such abnormalities include a low IQ or mental retardation. This defence is more widely used than the insanity plea because it is easier to prove, and the person may be completely normal in every other aspect of their mental capacity and health. Substantial impairment

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News

I'm glad it's over: robber's killer freed

Natasha Wallace

Sydney Morning Herald, 5 August 2006

The accused thanked the jury, the gallery applauded and even the prosecutor was not disappointed when Karen Brown was found not guilty of murder.

The facts of the case were simple: moments after the security guard Karen Brown shot dead a robber who had beaten her with knuckledusters, she staggered dazed and confused into a hotel, her head 'bubbling' with blood and the gun dangling from her hand. 'I have been robbed,' she said. 'Call the police. I think I killed him.'

But the issues in the case were complex. While Ms Brown admits she pulled the trigger, she insists she does not remember shooting William Aquilina, 25, as he tried to rob her of about $40 000 outside the Moorebank Hotel on July 26, 2004.

Two witnesses told the NSW Supreme Court during Ms Brown's trial that she had given up the fight and walked away before turning towards him and shooting him through a car window as he sat in the front seat.

Yesterday the jury found her not guilty of both murder and manslaughter after about four hours of deliberation.

This capped off a two-week trial in which the central issue was whether Ms Brown intentionally shot at Aquilina as he fled the scene.

When the jury handed down its verdict, Ms Brown dropped her head in her hands and cried. The public gallery applauded. Ms Brown turned to the jury, nodded her head and mouthed the words 'thank you'. …

To secure a guilty verdict, the prosecution had to prove that Ms Brown, 42, shot Aquilina out of revenge or anger, and that the act was not done under provocation and she was not acting in self-defence at the time she fired the gun. He died of a bullet wound to the head.

But her defence argued that at the time she fired the gun she experienced a brief period of automatism – that she was acting involuntarily and was not in control of her actions.

A defence psychiatrist, Olav Nielssen, said that despite entering the hotel shortly after the shooting and alerting patrons and staff to what had happened, Ms Brown had suffered from 'post-traumatic automatism' at the crucial moment. He said this was either because of the direct effect of the brain injury she sustained in the assault or the emotional trauma arising from believing her life was in danger.

Figure 3.12 Karen Brown outside Liverpool Court during a break in proceedings, 26 August 2005

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News

During deliberations yesterday, the jury asked the judge to clarify the Crown and the defence's positions on what constituted a voluntary act.

Through the trial, Ms Brown had appeared to be traumatised still. Her head sometimes shook, her eyes constantly darted about the courtroom and she often wept as witnesses recounted events.

She took deep breaths and tried to steady herself as the jury listened to how she fought Aquilina for the bag of cash before turning and shooting him dead.

She did not give evidence. She says she does not remember anything from the time Aquilina bashed her and dragged her along the ground by the backpack until she was in hospital later.

Dr Nielssen diagnosed her with concussion, which he said lasted up to two months afterwards. Dr Elizabeth Swinburn, who had treated Ms Brown at Liverpool Hospital that night, thought Ms Brown was 'lucid' and alert and said she had denied any loss of consciousness.

She was discharged from hospital but an X-ray and CT scan two days later showed she had a fractured nose, eye socket and wrist.

cannot be used as an excuse when the accused was drunk or under the influence of mind-altering drugs.

provocation
the defence where the defendant claims that their actions were a direct result of another person's actions, which caused them to lose control of their own actions

diminished responsibility
also known as substantial impairment of responsibility, this defence is used when the accused is suffering from a mental impairment

Review 3.6

Read the media article on page 64 and complete the following tasks.

1. Create a case study which outlines the facts, charges and judgement of the case.
2. Outline the facts of the case and describe the defences that were relied on.
3. Describe what evidence was relied on to find Ms Brown not guilty.

3.9 The role of juries, including verdicts

Juries are a central part of the adversary system of criminal law. They reflect the historic right of an accused person to be judged, impartially, by a group of their peers, based on evidence presented at a trial. In New South Wales, juries are used to hear most indictable offences where a plea of 'not guilty' is entered, and may be used in either the District Court or the Supreme Court. The Local Court does not have jurisdiction to conduct trials with a jury. Many of the rules about juries are found in the *Jury Act 1977* (NSW).

A jury is a panel of citizens, selected at random from a list compiled from the electoral roll, whose job it is to determine the guilt or innocence of the accused based on the evidence presented to them at trial. Their decision is called a verdict. It is a task that brings with it enormous responsibility. In most cases, a criminal trial involves a jury of 12 people.

Challenging jurors

In a criminal trial, both the prosecution and the defence have the right to challenge either the selection of the entire panel of jurors, or individual

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jurors. Both sides can also exercise a certain number of **peremptory challenges** of prospective jurors. This is when they disqualify individual jurors without having to give a reason. However, challenging the selection of a juror can be difficult: neither side knows anything about them in advance apart from their names, and peremptory challenges are usually based on nothing more than name or appearance (for example, age, gender, race, clothing or physique).

Challenges for cause are challenges based on the person not being qualified to serve on a jury – through being ineligible or disqualified, or because of being suspected of bias. For instance, one of the jurors may be acquainted with the defendant or have been a victim of a similar crime and therefore may be thought to be biased.

peremptory challenge
when the legal team rejects a juror without needing to provide a specific reason

challenge for cause
when the legal team rejects a juror because they believe that for some reason the juror will be prejudiced

Eligibility for jury duty

Australian citizens aged 18 years or over become eligible to sit on a jury once they are on the electoral roll (enrolled to vote). It is very difficult to gain an exemption from jury duty and some people view jury duty as an inconvenience and a burden, especially when they are selected to sit on a long trial. Jurors are paid for their attendance on the jury and employers are required to give leave to their employees for jury duty. It is an important part of our justice system for an accused person to be tried by a group of their peers. Some people can ask to be exempted – those who are aged over 65 years, are pregnant or care for children full-time. There are also some groups of people who are ineligible to sit on a jury. They include people who do not speak English; emergency services workers (police, fire and ambulance), disabled people, convicted criminals and members of the legal profession. If you fail to attend jury duty when requested you can face a $1100 fine from the Justice Office of the Sheriff. If a jury is empanelled and you are not selected you may be requested to attend another selection over the course of the next one to three months.

Jury role

Before a court case begins, jurors are sworn in. During the trial, the role of a juror is to listen to the evidence presented to the court, apply the law as directed by the judge and come to a verdict as to the accused's guilt or innocence.

Jurors are permitted to make notes in order to refresh their memory of what has happened in court. They are not permitted to talk to anyone except for their fellow jurors, when they are all together, about the case. They may also ask for clarification on matters from the judge. Throughout the case, they have to be alert and focused on what is being presented to them in the courtroom. Their role is to be unbiased and impartial, and to make a judgement based solely on the evidence they are presented with. Each jury elects a foreperson to speak on their behalf.

The jury must remain fair and open-minded when reaching their decision. The jury should not be influenced by the media or their own personal beliefs while deliberating a verdict. When deciding on the verdict, the jury does not have any set time limits. Jurors are encouraged to take their time and discuss the court proceedings as much as they need to.

Verdict

A jury has to reach a verdict of guilty or not guilty and present that verdict to the court. The accused will then be acquitted if found not guilty. If the accused is found guilty, the judge will then pass sentence.

Sometimes it is easy for the jury to arrive at a decision, but in other matters they can deliberate for days and still not reach a verdict. A jury that is unable to reach a verdict is called a 'hung jury'. In these situations the case is dismissed and a retrial will be ordered. This means that the whole case will begin all over again. A hung jury puts significant strain on all parties to a case and places a subsequent burden on the time and cost for the accused and the prosecution. If the accused is in remand during the trial, it may result in an extended period of custody for an offence they may ultimately be acquitted of. Also, a prolonged or repeated trial can cause great anguish to victims and witnesses.

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Figure 3.13 Australian citizens become eligible to sit on a jury once they are on the electoral roll.

Legal Info

Jurors' understanding in criminal trials

A lot of research has been conducted internationally to determine whether jurors in a trial understand the instructions given to them by judges. Much of that research has found that jurors do not understand instructions given to them by judges, and have particular difficulty with concepts such as 'reasonable doubt', 'intent' and 'the presumption of innocence'.

In 2008, the NSW Bureau of Crime Statistics and Research conducted a study entitled *Juror Understanding of Judicial Instructions in Criminal Trials*. The study surveyed over 1200 jurors on their understanding of the criminal trial process. In particular, the study focused on jurors' understanding of the phrase 'beyond reasonable doubt'; 55.4% of the jurors believed that it meant 'sure that the person is guilty', 22.9% believed it meant 'almost sure', 11.6% 'very likely' and 10.1% 'pretty likely'.

Almost all the jurors believed they could understand all or most of the judge's instructions to them on the law (94.9%). Almost half (47.2%) stated that they 'understood completely'. However, some groups were less likely than others to feel that they understood judicial instructions. If a juror's first language was not English, they were almost twice as likely to say they understood only 'a little' or nothing of the judge's instructions on the law.

Younger jurors, those who aged 18–35 years, were 1.3 times more likely than the rest to say the judge's summing-up of the case to the jury did not help the jury at all or only a little bit in reaching a verdict.

The Director of the Bureau, Dr Don Weatherburn, said that in general the results suggest that the jury system is effective: 'It is occasionally suggested that jurors do not understand what is going on in criminal trials. This study indicates that the overwhelming majority of jurors have little or no problem understanding judicial instructions on the law or the judge's summing-up of evidence at the end of the trial.'

In 2008, the rate of offenders found guilty at jury trials in New South Wales was 84.7%. In 2014, this has further increased to over 85% of offenders.

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Figure 3.14 In this old image you can see that all of the jurors are men. These days this would be a rare occurrence as jurors are selected at random.

In 2006, the NSW Parliament amended the *Jury Act 1977* (NSW) with the *Jury Amendment (Verdicts) Act 2006* (NSW) to allow majority verdicts of 11:1 or 10:2 in cases where reasonable time for deliberation has passed and the court is satisfied that a unanimous verdict will not be reached. The Act does not apply to Commonwealth offences, as unanimous verdicts for those offences are protected under s 80 of the *Australian Constitution*.

The system of unanimous verdicts in criminal trials was inherited from British Law. Unanimous verdicts mean every single one of the jurors must agree. This was changed in the United Kingdom in 1967, with many Australian states following its lead. Arguments for the change to majority verdicts include that a majority verdict removes the power of rogue or unreasonable jurors who are unrepresentative of the community, and it avoids the time delays, cost, and stress on the victim of a retrial. Arguments against majority verdicts include that a majority verdict removes the possibility of a 'reasonable doubt' decision if only one juror is disagreeing, that disagreements are rare, and that the possibility of a majority verdict may change jury deliberations from the beginning of the case.

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Chapter summary

- Different offences will be heard in different courts in the court hierarchy.
- The Local Court deals with summary offences and less serious offences.
- The Coroner's Court decides whether a person's death is suspicious and a case can be built to prosecute a suspect.
- The Children's Court deals with crimes committed by people under the age of 18 years.
- The District Court hears serious criminal matters and appeals from lower courts.
- The Supreme Court hears the most serious cases, such as murder and gang rape.
- The High Court is the highest court in Australia.
- The DPP prosecutes cases on behalf of the New South Wales Government.
- Public defenders represent the accused.
- Legal aid can be available to people who are unable to pay for legal representation.
- Evidence can take several forms: real, documentary and witness testimony.
- An accused may raise a partial or a complete defence to a criminal charge.
- Juries must in most circumstances reach a unanimous verdict; this may be reduced to 11:1 or 10:2 in certain circumstances.

Questions

Multiple-choice questions

1 The Coroner's Court is which of the following?
- **A** A court that deals with the cause and manner of a person's death
- **B** A court where most criminal cases are heard
- **C** A court where the general public are prohibited from viewing proceedings
- **D** The highest court in Australia

2 Which of the following best describes the defence of duress?
- **A** The accused claims that the victim consented to the crime carried out against them.
- **B** The accused tries to prove that they committed a crime against their own free will.
- **C** The crime was done in the act of self-defence.
- **D** The victim's actions caused the accused to lose control.

3 A public prosecutor is a:
- **A** judge
- **B** magistrate
- **C** lawyer
- **D** police officer

4 When a defendant pleads guilty to a lesser charge in exchange for another charge being withdrawn it is referred to as:
- **A** plea bargaining
- **B** charge negotiation
- **C** double jeopardy
- **D** committal hearing

5 The standard of proof in a criminal case is best described as:
- **A** beyond reasonable doubt
- **B** balance of all probabilities
- **C** diminished responsibility
- **D** innocent until proven guilty

Chapter summary questions

1 Describe the court hierarchy and jurisdiction of the lower courts, intermediate courts and superior courts.

2 Outline the similarities and differences in the roles of a magistrate and a judge.

3 Compare the roles of public prosecutors and public defenders.

4 Discuss the limitations in procedural fairness if an accused chose to self-represent in court.

5 Evaluate the role of a jury in the criminal justice system.

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Chapter 4
Sentencing and punishment

Chapter objectives

In this chapter, students will:

- identify the purpose of sentencing
- describe the many different types of sentences available
- discuss the role of the victim in the sentencing process
- explain the subjective and objective elements in applying a sentence
- describe the alternatives to traditional forms of sentencing
- communicate the effectiveness of a sentence as a means of deterrence.

Key terms/vocabulary

aggravating factor
appeal against conviction
appellant
bond
caution
circle sentencing
community service order
continued detention
correctional centre
criminal infringement notice
deterrent
diversionary program
fine
forfeit
general deterrence
gratuitous violence
guideline judgement
home detention
incapacitation
Intensive Correction Order (ICO)
judicial discretion
mandatory sentencing
maximum penalty
mitigating factor
non-parole period
parole
penalty unit
preventive detention
probation
proceeds of crime
recidivism
rehabilitation
remorse
restorative justice
retribution
sentence appeal
sentencing hearing
specific deterrence
suspended sentence
victim impact statement

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Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Crimes Act 1914 (Cth)
Migration Act 1958 (Cth)
Criminal Assets Recovery Act 1990 (NSW)
Young Offenders Act 1997 (NSW)
Crimes (Administration of Sentences) Act 1999 (NSW)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Child Protection (Offenders Registration) Act 2000 (NSW)
Crimes (Appeal and Review) Act 2001 (NSW)
Terrorism (Police Powers) Act 2002 (NSW)
Crimes (High Risk Offenders) Act 2006 (NSW)
Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010 (NSW)
Victims Rights and Support Act 2013 (NSW)

SIGNIFICANT CASES

Kable v DPP (1996) 189 CLR 51
R v AEM (Snr); R v KEM; R v MM [2002] NSWCCA 58
R v Thomas [2007] NSWCCA 269
McCartney v R [2009] NSWCCA 244
R v Tuala [2015] NSWCCA 8

Legal oddity

A woman in Ohio had been getting her daughters to help her shoplift. After being caught on video serveillance stealing items from a Wal Mart store, the woman was found guilty of petty theft and child endangerment. Due to the involvement of her children, the case was taken very seriously. In addition to a $600 fine, 10 days' imprisonment plus two years' community control, she was also required to write a letter to her children explaining why their actions were wrong.

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4.1 Sentencing and punishment

Once a crime has been committed, the police investigate it and lay a charge or charges, and then the relevant authority prosecutes the case. If the person accused of the crime pleads not guilty, the case will be tried in court by a magistrate or a judge or a judge and jury. If the accused is found not guilty, they will be acquitted and set free.

Where an accused pleads guilty, or if the jury reaches a guilty verdict at the trial, the accused will be sentenced. It is the responsibility of a judicial officer – the magistrate or judge – to set the most appropriate sentence. The jury is not involved in sentencing an offender.

Sentencing occurs in a **sentencing hearing**. This may take place at the same time a verdict is reached or a guilty plea is given, but it often will happen on a different day from the trial or summary hearing. The sentencing hearing is where the magistrate or judge hears and considers arguments and evidence about the relevant law and what the most appropriate sentence ought to be in the matter at hand. The magistrate or judge will then determine and announce the sentence.

sentencing hearing
a hearing following a finding of guilt in which a magistrate or judge will determine the sentence to be given to the accused

The sentence is the sanction imposed by the state in relation to the offender's criminal conduct.

Figure 4.1 Hearings take place in a court room.

As such, the sentencing of an offender is one of the most crucial steps in the criminal process. It involves a judgement about the severity of the offence, the *mens rea* of the accused and the need for the crime to be punished. In high-profile cases, sentencing can attract significant publicity or become heavily politicised. For example, the 2014 murder trial of Gerard Baden-Clay saw news broadcasting teams reporting from the court as well as a full public gallery every day of the trial. However, regardless of the publicity, all sentences require careful balancing of the interests of all parties concerned. This includes the victims, the community, the state and the accused. This can be the most difficult role the judge has to perform. It is usually the discontent of the victim or the family of the victim that is conveyed through the media.

4.2 Statutory and judicial guidelines

When imposing a sentence, magistrates and judges do not simply pluck a punishment from the air. Sentencing is an established area of criminal law: there are numerous laws, rules, guidelines and cases on how sentences are to be determined.

The *Crimes (Sentencing Procedure) Act 1999* (NSW) is the primary source of sentencing law in New South Wales. It sets out the purposes for which a sentence may be imposed, the types of penalties that can be imposed and when they can be used, as well as a number of factors and guidelines for sentencing generally. In addition to that Act, limits and guidelines on sentencing are found in many other statutes.

The **maximum penalty** that an offender can receive for an offence is usually decided by parliament and listed in legislation. This can be found in the same section as the offence it relates to. No judicial officer can pass a sentence higher than the maximum penalty. Maximum penalties differ according to the seriousness of the offence. For example, s 19A of the *Crimes Act 1900* (NSW) describes the maximum penalty for murder as life imprisonment, and s 61I sets the maximum penalty for sexual assault at 14 years' imprisonment. A variety of lesser penalties is available for a judicial officer to use at their discretion, so maximum penalties are only imposed in the most extreme cases.

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The *Crimes (Sentencing Procedure) Act* states clearly that a court may not impose a prison sentence unless it is satisfied that no other penalty is appropriate. Ultimately, it is up to the magistrate or judge to determine the most appropriate sentence – this is known as **judicial discretion**. Judicial officers determine the best sentence on a case-by-case basis. They take into account numerous aspects of the offence, especially any aggravating or mitigating circumstances.

maximum penalty
set by parliament, this is the maximum sentence available to a court to impose for an offence; the maximum penalty is rarely handed down

judicial discretion
the power of a judge or magistrate to make a decision within a range of possibilities based on the particular circumstances of a case

Judicial officers can be guided by precedents in cases with similar facts. Case law will often be cited by the prosecution or defendant in a sentencing hearing – other judgements will often be persuasive, and sentencing principles that have been handed down by a higher court may need to be followed. The *Crimes (Sentencing Procedure) Act* also allows for the New South Wales Attorney-General to apply to the court for **guideline judgements** on sentencing for particular offences – such judgements will be issued by a judge after hearing arguments from both the Director of Public Prosecutions and the Senior Public Defender. They will be used in determining future sentences.

guideline judgement
a judgement issued by the court, on the application of the Attorney-General, that will set out sentencing guidelines for a particular offence

In some controversial instances, parliaments have replaced judicial discretion for certain offences with what is known as **mandatory sentencing**. Mandatory sentencing is an automatic sentence set by parliament that must be imposed by the judicial officer for particular offences or repeat offences. Mandatory sentencing laws were introduced in the Northern Territory and Western Australia in the 1990s. They aimed to be a harsh **deterrent** for repeat offenders and to remove serial offenders from the streets. The 'three strikes and you're out' policy involved offenders being mandatorily imprisoned if convicted three times for certain offences. In recent years, New South Wales and other states have introduced mandatory sentencing laws for a range of offences. Specifically, New South Wales Premier Barry O'Farrell in 2014 introduced the eight-year minimum sentence for convicted one-punch offenders. The New South Wales Government has also made further calls for mandatory sentence laws for child sex offenders.

mandatory sentencing
removal of judicial discretion by legislation, by setting a minimum or mandatory sentence for a particular offence or type of offender

deterrent
something that discourages or is intended to discourage someone from doing something

Recently the New South Wales Government has come under much criticism for attempting to introduce mandatory sentences for anyone who murders a police officer who is on the job. Legal groups argue that this is unnecessary, as this crime already carries a maximum non-parole period of 25 years, and it also implies a flaw in the rule of law.

Opponents claim that such laws are unduly harsh as they remove the ability of a magistrate or judge to consider the individual circumstances of the accused and the offence they have committed. It has also been highlighted that particular ethnic, socioeconomic and minority groups may suffer more than others through mandatory sentencing laws and there is little evidence that they work as a deterrent.

Figure 4.2 In 2014, New South Wales introduced an eight-year minimum sentence for convicted one-punch offenders.

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The Northern Territory has now abolished its mandatory sentencing laws, after they were found to cause a huge and unmanageable rise in imprisonments, with little deterrent effect and with Indigenous offenders over-represented.

Review 4.1

1. Outline the purposes of sentencing and the role a magistrate or judge has in this process.
2. Explain the term 'judicial guidelines' and their purpose in sentencing.
3. Compare and contrast the positive and negative aspects of mandatory sentencing. Find a case involving mandatory sentencing in New South Wales.

4.3 The purposes of punishment

Sentencing is traditionally the means through which the state and the community punish an offender for the crime they have committed. However, the notion of 'punishment' is misleading and needs to be separated from sentencing – punishment is just one of many purposes behind imposing a sentence on an offender. A judicial officer will have to consider the purpose behind the sentence that is being considered and ask him- or herself why this particular sentence is required in the circumstances.

The *Crimes (Sentencing Procedure) Act 1999* (NSW) lays down the allowable purposes of sentencing.

Crimes (Sentencing Procedure) Act 1999 (NSW)

Section 3A

The purposes for which a court may impose a sentence on an offender are as follows:
(a) to ensure that the offender is adequately punished for the offence,
(b) to prevent crime by deterring the offender and other persons from committing similar offences,
(c) to protect the community from the offender,
(d) to promote the rehabilitation of the offender,
(e) to make the offender accountable for his or her actions,
(f) to denounce the conduct of the offender,
(g) to recognise the harm done to the victim of the crime and the community.

All these purposes are important when considering a sentence. Some will be more important than others depending on the circumstances of the offence. These purposes are considered in more detail below.

Deterrence

A deterrent is something that discourages or is intended to discourage someone from doing something. In the context of sentencing, deterrence relates to passing a higher sentence in the hope that fear of punishment might help prevent future offences. There are two types of deterrence:

- **specific deterrence** – punishment against an individual offender aiming to deter them from committing crime in the future by showing that 'crime does not pay'
- **general deterrence** – punishment attempting to make an example of an offender in order to send a message to the rest of the community that the law is serious about punishing people for this offence.

specific deterrence	**general deterrence**
punishment against an individual offender aiming to deter them from committing crime in the future	punishment attempting to make an example of an offender in order to send a message to the rest of the community

Section 3A(b) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) mentions both types of deterrence – 'deterring the offender and other persons' – as possible purposes of sentencing. While deterrence is a relatively simple concept that people can easily relate to, there is very little evidence to suggest that individual criminal sentences are an

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Figure 4.3 Studies have shown that a sentence of imprisonment does not reduce the chance of reoffending.

effective deterrent. Studies are either inconclusive or suggest that they are not effective.

In New Zealand from 1924 to 1962, the general deterrence of the death penalty for murder was in a state of flux. During this time it was in force, abolished, reinstated and abolished again, with much publicity and discussion. Yet during this entire period there was no significant change in the murder rate.

Similarly with specific deterrence, there is little evidence that the higher penalty will reduce the chance of reoffending. Studies have shown that a sentence of imprisonment does not reduce the chance of reoffending. It has also been shown that there is not a lower reconviction rate among those who were given the lesser sentence of a fine compared with those who were sentenced to a term of imprisonment.

This is a significant issue for achieving justice in criminal law – punishing one person more severely than others may be an injustice if it fails to achieve its only purpose. If there is no verifiable deterrence benefit in passing the higher sentence, that sentence would be simply excessive. Of course, if other purposes (such as incapacitation) are relevant, then imprisonment may be appropriate.

In 1988, the Australian Law Reform Commission recommended that deterrence not be included as a sentencing objective, and that sentences should be set in relation to the seriousness of the offence committed. As a consequence, deterrence was not included as a purpose in the federal *Crimes Act 1914* (Cth), but it remains in New South Wales law. The former Director of Public Prosecutions, Nicholas Cowdery AM QC, objected strongly to the concept of deterrence in both Australian and New South Wales sentencing procedures. He believes that it is only through education and social programs that we can really deter people from committing crimes. You'll probably find that your teacher feels the same way. As a general rule, well-educated, healthy people with a comfortable standard of living are not the ones filling up our jails. Mr Cowdery has suggested that programs such as circle sentencing, MERIT and drug courts are far more appropriate ways of deterring people from reoffending.

Retribution

Retribution is an important factor in sentencing. It refers to punishment considered to be morally right or deserved because of the nature of the crime. It has a range of purposes, but assumes that some good comes from inflicting hardship on the offender for their crime. Retribution is related to the concept of revenge or 'getting even', but differs in that it is society seeking retribution on behalf of victims in an impartial manner through the courts. It aims to ensure that the punishment is proportionate to the crime but not violent or physically harmful to the offender.

retribution
punishment considered to be morally right or deserved because of the nature of the crime

Retribution is the main justification for inflicting punishment on an offender and is related to a number of points under the s 3A purposes listed above, including:

- ensuring that the offender is adequately punished for the offence, and according to the severity of the offence
- making the offender accountable for their actions and denouncing their conduct
- recognising the harm to the victim and the community.

Centuries ago, punishment served as a form of revenge and was often carried out by the victim of

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a crime or by the wider community, with terrible consequences (for example, public hangings and assaults). Victims today are no longer permitted by law to take personal revenge – instead, they are required to seek retribution through the legal system.

When someone is being sentenced for their crime, a judge will take into account the effect the crime had on the victim and their family and make an assessment of whether the punishment fits the crime. If the offence was particularly appalling or had particularly serious consequences, this will be taken into account. An example of this was discussed in Chapter 1 in the case of *R v AEM (Snr); R v KEM; R v MM* [2002] NSWCCA 58, where three teenagers were sentenced to particularly long terms of imprisonment due to the horrific nature of their offence (aggravated sexual assault in company) and the long-lasting effect it would have on the victims.

Retribution is among the many factors considered in sentencing determinations.

Rehabilitation

Rehabilitation is one of the most important purposes of punishment and will be considered in most cases. Like deterrence, rehabilitation aims to discourage future offences by the offender, but does so by attempting to alter the views of the offender. It encourages offenders to eliminate the factors that contributed to the conduct, fostering renunciation of the crime by the offender. This purpose is focused personally on the accused. The main aim is to prevent **recidivism** by helping criminals choose not to return to the same patterns of behaviour or lifestyle that led them to offend in the first place.

rehabilitation
an objective of sentencing designed to reform the offender so that they do not commit offences in the future

recidivism
habitual or repeated acts of criminal behaviour after having undergone treatment or punishment to deter such behaviour

Several of the purposes listed in s 3A – making the offender accountable, denouncing their conduct and promoting rehabilitation – are relevant to this concept. Rehabilitation may include a number of sentencing options and programs, such as drug counselling, drug rehabilitation programs, alcohol programs and anger management courses. Others may aim to give the offender the skills needed to function in society through educational courses.

Figure 4.4 Sentencing may include imposed attendance at counselling sessions to facilitate rehabilitation.

Participation in such programs may be specifically imposed or incorporated into other sentencing options.

Rehabilitation will rarely be the prime consideration for very serious offences, where other factors will usually outweigh the consideration of reform. However, there is some evidence that rehabilitation programs have some success with offenders, particularly for less serious offences or offences involving drug or alcohol abuse. It can be said that rehabilitation and reform through criminal sentencing will work at some level for some offenders. There is no firm evidence that it cannot also work for the majority.

Incapacitation

Incapacitation relates primarily to the third purpose under the *Crimes (Sentencing Procedure) Act 1999* (NSW): 'to protect the community from the offender'. It involves making the offender incapable of committing further offences. Different penalties can achieve incapacitation – for example, home detention, community work or licence cancellation – but the harshest form, imprisonment, is also the most effective. While these cannot prevent further offences, their purpose is to restrict freedom as much as necessary to reduce the likelihood of the offender committing another similar offence.

incapacitation
making an offender incapable of committing further offences by restricting their freedom

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One of the dangers of incapacitation is the difficulty in determining which offenders are likely to reoffend and which are not. Incapacitation is a severe penalty, so the likelihood of the individual person reoffending should be considered in each case to ensure that the sentence is not excessive. There will, of course, be certain offenders for whom incapacitation is more clearly justified in the interests of protecting the community – we would probably all agree that serial killers require imprisonment, for instance, and that serial drink-drivers should have their licences cancelled.

Review 4.2

1. Outline the main purposes of sentencing in New South Wales.
2. Explain the role of retribution in the legal system.
3. Discuss the purpose of rehabilitation and its role in the criminal justice system.
4. Describe any circumstances in which the need for incapacitation might justify a higher sentence.

4.4 Factors affecting a sentencing decision

In addition to statute (legislation), case law and the purpose considerations discussed above, a magistrate or judge must take into account individual factors – the facts of the offence, the circumstances and seriousness of the offence, and certain subjective factors about the offender. Part 3 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) sets out numerous factors for judicial officers to consider. These include:

- **aggravating factors**, which are circumstances that make the offence more serious and can lead to an increased sentence
- **mitigating factors**, which are circumstances that make the offence less severe and can lead to a reduced sentence
- any other objective or subjective factor that affects the relative seriousness of the offence (objective factors refer to the circumstances of the crime, and subjective factors refer to the circumstances and state of mind of the offender)
- whether or not the accused pleaded guilty
- whether or not the offender assisted law enforcement authorities
- a **victim impact statement** from victim(s) of the offence (discussed later in this section).

aggravating factor
a circumstance that makes the offence more serious; it can lead to an increased sentence

mitigating factor
a circumstance that makes the offence less severe; it can lead to a reduced sentence

victim impact statement
a statement written by the victim or victim's family about the impact the crime has had on them, heard at the time of sentencing

Section 21A of the *Crimes (Sentencing Procedure) Act* lists the aggravating and mitigating factors that are to be taken into account. These are extremely important in determining a sentence.

Aggravating and mitigating factors need to be carefully balanced against each other and will usually involve arguments from both the prosecution and defence. Not all aggravating and mitigating factors automatically mean an increased or reduced sentence. Their importance will depend on the circumstances of each case. For younger offenders, for example, personal circumstances might be important in terms of the possibility of rehabilitation, but if the offence is particularly severe or extreme, that might outweigh those considerations.

Aggravating factors

Aggravating factors are factors that somehow make the offence more serious or severe. They are likely to result in an increased sentence being imposed. Aggravating factors can relate to the way the offence was committed, the characteristics of the victim(s) or the characteristics of the offender. They usually make the crime less excusable or more appalling in some way. For example, violence, particularly **gratuitous violence**, is likely to increase the sentence.

Some aggravating factors include:

- offence – if the offence involved any violence, cruelty or weapons, or any threat of them; if it caused any injury, harm or damage; if it was motivated by any hatred or prejudice; or if it

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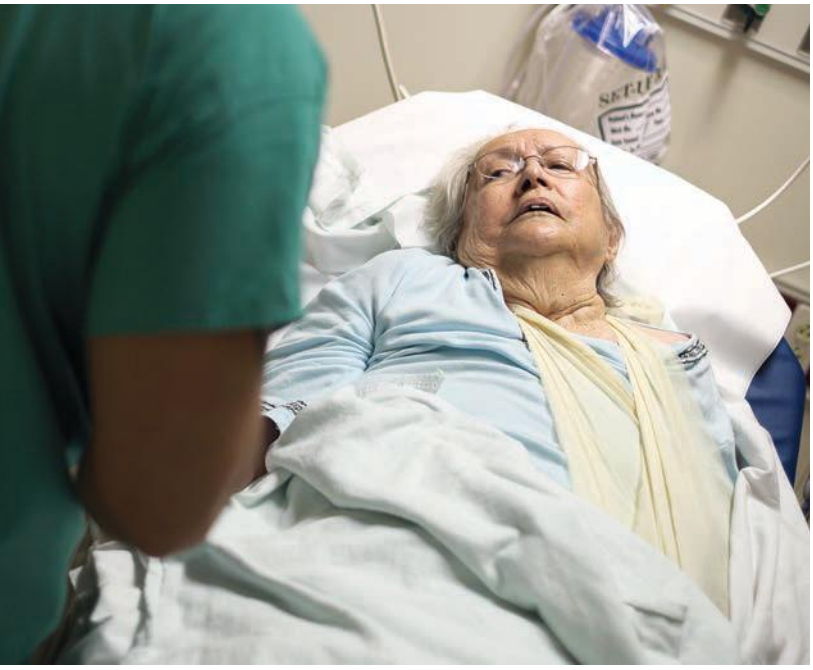

Figure 4.5 If the victim was vulnerable, this is likely to affect the sentencing decision.

was committed in company or involved some type of organised crime

- victim – if the victim was vulnerable (for example, old, young or disabled) or targeted for their occupation (for example, police officer, judicial officer, teacher or health worker); or if there were multiple victims
- offender – if the offender abused a position of trust or authority when committing the offence (for example, a doctor to a patient or a teacher to a student); or if the offender is a reoffender and/or has any prior convictions.

gratuitous violence
excessive violence carried out without reason, cause or excuse

Mitigating factors

Mitigating factors are the opposite of aggravating factors, and involve circumstances that may work in the defendant's favour by explaining the cause of their conduct (for example, showing that they honestly regret their actions or that they usually have a good character and the offence was just a one-off occurrence). Mitigating factors are usually subjective factors about the mind of the accused or their behaviour, and can include evidence that:

- the offender is of good character (such as character references from teachers or employers) and/or does not have any prior convictions
- the offender is youthful or inexperienced and was easily led
- the offender pleaded guilty or assisted police
- the offender has shown honest **remorse** (such as by compensating or apologising to the victim) or has good prospects of rehabilitation and is considered unlikely to reoffend
- the offender was somehow provoked or was acting under duress.

remorse
deep regret or sorrow for one's wrongdoing

Research 4.1

Visit the New South Wales legislation website at http://cambridge.edu.au/redirect/?id=6239.

Browse the current Acts in force and find the *Crimes (Sentencing Procedure) Act 1999* (NSW). Look at s 21A of the Act and complete the following tasks.

1. List three aggravating factors that relate to the victim of the offence.
2. Outline three aggravating factors that relate to the circumstances of the offence.
3. Explain three mitigating factors that relate to the circumstances of, or reasons behind, the offence.
4. Examine three mitigating factors that relate to the offender's conduct after the offence was committed.

4.5 The role of the victim in sentencing

Many crimes involve a victim who suffers some kind of harm as a result of the offender's action. This can include a person who is directly harmed, such as in a case of assault, or indirectly affected, such as the family of a person who has been killed.

Victims can be involved in the criminal trial process in a number of ways, from reporting a crime

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In Court

***McCartney v R* [2009] NSWCCA 244**

The offender, a 22-year-old male, had met the victim at a hotel and later at a restaurant. He then invited the victim home for drinks. The victim had repeatedly told the offender that she would not have sex with him. Both were intoxicated, and when the victim lay down to sleep, the offender sexually assaulted her.

The offender was found guilty and sentenced to two years and six months' imprisonment. He appealed against the sentence on the grounds that it was too severe and did not properly balance all the sentencing factors.

In sentencing the offender, the judge referred to general deterrence as a purpose of the sentence, stating that it is an important responsibility of the court to send a message to the community generally that sexual assault is not acceptable. The offender appealed on the ground that too much weight was given to the purpose of deterrence. However, the judge stated that deterrence was only a very strong consideration and not applied over and above all other purposes.

Aggravating factors included the nature and seriousness of the offence and, particularly, the impact on the victim. The judge considered a victim impact statement and put weight on the fact that 'her life and studies have been totally disrupted by this event and she has suffered considerable distress'.

Mitigating factors included the fact that the offender was relatively young, had no criminal history and was considered unlikely to reoffend. He was in steady employment as a carpenter in a supervisory position, and strong character references from his friends and employer were given. However, the judge noted that even people of the best character sometimes 'make mistakes and commit offences'. The judge noted that he had already reduced the sentence significantly (by 16.6%) due to the offender having pleaded guilty.

The offender also argued that intoxication had affected his judgement and contributed to the offence. The judge considered this, but stated firmly that intoxication was not a mitigating factor and did not excuse the behaviour. In particular, it was pointed out that the offender had managed to drive his utility back to the house.

The offender presented evidence that he had consulted an alcohol counsellor after the offence. The judge noted, in sentencing, that this was relevant and that the offender should be given further help in this area to assist his rehabilitation.

The offender's appeal was dismissed by the Court of Criminal Appeal, which stated that the judge had not erred in consideration of the sentencing factors. The panel of three judges stated that the sentence already fell within lowest range of available sentences for the offence, which carries a maximum of 14 years, and determined that the sentence should not be altered.

and assisting police through to testifying at trial as a witness and submitting a victim impact statement. The victim's role can sometimes be very difficult; in cases of sexual assault, for example, confronting or distressing questioning will often be required.

In New South Wales, victims of crime are recognised and guaranteed certain rights under the *Victims Rights and Support Act 2013* (NSW). The Act contains a Charter of Victims' Rights, which requires, among a number of things, respect for a victim's dignity, victims' compensation, protection from the accused, protection of identity and certain rights to information and assistance during the criminal process. The charter also introduces victim impact statements to the sentencing process. These are further outlined in the *Crimes (Sentencing Procedure) Act 1999* (NSW).

A victim impact statement is a voluntary statement written by the victim about the impact that the crime has had on them. It is defined in s 26 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). It allows the victim an opportunity to participate in the process by letting the court know how the crime has affected them. The statements are only permitted for serious

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Figure 4.6 A victim impact statement is a voluntary statement written by the victim about the impact that the crime has had on them.

offences involving violence (actual or threatened) or the death of or any physical harm to a person, and only if the court considers it appropriate. The statutory scheme applies in the supreme and district courts. They are presented after the offender is found guilty but before sentence is passed. The statements can influence the sentence. Two cases where the use of victim impact statements at sentence have been discussed are *R v Tuala* [2015] NSWCCA 8 and *R v Thomas* [2007] NSWCCA 269.

Victim impact statements relate to the personal harm to the victim, and can include physical and psychological harm. The statement can also include reports, such as medical reports, or diagrams or pictures (in the case of child victims). If the statement is given by the family, it will relate to the impact the act has had on them.

Victim impact statements can be controversial, because they can be very subjective yet have a significant effect on sentencing. Supporters argue that they provide an important opportunity for victims to express themselves in the criminal process. Also, if the offender is able to submit personal circumstances in mitigation of their sentence, then the victim's personal circumstances should also be able to be considered.

Statements by family members in cases of death are particularly controversial. Some commentators suggest that they are a danger, as they could lead to a court handing down different punishments according to whether the victim was more or less loved by their family. Also, family statements might remove impartiality from the judge's process, opponents say. However, victim impact statements can at least allow family members to publicly express their grief and anger. Importantly, they can be a confronting experience for the offender and so form a valuable part of the sentencing process.

4.6 Appeals

A person convicted of an offence and sentenced will have the right to appeal their case – that is, apply to a higher court for review of one or more decisions made in the lower court. The Crown also has the right to appeal a case where, for example, it believes the sentence is too lenient. The party appealing is known as the **appellant** or applicant. There are two types of appeals in criminal cases:

- **appeal against conviction**
- **sentence appeal**.

appellant
in an appeal case, the party who is making the appeal

appeal against conviction
an appeal where the appellant (the defendant) argues that they did not commit the offence of which they were found guilty

sentence appeal
an appeal against the severity or leniency of a sentence

In appeals against conviction, the appellant argues that they did not commit the offence of which they were found guilty. It is difficult for this type of appeal to succeed and it will usually involve an argument that there was some error in the handling and prosecution of their case – in the evidence admitted or in the instructions of the judge to the jury, for example. If successful, the appellant may be acquitted or a retrial may be ordered.

Sentence appeals, on the other hand, are appeals by the offender against the severity of their sentence,

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Figure 4.7 The High Court of Australia

or by the prosecutor against the leniency of the sentence. Sentence appeals might be made alone or in conjunction with an appeal against conviction. The judge's options for these appeals are to set aside a sentence, vary a sentence or dismiss the appeal. A sentence might be increased or reduced – this is a risk that the appellant must consider carefully before making the appeal.

The type of appeal allowed will depend on the court the offender was tried in, and there are also various time limits and process requirements for when a person can appeal. Any person convicted or sentenced in a Local Court will have a right of appeal to the District Court under the *Crimes (Appeal and Review) Act 2001* (NSW). A person may also appeal directly to the Supreme Court if it is on a question of law, but otherwise only by seeking permission from the Supreme Court. The District Court will usually conduct a rehearing of all the evidence, usually by reading the documents from the initial hearing.

A person sentenced in the District or Supreme Court can seek permission to appeal to the Court of Criminal Appeal. The Crown might also appeal against the leniency of a sentence. An appeal against conviction or a sentence appeal to the Court of Criminal Appeal will only succeed if the person can show that there was a legal error. This can include imposing a sentence that was too severe or too lenient. For example, in *R v AEM (Snr); R v KEM; R v MM* [2002] NSWCCA 58, the Crown appealed to the Court of Criminal Appeal against the leniency of a sentence given in a very serious case of aggravated sexual assault in company. On appeal, the court decided to more than double the original sentences that had been given to the offenders, from five and six years' imprisonment to 13 and 14 years' imprisonment.

The final court of appeal in the New South Wales criminal justice system is the High Court of Australia. An appellant will need to seek permission from the High Court to appeal. This leave will only be granted in rare circumstances.

Research 4.2

One high-profile criminal appeal in New South Wales was the case of Bilal Skaf. The original offence was committed in 2000 and various appeals were heard until 2008. Leave to appeal was even sought from the High Court. Search the internet for details of the case and answer the questions below. Sources might include media articles and transcripts of the most recent cases, which can be found at http://cambridge.edu.au/redirect/?id=6240.

1. Create a case study outlining a profile of Bilal Skaf and the types of crimes he committed.
2. Describe the court where the case was originally heard and the sentence Bilal received.
3. Outline the process of the appeals in this matter. When were the sentences appealed and to where?
4. In detail outline one of the appeals and the reasoning behind the appeal. What was the outcome of the appeal?

Review 4.3

1. Outline and discuss the different roles a victim can play in a criminal trial.
2. List the pieces of New South Wales legislation that specifically relate to the victims of a crime.
3. Outline the steps of the appeal process for both the accused and the victim.

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4.7 Types of penalties

There are many different penalties that a court can apply in its sentencing of an offender. The *Crimes (Sentencing Procedure) Act 1999* (NSW) lists the various penalties that can be imposed, from no conviction recorded, cautions and fines, through to imprisonment and even deportation. The type of penalty imposed will depend on how the magistrate or judge ultimately weighs all the factors discussed above, and cannot exceed the maximum penalty specified for the offence.

Caution

Before a charge is laid and a person goes to court, police have the power to issue a person with a **caution**. A caution is a formal warning and is used for certain less serious offences as a way to avoid the court system, in the hope that the offender has learnt a lesson and will not reoffend.

caution
a formal warning without charge issued by police for less serious offences

For example, under the *Young Offenders Act 1997* (NSW), police can issue a formal caution to offenders between the ages of 10 and 18 years for a variety of minor offences, such as damaging property, stealing or a minor assault. A formal caution can only be issued when the offender admits to the offence in the presence of an appropriate adult. It usually involves a formal conference where the offender, police, family and support people meet and discuss the crime. It includes discussion of the offence, its implications and the reasons why it occurred. The caution is kept on police record and the offender will be told what will happen if they reoffend.

Another example in New South Wales is the Cannabis Caution Scheme, where police may issue a caution for minor offences involving cannabis if a person has no prior conviction. It does not apply to people caught supplying cannabis. It involves a warning about the health and legal consequences of cannabis use as well as information about certain counselling and support services. The NSW Bureau of Crime Statistics and Research suggests that the New South Wales Government scheme has been quite successful in diverting minor offences away from the court system. Cautions were predominantly issued for possession (96%).

Criminal infringement notice

A **criminal infringement notice** is another type of penalty that can be issued by police. Introduced in New South Wales in 2007, it allows police to issue on-the-spot fines for certain offences, including larceny of goods valued at less than $300, offensive behaviour or language, and obstructing traffic.

criminal infringement notice
a notice issued by the police outside of court alleging a criminal infringement and requiring payment of a fine

The aim of criminal infringement notices is to remove some of the burden on the criminal court system by allowing police to just issue fines for these minor offences. Although they do represent an increase in police powers, the notices are not final and offenders can choose to have the matter heard in court. The benefit to offenders is that no conviction is recorded when they accept the notice; however, if the matter goes to court and the offender is found guilty, the sentence is likely to be more severe than the notice.

Conviction or no conviction recorded

When a person is charged with an offence and declared guilty by a judge or jury, that person is considered convicted of that offence. In sentencing, the judicial officer can either record the conviction against the offender, or pass sentence with no conviction recorded.

A criminal conviction is a serious matter and can have an important impact on a person's life. A person will be required to declare their criminal convictions at various times in their life – when applying for certain jobs, seeking certain entitlements or applying for travel visas, for example.

Normally, a conviction will be recorded and an appropriate sentence imposed. For less serious offences, particularly where they involve young offenders or first-time offenders, a judicial officer might choose not to record a conviction. Alternatively, the court may decide to record the conviction, but impose no other sentence.

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Fines

Fines are the most common sentencing option used in Australia. A fine is a monetary penalty imposed on an offender and usually applies for less serious offences, such as driving offences or breaches of local laws, or for particular types of offences, such as some violations of environment law or corporate law. For minor offences, a fine will usually be issued outside of court by the police or by local law enforcement officers (such as council parking officers). These are often referred to as 'on the spot fines'. Such fines can be challenged in court.

The maximum fine for an offence will be set out in legislation and will be based on **penalty units**. The value of a penalty unit is defined in s 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) – at the time of publishing, the value is $110. In 2015, under Australian federal law a penalty unit for an individual was $180. A recent reform to the on-the-spot fines system in New South Wales is called a Work and Development Order (WDO). This pilot program, which is delivered by Legal Aid NSW in collaboration with the Aboriginal Legal Service, State Debt Recovery and the Department of Police and Justice, enables people to pay their fines in ways other than with money, such as by completing community service with volunteer organisations or by participating in a rehabilitation or treatment program. WDOs are only available to people who have a mental illness or an intellectual disability, or who suffer from acute economic hardship, such as the homeless.

Figure 4.8 Fines may be issued by local law enforcement officers, such as council parking officers.

fine
a monetary penalty imposed for infringement of a law

penalty unit
a specified unit of money used in legislation to describe the fine payable; currently $110 in New South Wales

Although fines are most commonly used for minor offences, they can also be issued for more serious offences. For some serious offences, judicial officers have the option of a fine or imprisonment or both, depending on the circumstances. For example, under the *Crimes Act 1900* (NSW), a person convicted of unlawful gambling may be sentenced to a fine of up to 1000 penalty units ($110 000), imprisonment for up to seven years, or both.

The effectiveness of a fine will depend on the type of offence and the personal circumstances of the offender; for example, a small fine might have little deterrent effect on a wealthy person, but a large impact on a person who is unemployed. A court may look at evidence of a person's financial circumstances when considering imposing a fine.

Forfeiture of assets

Where an offender has obtained money or property through their criminal activities, a court may order that the money or property be recovered. Such assets might have been obtained through theft, fraud, money laundering, drug trafficking or tax evasion. The court might order that the assets be recovered in addition to any other form of punishment.

This power is given to the court via a number of Acts known collectively as the **proceeds of crime** legislation – the main Act in New South Wales is the *Criminal Assets Recovery Act 1990* (NSW). The laws are wide-ranging, and can allow examination of an offender's financial affairs and allow the assets to be restrained, seized and **forfeited**. The court might also require the offender to pay an amount assessed as the value of the proceeds (profits) of their crimes.

proceeds of crime
assets (money or property) obtained by an offender through their criminal activities

forfeit
(also known as forfeiture) loss of rights to property or assets as a penalty for wrongdoing

These laws are especially important in relation to organised crime, where simply sentencing the offender will not be enough to deter them from reoffending, especially where the offender is still

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able to enjoy the benefits of their criminal acts. These proceedings are civil, not criminal, and can proceed even if the accused has not been found guilty of a crime or has been acquitted. Forfeiture of assets is difficult to relate to the traditional purposes of sentencing, but it can be claimed to involve making the offender accountable and acting as a deterrent. Particularly, it gives the law an avenue to target the primary incentive of most criminal organisations – money.

Bond

A court may decide to issue an offender with a **bond**, either by itself or in conjunction with another penalty. A bond is a compulsory condition imposed on the offender for a period of time. The offender undertakes to comply with the bond in exchange for a more lenient sentence. A good behaviour bond involves the offender undertaking to be of good behaviour for the bond period (up to five years). If the offender breaches the bond, they will have to appear in court again and may be sentenced to more serious penalties, such as imprisonment. Other conditions imposed can include:

- attending family counselling
- attending anger management courses
- avoiding visiting a particular place or associating with certain people
- attending a drug and/or alcohol rehabilitation program
- refraining from particular activities, such as gambling.

bond
a compulsory condition imposed on an offender for a period of time, which the offender undertakes to comply with

A bond can be a significant restriction on an offender's life and freedom. Bonds are usually used in cases where lesser penalties are not considered sufficient or effective, but imprisonment is considered too severe. Offenders are given a second chance to prove that they will not reoffend during the bond period.

Probation

In more serious matters, a court may decide to order a bond with **probation** attached. Where probation is attached, the offender will be placed under the supervision of a probation officer appointed by the court for a period of time. Under the terms of a probation order, the offender will have to adhere strictly to the conditions of the bond, as above, but will also be required to maintain regular contact with the probation officer. This may require the offender to visit a police station three times a week at 9 am. The court will impose this where there is a higher danger of reoffending, but where an order for detention is considered too severe. Breach of probation is a serious matter: as with a bond, the offender will have to appear back in court and risk facing a more severe sentence.

probation
a type of good behaviour bond where the offender is released on condition of good behaviour but placed under some form of supervision, such as daily reporting to a probation officer

Suspended sentences

A **suspended sentence** is a serious penalty. It is imposed in place of imprisonment on the condition that the offender enters into a good behaviour bond for the same period of time. The imprisonment is suspended providing the offender complies with the conditions of the bond, and the offender is released to resume their normal life.

suspended sentence
a sentence of imprisonment imposed but suspended on condition of good behaviour

A court can impose a suspended sentence where it is sentencing an offender to imprisonment of up to two years. Breach of the bond is very serious: the court can revoke the bond and reinstate the original prison sentence, together with an additional sentence for breaching the bond.

Community service orders

A **community service order** is a penalty that can be imposed by the court instead of a period of detention or imprisonment. It involves compulsory supervised work in the community for up to 500 hours. The court will assess what work is most suitable.

community service order
a penalty where the offender is sentenced to serve specified hours of work in the community

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Figure 4.9 Some people may be required to complete community service as a form of punishment.

Community service orders are a means of punishing and shaming the offender, while allowing for rehabilitation by requiring a period of time spent making amends in the community for their wrongdoing. Community service orders have the benefit of being cost-effective and beneficial to the community as a whole while still penalising the offender for the offence. They also allow the offender a chance to rehabilitate outside the prison system, while still enjoying their freedom, and avoid the harsher penalty of imprisonment that would otherwise be imposed.

Imprisonment

Imprisonment is the most severe sentence that can be imposed in Australia and is considered a sentence of last resort. Section 5 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) makes this clear, stating that 'a court must not sentence an offender to imprisonment unless it is satisfied, having considered all possible alternatives, that no penalty other than imprisonment is appropriate'.

A sentence of imprisonment deprives a person of their liberty and removes them from the community. It will require careful consideration by a judicial officer of the purposes of sentencing as well as of all the relevant factors of the case. All purposes may be relevant: deterrence, retribution, rehabilitation and incapacitation. The magistrate or judge will consider the various forms of imprisonment that can be imposed in New South Wales. Each one involves a different level of severity, from full-time imprisonment served at a **correctional centre** or working farm, to periodic detention or **home detention**.

If the court deems imprisonment appropriate, the judicial officer will need to announce the total sentence as well as a **non-parole period**. The non-parole period is the minimum amount of time the offender is kept imprisoned before being eligible for release on **parole**. Unless there are special circumstances, the non-parole period will be at least three-quarters of the total sentence.

A sentence will be imposed for each offence the offender is convicted of. These will usually be served at the same time. For example, if an offender is sentenced to three years for one offence and five years for another, the total sentence of five years will usually be ordered. If the offender is in remand, the sentence will also take into account the amount of time the offender has already served (that is, if the offender has been in remand for six months and the non-parole period is five years, the offender has four years and six months left to serve before becoming eligible for parole).

correctional centre
commonly known as a prison – an institution where offenders are held in custody for the period of their imprisonment

home detention
an imprisonment sentence where the offender is confined to their home under certain conditions of monitoring

non-parole period
a period of imprisonment during which parole cannot be granted

parole
release of a prisoner before the expiry of an imprisonment term, temporarily or permanently, on the promise of good behaviour

The following media article discusses some of the implications of imprisonment and the concern of adult reoffending rates.

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News

Reducing adult reoffending

Lenny Roth

New South Wales Parliamentary Research Service, 17 February 2015

Repeat offenders are responsible for a large proportion of crime in NSW; and those returning to prison make up more than half of the prison population. The costs of reoffending to society and the criminal justice system are therefore clear. Focusing on adult reoffending, this paper seeks to address these four key questions:

(1) Are rates of reoffending getting better in NSW?
(2) What is the evidence about what works in reducing reoffending?
(3) What is being done to reduce reoffending in NSW?
(4) What more could be done to reduce reoffending in NSW?

The answer to the first question is: Yes and No. Between 2000 and 2011 there was a downward trend in the rate at which adult offenders were reconvicted of another offence within two years, falling from 31.4 per cent to 25.8 per cent. On the other hand, the rate at which adults return to prison within two years improved between 2000–01 and 2007–08 but, due to a sharp rise between 2010–11 and 2011–12, is now above the 2000–01 level; and this rate is higher than almost all other Australian jurisdictions.

What works? The Australian evidence on reducing reoffending is fairly limited, although some programs such as drug courts have been shown to be effective. The international evidence is more developed but there are still many gaps. There is good evidence that certain interventions reduce reoffending: these include interventions targeting drug use, programs addressing cognitive skills, and psycho-social interventions addressing violent behaviour.

What is being done? The NSW Government has a target of reducing rates of reoffending by 5 per cent by 2016 and is currently developing a strategy to reduce reoffending. There are a range of court-based intervention programs, which aim to address the underlying causes of offending. The programs that have been shown to be effective are: the MERIT program, the NSW Court Liaison Service, and the Drug Court program. There are some alternative custodial sentencing options that target reoffending. In addition, Corrective Services provides a range of programs and services to prisoners, parolees, and people serving community-based sentences.

What more could be done? Suggestions are made in recent NSW Law Reform Commission reports on diverting people with cognitive and mental health issues from the justice system, and on sentencing. A Senate Committee report on Justice Reinvestment, an approach to criminal justice pioneered in the United States, is another reform that is worth considering. Further possibilities to tackle reoffending are outlined in recent UK Government strategies, one of which is to adopt 'payment by results' schemes in relation to services provided to offenders.

Home detention

For certain non-violent offences where a person is sentenced to 18 months' imprisonment or less, the offender might apply to serve their sentence while confined to their own home. The offender will need to be assessed for suitability before a court can grant such home detention. Compliance with the order is supervised by electronic monitoring of the offender, and a probation and parole officer monitor the order and conduct random visits.

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Review 4.4

Read the media release from the NSW Parliamentary Research Service in the media article on page 86 and complete the following tasks.

1. Outline the main finding of the NSW Parliamentary Research Service report.
2. Identify the two issues that were highlighted in the report. What is the response to these issues?
3. Critically evaluate the effectiveness of the law reform initiatives and programs in light of the report's findings. Refer to the purposes of sentencing in your response.

Certain conditions may be added (for example, allowing the offender to go to work or get medical treatment outside the home). Particular controls and restrictions might also be put in place (such as not communicating with certain persons). Home detention orders offer many benefits – they are more cost-effective than full-term imprisonment, they provide an opportunity for rehabilitation, they keep the offenders out of the prison system and they allow normal family life to continue.

Home detention is likely to be more controversial for more serious offences, especially where a victim is involved or there is a risk of reoffending. For this reason, home detention orders cannot be used for violent or sexual offences, including murder, manslaughter and sexual assault, or for firearms offences. It is also restricted if the offender has a history of violent offences or if they live at the same address as the victim of their offence.

Intensive Correction Order (ICO)

A periodic detention order was a form of imprisonment that allowed offenders to serve a period of time each week or month in prison, rather than the full period of a sentence. On 1 October 2010, periodic detention was replaced by the **Intensive Correction Orders (ICO)**. This was brought about by an amendment to the *Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010* (NSW). People who are still serving periodic detention orders set before that date will continue to serve them until completion.

Intensive Correction Order (ICO)
an alternative to a custodial sentence where an offender has restricted movement and must attend a rehabilitation program

An offender who has been sentenced to a maximum term of two years is eligible for an ICO. An ICO has strict conditions, not unlike bail conditions. Offenders who breach these conditions may be liable for a full-time custodial sentence for the remainder of their sentence. Some of those conditions are:

- strict curfews and association restrictions
- 24/7 electronic monitoring
- random breath tests and urine analyses
- completion of mandatory community service (32 hours per month)
- restrictions on travel and behaviour
- mandatory participation in rehabilitation and education programs.

ICOs aim to reduce the likelihood of reoffending, which periodic detention failed to address. This is a far more flexible system as it enables people to keep their full-time employment and attend rehabilitation and counselling services, which are aimed at making lifestyle changes for the better for them.

Figure 4.10 Conditions of an ICO may include random breath tests and urine analyses.

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Diversionary programs

A **diversionary program** is a court program (also known as an intensive judicial supervision program) set up to divert certain offenders from more traditional criminal processes in the hope that they can be rehabilitated and encouraged not to reoffend. The programs are only available for particular offences or types of offenders. They have been established in an attempt to target the causes of offending in individuals and improve those offenders' future prospects.

diversionary program
an alternative to the traditional court system that focuses on the rehabilitation of offenders

Diversionary programs usually involve a magistrate of the Local Court adjourning a case while the offender attends some form of rehabilitation or special hearing. Sometimes called 'therapeutic justice', the programs may include education, medical or psychiatric treatment, rehabilitation or social welfare assistance. Many diversionary programs are set up to support offenders who have committed crimes due to drug and alcohol abuse. The Drug Court is one of the most important diversionary programs. Established in 1999, it was the first of its kind in Australia and aimed to rehabilitate non-violent drug-addicted offenders. Over 150 offenders a year complete its program. It emerged after growing disenchantment with the traditional criminal justice system and its effectiveness in providing long-term solutions to cycles of crime and drug abuse. It has proven a great success and attracted international renown.

The NSW Bureau of Crime Statistics and Research released a report in 2008 which assessed the effectiveness of the Drug Court. It found that those who had completed the program were less likely to be reconvicted than those sentenced to traditional penalties. Among the report's most important findings was that the Drug Court is more cost-effective than prison in reducing drug-related recidivism. Participants who completed the program were:

- 37% less likely to be reconvicted for any offence
- 65% less likely to be reconvicted for an offence against the person
- 57% less likely to be reconvicted for a drug offence.

A 2014 report by the NSW Bureau of Crime Statistics and Research concluded that offenders participating in intensive judicial supervision programs (such as the MERIT program and the programs run through the Drug Courts) were less likely than those not in such programs to return positive urine analysis tests, and had a significantly greater number of periods of abstinence from drugs and alcohol.

Research 4.3

The website of the New South Wales Crime Prevention Division outlines some of the major diversionary programs currently in use in New South Wales (see http://cambridge.edu.au/redirect/?id=6241).

Visit the website and select two diversionary programs to report on.

1. Outline the types of offences and offenders targeted by the diversionary program.
2. Describe the methods used by the program to assist offenders.
3. With reference to traditional penalties evaluate whether the programs are effective in achieving justice.

4.8 Alternative methods of sentencing

Recent developments in the law have introduced new forms of sentencing targeting particular types of offenders. Like diversionary programs, they attempt to combat some of the issues associated with recidivism and more traditional forms of sentencing. They include **circle sentencing** and **restorative justice**.

circle sentencing
a form of sentencing for some adult Indigenous offenders where sentencing is conducted in a circle made up of local community members and a magistrate

restorative justice
a form of sentencing involving a voluntary conference between the offender and the victim of the crime

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Circle sentencing

Circle sentencing is an alternative court for sentencing adult Indigenous Australians. It was introduced in New South Wales on a trial basis at Nowra in February 2002.The Circle Courts are designed for repeat offenders and those who have committed more serious crimes. Circle sentencing is based on Indigenous customary law and more traditional Indigenous forms of dispute resolution. It involves community members and a magistrate sitting in a circle to discuss the offender's crime and then tailor the most appropriate sentence for the offender. It has the full sentencing powers of a court.

Circle sentencing directly involves local Indigenous people in the sentencing process. This makes it more meaningful to the offender, and also improves the confidence of the community in the criminal justice system. It also aims to improve understanding between Indigenous communities and the courts and to reduce recidivism among offenders.

Recent evaluation of circle sentencing has shown that the program's objectives are being met. However, improvements are still needed in some areas, such as participation and support services. The NSW Bureau of Crime Statistics and Research reported that Indigenous offenders were no less likely to reoffend in the 15 months after circle sentencing than those sentenced in a traditional court setting. However, the New South Wales Government still expanded the program to more communities.

Figure 4.11 Aboriginal and Torres Strait Islander peoples have their own Indigenous customary law and other more traditional Indigenous forms of dispute resolution.

Restorative justice

Restorative justice is another alternative to traditional sentencing methods. It involves bringing together the offender and the victim of the offence. It provides an opportunity for the offender to take responsibility for their actions and the impact they have had on others, while giving victims a voice and an opportunity to confront the offender and work out a way to repair the damage done. Victims are able to ask questions about the offence in an attempt to move forward and the offender has the opportunity to apologise or make amends for their act.

Restorative justice sessions can be confronting and difficult for both parties involved. They are voluntary and will usually accompany a form of traditional sentencing. One of the first Australian restorative justice models was started in Wagga Wagga in 1991, and it has since become a valuable part of the rehabilitation process. It is now an important program run by the Restorative Justice Unit of Corrective Services NSW and involves safe and private conferencing and mediation services run by a facilitator.

There are many stories of victims who have found the restorative justice program significantly helpful for recovery from a crime. The effectiveness of programs for offenders is unclear, but Australian studies based on youth conferencing initiatives have shown that a 15–20% reduction in reoffending is possible. However, it has been suggested that restorative justice programs will continue to relate mainly to minor infringements or youth justice, and that they are unlikely to expand greatly.

Review 4.5

1. Outline the differences between circle sentencing and traditional methods of sentencing.
2. Analyse and evaluate the role alternative methods of sentencing can play in the criminal justice system.
3. Outline the advantages and disadvantages that alternative methods of sentencing offer the criminal justice system.

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4.9 Post-sentencing considerations

Once an offender is sentenced to a community-based order or a non-custodial sentence, they will need to serve out the terms and conditions of that sentence or be returned to court for a review of their sentence.

When an offender is sentenced to a period of imprisonment, they will be sent to an assessment centre where they will be given a security classification. They will then be sent to an appropriate correctional centre, more commonly known as prison, where they will serve out their sentence. In New South Wales, the administration of imprisonment and other sentences is governed by the *Crimes (Administration of Sentences) Act 1999* (NSW). Correctional centres are managed by Corrective Services NSW, which is the responsible government agency.

Security classification

Correctional centres are divided into three security classifications: maximum, medium and minimum. Some centres have sections for more than one classification. There are 31 correctional centres located all over New South Wales. Offenders will be classified according to factors such as the seriousness of their crime, their prospects for rehabilitation and whether or not they have displayed good behaviour during previous sentences.

Maximum security centres, such as the Goulburn Correctional Centre for men or the Silverwater Women's Correctional Centre, hold offenders who committed the most serious crimes and whose escape would be highly dangerous to the public.

Figure 4.12 Goulburn Correctional Centre is a maximum security facility.

In medium security prisons such as the Tamworth Correctional Centre, inmates can move around more freely, but within high walls or security fences. In minimum security centres, such as the Silverwater Women's Correctional Centre, there are fewer barriers to escape and inmates are allowed more open conditions. At the Balund-a (Tabulam) facility inmates are given the chance to participate in a residential diversionary program.

Protective custody

Protective custody is provided in New South Wales correctional centres to offenders who are vulnerable to attack from other prisoners. Correctional authorities have a duty of care for the safety of offenders in their custody. This includes protecting offenders from the risk of physical violence from other offenders.

The purpose of sentencing an offender to imprisonment is to isolate them from the community, whether for the purpose of incapacitation, deterrence or otherwise. This does not include subjecting them to high risk of physical harm or to cruel or inhumane conditions. Offenders who have been placed in custody for offences that other inmates deem offensive, such as offences against children, might be under threat of harm from fellow inmates and may require periods of protective custody. Certain offenders, such as police officers or politicians, might also be vulnerable to attack due to their history, and so may be isolated in a particular wing of a prison.

Parole

Parole refers to the conditional release of a prisoner from custody after the completion of the minimum term of the sentence (that is, the non-parole period set by a judicial officer at sentencing).

The fundamental purpose of parole is to provide the offender with an incentive for rehabilitation. It is believed that the possibility of early release will increase the likelihood of the overall reform of offenders and encourage better prisoner discipline within the prison setting.

When released on parole an offender is put under the direct supervision of a parole officer. The parolee (released offender) is required to report to their

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parole officer as directed, and the officer will visit the parolee's residence and make inquiries in the community to ensure that the parolee is meeting the conditions of their early release. These conditions can include a good behaviour bond, not reoffending during the parole period, gaining employment and/or avoiding certain company or a specified public area.

Additional conditions, such as receiving specified counselling or other treatment, may apply.

All these programs are intended to assist offenders in their gradual reintegration into the community after release from imprisonment. They also aim to ensure that offenders will not reoffend.

Review 4.6

1. Use the NSW Offender statistics in the 'Legal Info' box and the NSW Bureau of Crime statistics summary report at http://cambridge.edu.au/redirect/?id=6242 to critically evaluate the effectiveness of imprisonment as a form of sentence.
2. Identify the duty of the state to offenders in custody. How can an offender under threat of violence be protected?
3. Describe how an offender can achieve parole. What is the importance of parole in the criminal justice system?

Preventive and continued detention

Preventive detention is possibly the harshest form of sentence. It is also the most controversial. Preventive detention involves imprisonment of a person for some type of future harm that they may commit. The person is detained in custody without actually having committed or being found guilty of any offence. The purpose is incapacitation of a person considered to constitute a significant threat to community safety.

preventive detention
keeping a person in custody, even though they have not committed any offence, to prevent some future harm that they may commit

There are two types of preventive detention: post-sentence preventive detention, which occurs when a person has already been sentenced and has served that sentence; and preventive detention without charge, which can occur at any time. All types of preventive detention orders are highly contentious as they act to remove a person's basic legal rights without due process.

The most severe type of preventive detention is legislation that is targeted at individual offenders. This type of law was held to be unconstitutional in the High Court case of *Kable v DPP* (1996) 189 CLR 51. However, most Australian jurisdictions have

Legal Info

NSW offender statistics 2014

Corrective Services NSW oversees 31 correctional centres (eight maximum, 13 medium and 10 minimum security) and eight periodic detention centres.

The statistics for full-time imprisonment are:

- On a daily basis, New South Wales correctional centres hold 10 578 prisoners.
- Of these, only 6.8% are female.
- The majority of inmates (34.4%) are 25–34 years old, closely followed by 35–44 year olds (26.9%).
- 23.6% of inmates in New South Wales are Indigenous.
- The average daily cost of full-time custody per inmate is $182.28 (open custody) or $209.29 (secure custody).
- This equates to a cost of somewhere between $75 000–80 000 per inmate per year.

For community-based orders:

- The daily cost for a community-based offender is $24.48.
- There are 15 977 people supervised under community-based orders on any day.

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legislation enabling general powers of preventive detention in restricted circumstances.

For example, in New South Wales, the controversial Part 2A of the *Terrorism (Police Powers) Act 2002* (NSW) allows police to make an application to detain a person in custody for a maximum period of 14 days if they reasonably believe the suspect will otherwise engage in a terrorist act. Victoria used the controversial anti-terror powers in April 2015 to detain five terror suspects.

Post-sentence preventive detention, on the other hand, is where offenders who have served their full sentence continue to be detained. New South Wales has a scheme of post-sentence preventive detention under the *Crimes (High Risk Offenders) Act 2006* (NSW) that allows for the continued detention of offenders serving a sentence for a serious sexual offence. The Attorney-General can apply to a court for **continued detention** of the offender if satisfied 'to a high degree of probability' that the offender is likely to commit another offence. The allowable purposes of the continued detention are:

- to secure the protection and safety of the community
- to facilitate rehabilitation.

continued detention
ongoing detention of a person who has already served the full sentence for their offence

Sexual offenders registration

There are both state and federal databases of offenders who have been convicted of certain sexual offences. The Australian National Child Offenders Register (ANCOR) and the New South Wales Child Protection Register are web-based systems designed to assist police with the registering and case management of those who have committed sexual offences against children.

Established under the *Child Protection (Offenders Registration) Act 2000* (NSW), a person convicted of specified violent or sexual offences against a child must register at the local police station (1) when the person is sentenced for the offence, or (2) when the person ceases to be in government custody in relation to the offence, whichever is later. When a sex offender is paroled they are served with a notice to inform them that they need to register. Adult offenders must register for a minimum period of eight years, and juvenile offenders must register for four years. Offenders must provide a range of personal information as well as travel plans, and must keep this information regularly up to date. At the end of 2014, there were over 10 650 offenders registered nationally.

Sexual offender registries are justified by their supporters on the basis that they protect the community. However, they are sometimes contentious, as they target certain offenders long beyond the period of the sentence they have been required to serve, and deny the chance for the offender to move on in the rehabilitation process. Supporters respond by claiming that the severity of the original crime, added to the ongoing risk of reoffending, outweighs the burden that the registry requirements impose on the offender.

In August 2015, the New South Wales Government set up a taskforce to investigate the use of anti-libido drugs for child sex offenders to 'chemically castrate' them. The review encompasses the use of this treatment within the New South Wales correctional system, and also as a sentencing option for judges. The hope is that this would significantly reduce the likelihood of reoffending.

Deportation

Under the *Migration Act 1958* (Cth), a migrant living in Australia who is not a citizen may be deported if they are tried and convicted of a criminal offence. Under ss 200 and 201 of the Act, if a non-citizen commits an offence for which they receive a custodial sentence of 12 months or more in their first 10 years of residence, the responsible minister (usually the Minister for Immigration) may decide that they should be deported from Australia.

Deportation is an extremely serious effect of a sentence of imprisonment. Cases of deportation under these sections will often become highly publicised because the circumstances of such cases are usually severe. They are controversial because they appear to treat a person as a problem that can be resolved by being moved elsewhere, but without any follow-up or support once outside the jurisdiction. For example, a person may have been living in Australia for decades yet still fall under the requirements of these sections. The person may be removed from family and friends to a country they know nothing about and/or that has a language they

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Case Study

Robert Jovicic: the stateless man

Robert Jovicic was born on 4 December 1966 in France to Serbian parents. When he was two years old, his family moved to Australia, and he became an Australian permanent resident. He was later eligible to become an Australian citizen, but (like nearly one million other Australian residents) he never officially took this up.

After many years living in Australia, Mr Jovicic developed an addiction to heroin, and by 2004 he had been charged with more than 100 criminal offences (mainly burglary and theft) that he had committed in order to support his addiction.

In June 2004, Mr Jovicic's permanent residency was cancelled under ss 200 and 201 of the *Migration Act 1958* (Cth) by the then Federal Immigration Minister, Philip Ruddock. The cancellation was based on the minister's discretionary power to deport non-Australian citizens convicted of an offence. Mr Jovicic was consequently held in custody before being deported to Belgrade, Serbia. However, Mr Jovicic was ill equipped to cope with life in Serbia. He had no knowledge of the Serbian language and no working visa, which prompted the Serbian Government to declare him 'stateless', meaning that he had no home country. Around 18 months after his arrival, Mr Jovicic was discovered homeless and ill, sleeping outside the Australian Embassy in Belgrade. At this time, his case became widely publicised in the Australian media.

In March 2006, after much media scrutiny and public debate, Senator Amanda Vanstone decided that Jovicic could come back to to Australia, under a special purpose visa. He returned to Australia on 9 March 2006, uncertain about his residency status, and waited almost a year before being given a two-year special protection visa.

In February 2008, he received a permanent residence visa, granted by Senator Chris Evans, the new Labor Minister for Immigration and Citizenship.

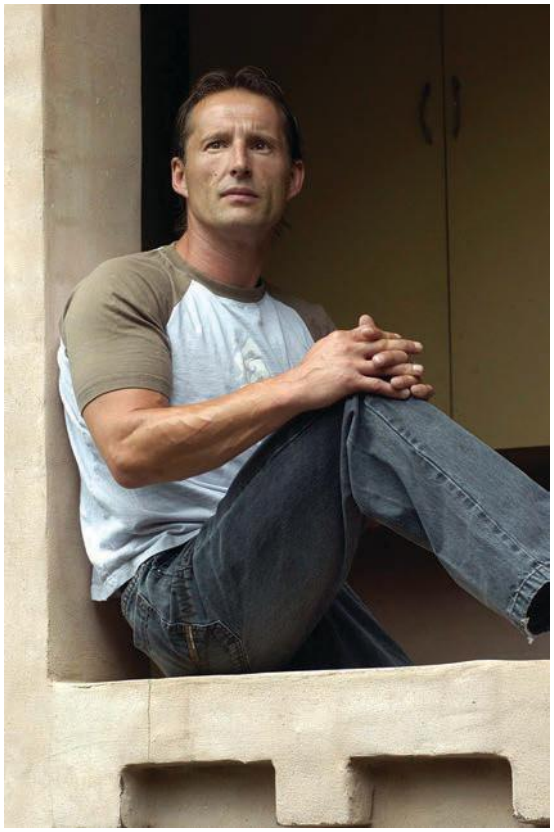

Figure 4.13 Robert Jovicic

do not speak, with no support networks in place to assist in their rehabilitation.

If such a person is also found to constitute a threat to Australian security, or has been convicted of a serious offence, they may also be prohibited from ever returning to Australia as well as being deported.

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Chapter summary

- Sentencing requires careful balancing of many different factors.
- The main purposes of sentencing are deterrence, retribution, rehabilitation and incapacitation.
- The main factors considered in sentencing are aggravating factors and mitigating factors.
- A victim may be involved in sentencing through a victim impact statement.
- Courts have a large variety of penalties that can be imposed.
- A judicial officer may only impose a sentence of imprisonment where no other penalty is appropriate.
- Imprisonment may increase the risk of an offender reoffending.
- There are alternatives to full-time imprisonment, including home detention and diversionary programs.
- Alternative methods of sentencing include circle sentencing and restorative justice.
- Post-sentencing considerations are an important part of sentencing.
- Certain prisoners may be detained beyond the end of their sentence.
- Adult sexual offenders may be required to register their details for a minimum of eight years.
- Deportation is a serious risk after imprisonment if a person is a non-citizen.

Questions

Multiple-choice questions

1 Which of the following is true of restorative justice?

A It brings together the offender and the victim so that the offender can see the impact they have had on the victim.
B It is the most severe form of punishment.
C It gives the offender the opportunity to confess to the crime.
D It aims to send a message to the rest of society that the law is serious about crime.

2 The victim's role in sentencing by providing a victim impact statement is:

A to tell the offender exactly what they think of them
B to influence the judge into giving the maximum penalty
C to make sure justice is achieved
D to express the effect the crime has had upon their life

3 Which of the following is not likely to be a mitigating factor?

A The offender assisted the victim after the offence.
B The offender had experienced similar treatment in their life.
C The offender was under the influence of alcohol or drugs.
D The offender shows contrition or remorse.

4 Which of the following crimes would a home detention order be suitable for?

A Manslaughter
B Murder
C Burglary
D Armed robbery

5 Imprisonment has been shown to:

A reduce recidivism
B reduce reoffending
C increase reoffending
D increase rehabilitation

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Chapter summary questions

1 Outline the differences between mitigating and aggravating factors and explain how these factors affect the sentencing process in a criminal trial.

2 List three types of penalties. Outline and evaluate the penalty and how it corresponds with the purposes of sentencing.

3 Evaluate the effectiveness of imprisonment as a method of sentencing in the criminal justice system.

4 Analyse one alternative to traditional means of sentencing and describe its effectiveness and role in the criminal process.

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Chapter 5
Young offenders

Chapter objectives

In this chapter, students will:

- discuss a range of issues surrounding the age of criminal responsibility
- explain why the criminal justice system treats young offenders differently from other offenders
- assess how effectively of the criminal justice system deals with young offenders.

Key terms/vocabulary

caution
conclusive presumption
control order
doli incapax
grave adult behaviour
interview friend
juvenile justice
Juvenile Justice Centre
rebuttable presumption
right to silence
youth justice conference
warning

Relevant law

IMPORTANT LEGISLATION

Children (Criminal Proceedings) Act 1987 (NSW)
Children's Court Act 1987 (NSW)
Summary Offences Act 1988 (NSW)
United Nations Convention on the Rights of the Child (1989)
Young Offenders Act 1997 (NSW)
Crimes (Sentencing Procedure) Act 1999 (NSW)
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW)
Bail Act 2013 (NSW)

SIGNIFICANT CASES

R v GDP (1991) 53 A Crim R 112
R v Pham & Ly (1991) 55 A Crim R 128
R v LMW [1999] NSWSC 1343
R v Cortez, CE, ME, IKEA & LT (unreported, NSWSC, Dowd J, 3 October 2002)

Legal oddity

In China, it is against the law for students to cheat in state exams, or for others to help students to cheat. Section 284 of the Chinese Criminal Law Code specifies a range of cheating activities, including providing equipment to enable cheating, providing questions or answers to a test and having someone else sit the exam. Penalties can include fines or imprisonment of up to three years. The most serious cases can result in imprisonment of up to seven years, and a fine.

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5.1 Young offenders and the law

Any person can commit a criminal act, providing they have the physical capability to do so. However, the law treats offenders differently when they are under 18 years of age. In most cases, the community and the law recognise that there may be a different level of responsibility involved in the actions of children and young people who have not reached full adulthood, or there may be a different level of protection or assistance required. The area of law and policy concerned with young people and the criminal justice system is often referred to as **juvenile justice**.

juvenile justice
the area of law and policy concerned with young people and the criminal justice system

The reasons behind any young person becoming involved in crime are varied and complex. For example, in New South Wales Juvenile Justice, in its Young People in Custody Health Survey, suggests factors such as:

- poor parental supervision
- drug and alcohol abuse
- neglect and abuse
- homelessness
- negative peer associations
- poor personal and social skills or difficulties in school and employment.

In Australia, people under 18 years old who are involved in crime represent only a small proportion of the population. According to Youth Justice Australia:

> [O]n an average day in 2012–13 in Australia, there were around 6 300 young people aged 10 and older under youth justice supervision due to their involvement, or alleged involvement, in crime. This equates to a rate of 23.8 per 10 000, or about 1 in 420 young persons aged 10–17. A total of 12 880 young people were under supervision at some time during the year.

There are two recognised approaches that can be taken by the law with regard to young offenders and juvenile justice. These are:

- the welfare model and
- the justice model.

The welfare model assumes that the causes of crime can relate to several factors, such as social and psychological factors, or the state of the economy. Under this model, there is a need to protect children and young people from the causes of crime and to assist in their rehabilitation if an offence is committed. By contrast, the justice model takes a 'tough on crime' stance. A more traditional model, the justice model generally promotes a 'zero tolerance' approach towards offenders of any age, and emphasises punishment and deterrence over rehabilitation.

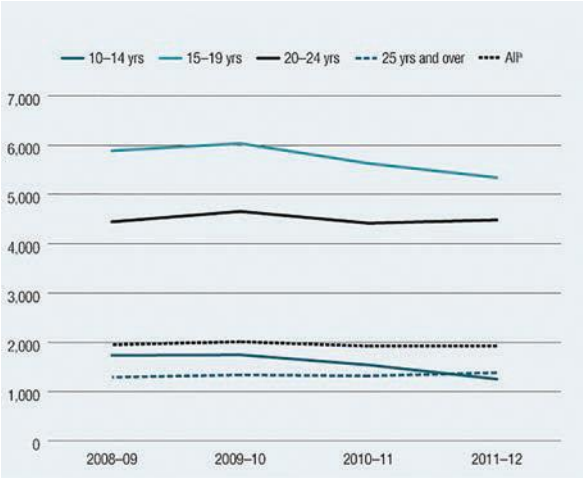

Figure 5.1 Offenders by age 2008–09 to 2011–12 (rate per 100 000 relevant people). Source: Australian Institute of Criminology

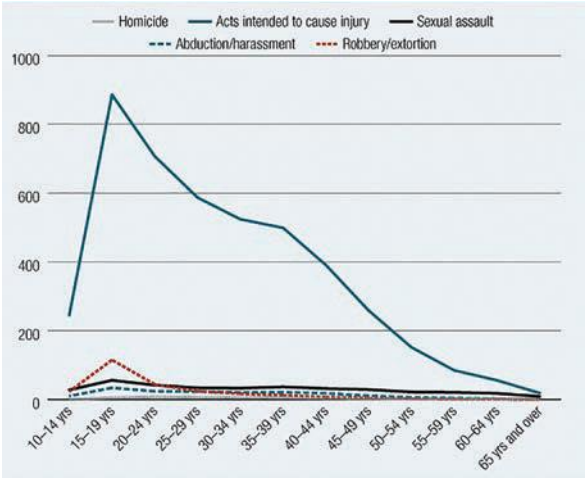

Figure 5.2 Offenders by selected violent offences and age, 2010–11 (per 100 000 relevant people). Source: Australian Institute of Criminology

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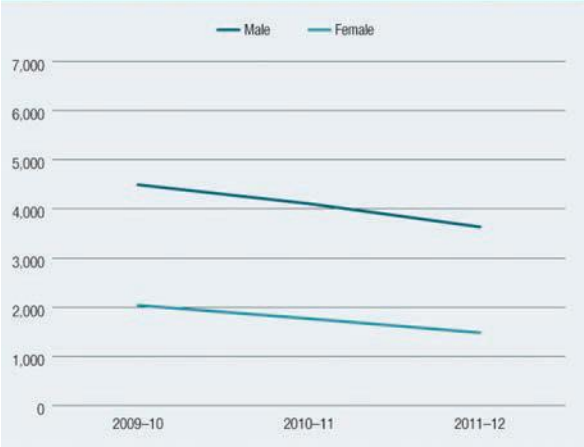

Figure 5.3 Young offenders by gender 2009–10 to 2011–12 (per 100 000 of that gender per year). Source: Australian Institute of Criminology

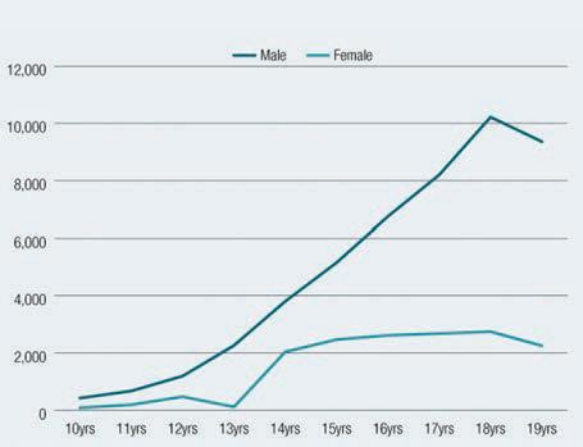

Figure 5.4 Young offenders by age and gender 2011–12 (per 100 000 of that age and gender). Source: Australian Institute of Criminology

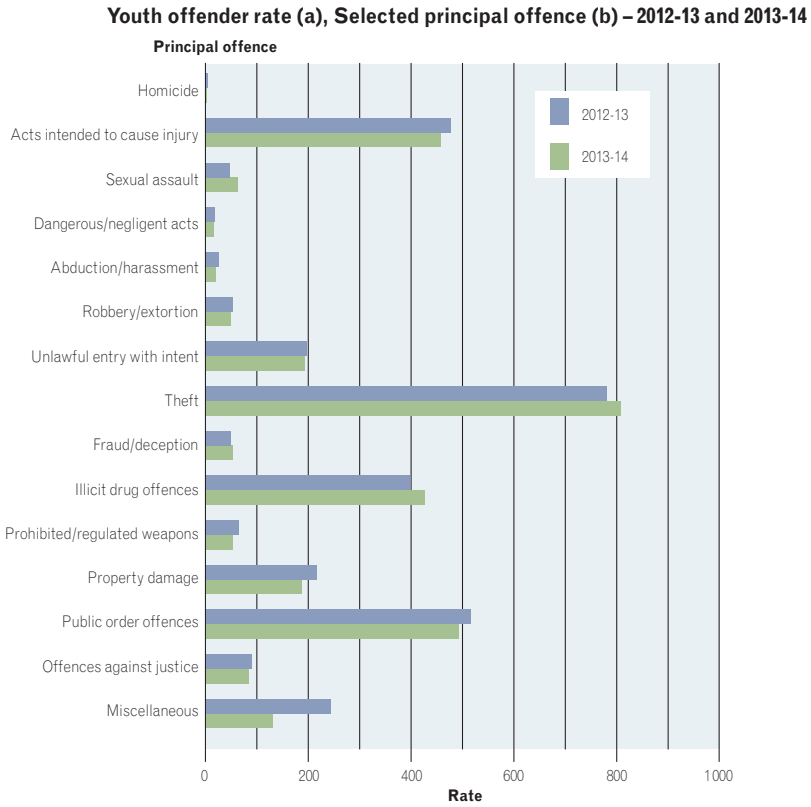

Figure 5.5 Principal offences of young offenders 2013–14. Source: Australian Bureau of Statistics

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To some extent, the juvenile justice system uses a combination of these approaches when dealing with offenders. This is evident in the different approaches to legislation that deals with young offenders in New South Wales; these differences will be explored throughout this chapter. There are promising aspects to the juvenile justice system that maximise an offender's chance at rehabilitation, but elements of the 'get tough' approach have also influenced current laws.

Both have had significant effects on younger people and the law; this is especially important in light of the high rates of young offenders when compared with adult offenders and in particular the higher prevalence of particular offences committed by young offenders (see Figures 5.1 and 5.2).

Review 5.1

1. Compare the juvenile offender rate by age and the offence shown in Figures 5.1 and 5.2 with that of adults.
2. Describe the trend in juvenile offender rates compared with that in adults.
3. Explore some possible reasons for the difference in the rates.
4. Comment on the variance in juvenile offending by gender and age as shown in Figure 5.3.
5. Explain the most common types of offences committed by young offenders as shown in Figure 5.5.

Research 5.1

Visit the website of the Australian Institute of Criminology (see http://cambridge.edu.au/redirect/?id=6243). Find the *Australian Crime: Facts and Figures 2013* report and investigate some of the emerging trends behind the rate of offending for young people.

5.2 Age of criminal responsibility

The law treats children and young people differently from adults. There are a number of reasons for this, including:

- preventing children and young people from being exploited
- protecting them from the consequences of making uninformed decisions
- protecting others from being disadvantaged by dealing with a person who is a minor.

The criminal justice system recognises that children and young people can be less responsible than adults for their offences, due to their relative youth or inexperience. This is most evident in the way the law approaches the age of criminal responsibility.

Historical background

Historically, children and young people who committed offences were treated in more or less the same way as adult offenders. Children as young as seven or eight years old were often convicted of serious criminal offences. Children could be imprisoned, flogged, transported to colonies such as Australia, or even executed. In the year 1814, up to five children under the age of 14 were convicted and hanged at the Old Bailey in London. The youngest was only eight years old.

For infants and very young children, however, the law sometimes recognised that they might not yet be capable of crime, physically or mentally. Legal opinions and laws dating as far back as 694 CE, in the Laws of King Ine of Wessex, suggested that infants might be incapable of committing wrong, or that they might not have sufficient knowledge of good and bad. This usually applied to infants and children under seven years old. Mental capacity is particularly important in establishing the intent, or *mens rea*, of the crime, and it was difficult to show that a child had the necessary intent.

Under the common law, the term describing a child as not legally responsible is the Latin term ***doli incapax***, meaning 'incapable of wrong'. *Doli incapax* is a presumption that children are incapable of having criminal intent.

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doli incapax
a Latin term meaning 'incapable of wrong'; the presumption that children under a certain age cannot be held legally responsible for their actions and so cannot be guilty of an offence

Under the common law, this was a **rebuttable presumption**, which means the presumption was that the child could not have committed an offence, unless the prosecution could prove beyond reasonable doubt to the judge, or jury, that the child was capable of understanding their actions – that is, that the child knew that what they were doing was 'seriously wrong' at the time they did it, and not just 'naughty'.

rebuttable presumption
a legal presumption in favour of one party – it can be rebutted by the other party if they can show sufficient evidence to disprove it

By the end of the 19th century, there was a growing awareness that treating children in the same way as adults did not take into account a child's lack of life experience, uninformed and at times poor decision-making, and socioeconomic circumstances – all of which differentiate them from adults. Because of this the age of criminal responsibility was reconsidered.

By the late 20th century, most countries had adopted a minimum age of criminal responsibility, though it varied. In 1989, the United Nations established a treaty on children's rights known as the *United Nations Convention on the Rights of the Child*. It included many aims and requirements for the treatment of children, including certain rights for children under the criminal law. Particularly, article 40(3)(a) of the convention encouraged establishment in all countries' laws of 'a minimum age below which children shall be presumed not to have the capacity to infringe the penal law'. The treaty is in force in every country worldwide except Somalia and the United States.

Although Australian jurisdictions have not passed any single law that adopts the convention in its entirety, the High Court has ruled that Australian laws should, wherever possible, be understood in a manner that is consistent with the convention.

Children (under 10 years)

In New South Wales today, the *Children (Criminal Proceedings) Act 1987* (NSW) lays out the minimum age of criminal responsibility. Section 5 of the Act states that '[i]t shall be conclusively presumed that no child who is under the age of 10 years can be guilty of an offence'.

This means that, for children under 10 years old, *doli incapax* is a **conclusive presumption**. No child under the age of 10 can be found by law to have committed an offence, and this cannot be rebutted.

conclusive presumption
a legal presumption in favour of one party that is final and cannot be rebutted by the other party

Previously, in some states the age of criminal responsibility was as low as the age of seven years.

Proving that an offender under the age of 10 understood their act to be wrong and hence the existence of *mens rea* beyond reasonable doubt would be extremely problematic. Children under the age of 10 draw on very limited life experience when making decisions about right and wrong. Punishing children under 10 years of age by law may also be considered cruel treatment. Children are considered more likely to be rehabilitated from offending behaviour, and the imposition of any criminal penalty at such a young age may prevent this occurring. For these

Figure 5.6 In Australia, no child under the age of 10 years can be found by law to have committed an offence.

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reasons, children under the age of 10 are deemed by law never to be criminally liable.

Children under the age of 10 have in some instances committed acts which would be considered unlawful, even if the law does not recognise their mental capacity for intention. There are occasionally calls from some sections of the community to lower the age of criminal responsibility, or even abolish it altogether. However, any reduction in the minimum age to below 10 years is extremely unlikely.

Children (10–13 years)

At what age, then, does a child become responsible for their actions? The *Children (Criminal Proceedings) Act 1987* (NSW) is silent on the responsibility of children 10 years or older. In New South Wales, the answer is still found in the common law – the rebuttable presumption of *doli incapax*. This applies to children 10–13 years old.

Once a child turns 10, they are still presumed incapable of committing a criminal offence, but this presumption is allowed to be rebutted. That is, the prosecution may be able to show that the child, at the time of the alleged offence, actually knew that their act was seriously wrong, not just 'naughty'.

The rebuttable presumption recognises that children of this age might have the mental capacity to understand the seriousness of their act, but it is up to the prosecution to prove it beyond reasonable doubt. Evidence that the prosecution might rely on could include psychiatric evidence, evidence of parents and teachers, or behaviour of and statements by the child.

As in the case of *R v LMW* [1999] NSWSC 1343 (see the 'In Court' box), the application of *doli incapax* has occasionally come under scrutiny, usually through high-profile cases relating to heinous crimes committed by children. Some of the issues surrounding this debate are highlighted by Thomas Crofts, Associate Professor at Murdoch University School of Law, in his paper '*Doli incapax*: Why Children Deserve its Protection' ((2003) 10(3) *Murdoch University Electronic Journal of Law* 26). Crofts states that:

- opponents argue that *doli incapax* should be lessened or removed because children today are better educated and the criminal law is not as harsh as it once was
- the rule can be unfair, especially to the victims of the crime
- it makes the prosecution's role in a criminal trial more difficult, as there is not always enough evidence to rebut the presumption of *doli incapax*.

However, Crofts goes on to defend the presumption of *doli incapax*. First, he states that it is consistent with the principles of international law to which Australia is a signatory. He also highlights that children develop their understanding of right and wrong at different stages of their lives and that *doli incapax* helps to remind us of these different levels of maturity by forcing the prosecution to prove understanding on a case-by-case basis. Further, although it may slow down the prosecution, ultimately it does not stop it if there truly is proof of a guilty mind.

Young people (14–17 years)

Once a person turns 14 years, the presumption of *doli incapax* no longer applies and the offender can be found criminally responsible for their actions.

Children aged 14 and over are deemed mature enough to know when their actions are wrong and to know not to commit an offence. However, the law still continues to protect young people in a number of ways – full criminal responsibility, publicly triable in adult courts, does not occur until a person reaches 18 years of age.

For example, young people under the age of 16 cannot have a criminal conviction recorded against them, unless the offence was an indictable offence. This means that the offence cannot be considered by

Figure 5.7 Once a person turns 14 years old, the presumption of *doli incapax* no longer applies.

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In Court

R v LMW [1999] NSWSC 1343

In this case, a 10-year-old child, LMW, was accused of manslaughter after he dropped another boy, six-year-old Corey Davis, into the Georges River, knowing that he could not swim. The boy drowned, and the New South Wales Director of Public Prosecutions (DPP) brought a charge of manslaughter against LMW for his death.

Initially, the Senior Children's Magistrate at the Children's Court dismissed the case against LMW at the committal hearing, saying that a jury would not convict a child so young. However, the DPP persisted and took the case to the Supreme Court of New South Wales, to be heard in front of a jury. LMW was the youngest person to face the Supreme Court and the youngest in Australia to be charged with manslaughter.

After an 18-month effort by the DPP, with intense media and political interest in the case, the Supreme Court jury acquitted LMW. Central to the case was the issue of *doli incapax*. Studdert J, who heard the case, affirmed that the presumption of *doli incapax* applied in New South Wales, and that it was for the jury here to decide, on the evidence, whether or not the prosecution had rebutted the presumption.

The prosecution argued that LMW had and was capable of forming criminal intent, and that he understood the consequences of pushing Corey Davis into the river. The DPP painted LMW as a bully who showed malice and deception. The defence argued that it was a childish prank that had gone wrong and that LMW did not understand the consequences of his actions.

Some of the evidence presented included evidence from a child psychiatrist who determined that LMW probably could understand the difference between right and wrong, and evidence from three teachers that LMW was behind intellectually at school, but that he was capable of following school rules. Corey was also much younger and smaller than LMW and there was evidence of what LMW said as he picked him up and dropped him into the river, and afterwards. This was based, however, only on the evidence of two other six-year-old witnesses.

On various appeals about the available evidence from the defence and the DPP, Studdert J determined that there was sufficient evidence for the jury to make a decision on *doli incapax*, but that this decision was for the jury to make. The jury acquitted LMW after three hours of deliberation.

Legal Info

The age of criminal responsibility in New South Wales

Age (inclusive)	Criminal responsibility
0–9 years old	Cannot be charged with a criminal offence. Children under 10 are viewed as insufficiently mature to commit criminal offences.
10–13 years	Rebuttable presumption of *doli incapax*. Presumed not capable of committing an offence, but the prosecution may prove capacity with sufficient evidence.
14–15 years	Criminally responsible for any offence committed, but no conviction can be recorded unless it is a serious offence.
16–17 years	Criminally responsible for any offence committed and a conviction may be recorded, but the case will still be heard in the Children's Court.
18 years or older	Full adult criminal responsibility, with case to be heard in adult courts.

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a court if the offender appears again later in their life. However, if it is an indictable offence, the magistrate or judge may decide to record a conviction. This does not apply to children aged 16 or 17.

People under the age of 18 are subject to the *Children's (Criminal Proceedings) Act 1987* (NSW). This includes a number of protections, such as prohibiting reporting of the child's name (for example, 'LMW' in the 'In Court' box), and a requirement that any convictions will be cleared after three years (if no more have been committed). Most importantly, the matter will be heard in the Children's Court.

Review 5.2

1. Describe the meaning of the term '*doli incapax*'.
2. Explain the distinction for the prosecution if a child is under 10 years old, 10–13 years old, or 14 and older.
3. Outline the facts of *R v LMW*. Evaluate the outcome of the case and discuss whether you think the law was appropriate in the circumstances.
4. Discuss some arguments for and against the retention of *doli incapax* in its present form.
5. Read the full article by Thomas Crofts, available at http://cambridge.edu.au/redirect/?id=6244, and elaborate further on the contemporary issues surrounding *doli incapax*.

5.3 The rights of children and young people when questioned or arrested

The rights of children and young people when dealing with law enforcement authorities vary between Australian jurisdictions. However, the law generally recognises that children and young people require some special protections when dealing with the police that are not afforded in ordinary circumstances to adults. In 1997, the Australian Law Reform Commission (ALRC) conducted an important inquiry into young people and the law, jointly with the Human Rights and Equal Opportunity Commission. The report was titled *Seen and Heard: Young People and the Legal Process*, and examined the relationship between young people and the legal process, including the criminal process. The report's recommendations included:

- standardising the minimum age of criminal responsibility, which was achieved in all jurisdictions in 2000
- standardising national standards through legislation or policy for juvenile justice that extends to investigation and arrest, bail conditions, sentencing and detention.

Particularly, changes were recommended to ensure that Australian jurisdictions comply with Australia's obligations under the *United Nations Convention on the Rights of the Child*. However, national standards have not yet been implemented. The inquiry also surveyed 843 children and young people on dealings with the police: 78% of those surveyed stated that the police rarely treated young people with a sufficient degree of respect. There could be many reasons for this, and it does not necessarily mean inadequate policing. However, it was clear that there was room for improvement in the relationship between young people and police. Since the survey, a number of legislative changes have been introduced to try to add certain protections for children and young people.

As explored in Chapter 2, the main legislation outlining police powers in New South Wales is the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The Act contains a number of requirements for police in their dealings with young offenders.

Questioning of young people

Police in New South Wales have the power to approach young people and ask them questions at any time, as they do for adults. Most police powers that apply to adults (for example, powers to ask a person to 'move on' and most compulsory powers of search and seizure) apply equally to children and young offenders.

Identification, name and address

The police have a right to ask a person to identify themselves by giving their name and address. Likewise, a person can ask a police officer for their name and their police station. There are several situations, under various laws, where a person is

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legally required to respond and may commit an offence if they do not, for example:

- where the police officer suspects on reasonable grounds that the person can assist them in investigating an indictable offence that was committed nearby
- in a number of situations relating to vehicles and traffic
- where a person is suspected of committing an offence on a train.

However, some laws do apply to young people in particular. For example, under the *Summary Offences Act 1988* (NSW), a person can be stopped and required to provide their details if suspected of being under the age of 18 and carrying or consuming alcohol in a public place without adult supervision or reasonable excuse. If the young person cannot produce adequate identification, refuses to comply with the request or gives false details, police can impose a fine of up to $20.

Questions and right to silence

With regard to ordinary police questioning, the police may ask a person questions at any time. However, in most circumstances a person is not required to respond and may exercise their **right to silence**. A person can refuse to answer questions, even if they have been taken to a police station for questioning or arrested. This is because it may not be in their best interests to answer certain questions as their answers may later be used in evidence. For this reason, a person suspected of committing any offence should usually not answer police questions or sign any statements until they have received independent legal advice.

right to silence
the right of a person to refuse to answer any question put to them by the police

Right to support of a responsible adult

The law provides an additional level of protection for young people under the age of 18 when they are questioned by police. This is because the law assumes that young people may not be aware of their rights, may not fully understand the law or may be more vulnerable than adults in these circumstances. Under s 13 of the *Children (Criminal Proceedings) Act 1987* (NSW), any information or statement a child or young person gives to police will be inadmissible as evidence in court proceedings against that person, unless:

- there is a responsible adult other than the police officer present, such as a parent, youth worker, guardian or lawyer
- the judge or magistrate otherwise decides that it should be admitted.

This is an important protection for young offenders as it means that police must ensure that there is a responsible adult present any time a person under 18 years old is questioned. If not, the police may be unable to use any information they were given as evidence. Generally, the adult should take notes and ensure that the young person gets legal advice and knows that they do not need to answer questions.

Searches

Police search powers for children and young people are largely the same as for adults, apart from strip searches. Under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), police can never perform a strip search on a child under 10. For a

Review 5.3

1. Explain if or when a young person has to give their name and address to police.
2. Define the right to silence and discuss its impact on police powers to question.
3. Assess why a young person might need a responsible adult present when asked questions by the police.

Legal Links

Legal aid hotline for under 18s

People under the age of 18 are entitled to free legal advice from Legal Aid NSW. This can be accessed over the phone on their 'Help over the Phone' service on 1300 888 529. This service is staffed by qualified lawyers experienced in juvenile matters and is accessible to young people seven days a week. Further information is available on the Legal Aid NSW website (see http://cambridge.edu.au/redirect/?id=6245).

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person between 10 and 18, a responsible adult other than a police officer must also be present, and if the person is 14 or older they must agree who the adult should be. Police may only conduct strip searches in serious and urgent circumstances. When conducting a strip search, police have to respect a person's privacy and must not touch the person.

Arrest and interrogation

The conditions under which a young person can be lawfully arrested are the same as those for adults. These conditions are listed in the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW). The Act requires that:

- police know or believe on reasonable grounds that the person has committed or is about to commit an offence
- police have a warrant for the person's arrest
- certain other conditions, relating to people who are on bail conditions, be adhered to.

Police must tell a person that they are under arrest and why, and inform the person of the police officer's name and station. Police may use reasonable force in arresting a young person, but the force may not be excessive, and the police officer may not assault or intimidate them. Likewise, a person cannot assault a police officer, resist arrest or use offensive language, or they may be guilty of further offences.

Support person and legal advice

The ALRC's *Seen and Heard* report, discussed earlier, recommended that upon arrest a child or young person's guardians or carers should be notified as soon as possible. This should not occur if the person's carer or guardian may be a threat to the child or young person's safety, which might be the case in some circumstances.

Under the *Law Enforcement (Powers and Responsibilities) Regulation 2005* (NSW), people under the age of 18 are defined as 'vulnerable people' and are given special protection when arrested and detained for questioning. The regulation requires the police to find out as soon as possible who the child's parent or guardian is and to contact them. Young people must have a support person, or **interview friend**, such as a parent, guardian or solicitor, present at a police interview. Police may not conduct any interview of a child or young person unless a support person is present. For people 14 years and over, police must get the young person's agreement on who they want as the support person. The support person will assist the child or young person and observe whether or not the interview is conducted properly.

Figure 5.8 Young people must have a support person present at a police interview.

interview friend
a parent, guardian, friend or legal representative present at the police interview of a minor; the interview friend's role is to offer support and witness that statements are made voluntarily

The police custody manager is required to assist the child or young person. At present there is no requirement to have legal representation during a police interview. The *Seen and Heard* report suggests that this should be a requirement for children and young people, and in 2002 the Supreme Court of New South Wales ruled in the case of *R v Cortez, CE, ME, IKEA & LT* (unreported, NSWSC, Dowd J, 3 October 2002) that the custody manager's duty includes informing a young person that legal aid advice is available over the phone and giving them an opportunity to ring it.

Caution of rights

As with questioning in general, people have a right to silence when dealing with the police. Like adults who are arrested and interrogated, children and young people may incriminate themselves without realising they are doing so and must be warned against this. Under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW), any person arrested must receive a caution – that is, the police

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must warn the person, orally and in writing, as soon as practicable after they are detained, that they do 'not have to say or do anything but that anything the person does say or do may be used in evidence'. They must also inform them of the maximum allowable period for detention without charge.

The accused has to sign an acknowledgement that this caution has been given – this would usually be completed by an interview friend, guardian or carer on the child's behalf. Some criticism of this has been that children and young people may not always understand the technical language used in the caution and that it should be age-specific. It has also been argued that admissions and confessions from children and young people should be admissible in court only if they have been electronically recorded.

Detention and identification

As with adults, people under 18 years of age in New South Wales can be detained for a maximum of four hours, or up to a further eight hours if a warrant for the extension is granted.

The *Seen and Heard* report recommended that children and young people not be detained for a period longer than two hours in all states. This is the practice at a federal level. Children may be particularly vulnerable during long periods of detention, so excessive periods are discouraged. As mentioned above, the presence of an interview friend is one mechanism that may help prevent evidence being obtained under duress or coercion during lengthy periods of interrogation.

Forensic procedures, photos and searches

Police will often require identification of suspects when arrested, including photographing them or taking fingerprints or DNA samples.

For young people 14 years or over, police may take fingerprints or photographs if it is for the purpose of identifying them. However, for children under 14 years, the police can only take photos or fingerprints if they apply to the Children's Court to do so. The child may not be held in custody while the application is being obtained, and the Children's Court will take into account the seriousness of the offence, cultural and ethnicity considerations, the 'best interests' of the child and the wishes of the child and their parent or guardian.

Figure 5.9 Police cannot take a DNA sample of any suspect under 18 years old unless they have a court order allowing them to do so.

Similarly, police cannot take a DNA sample of any suspect under 18 years old unless they have a court order allowing them to do so. Children and young people cannot give this consent on their own. If the criminal matter is not proved in court (for example, if the person is acquitted), or the person is found not guilty, or the case is discontinued, the police must destroy any fingerprints, photos or DNA samples on request of the parent or guardian.

Additional comments

It is hoped that good policing has preceded the arrest of a child or young person, and that police have gathered sufficient evidence to bring them into the police station. However, this is not always the case.

In some jurisdictions, there is criticism that police may rely too heavily on powers of arrest to gather evidence or to further the interrogation of suspects, especially in the case of Indigenous youth. The *United Nations Convention on the Rights of the Child* obliges

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Legal Info

Legal rights of children and young people

- Children and young people have a right to have a responsible adult present when police ask them questions.
- If the person is under 18 years old, a strip search can be conducted only if an independent responsible adult is present; no strip searches are permitted for children under 10 years old.
- If a child or young person is arrested, police must find out details of the person's parent or guardian as soon as possible and contact them.
- A child or young person must have a support person present during a police interview.
- Police must give the caution about rights in the presence of the support person.
- Police must inform the child or young person of their right to contact Legal Aid NSW and give them the opportunity to do so.
- The same period of detention as for adults applies, but a shorter period is strongly recommended.
- If the person is under 14 years old, fingerprints and photos can be taken only with a Children's Court order.
- If the person is under 18 years old, a DNA sample can be taken only with a Children's Court order.

countries to use arrest only as a 'last resort', as it is a negative and traumatising experience for children and young people. The *Seen and Heard* report also recommended that, for children considered 'at risk', welfare and health services will usually be more appropriate than police to deal with the situation.

Section 99 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) lays down the principle in New South Wales, with detailed provisions about when and for what purpose an arrest can be made. Section 8 of the *Children (Criminal Proceedings) Act 1987* (NSW) also creates a presumption that children should not be arrested or detained, unless, for example, the offence was a serious or violent one, or there is a danger of further offences or violent behaviour.

Further, it could be argued the police in New South Wales and other jurisdictions should be given additional specialist training in juvenile policing to enhance their understanding of many of the complex issues that some troubled young people may be facing and that are usually influencing their offending behaviour. As stated earlier, the events and methods surrounding police contact matter significantly and can affect a young person, forming lasting impressions. Improving policies or finding alternatives – including community- or problem-oriented strategies, adjustments to procedures for the apprehension of juvenile offenders, interrogation and evidence-gathering guidelines, and police discretion regarding referrals to juvenile courts or other alternatives – are all areas worthy of refinement.

As a result, it could also be suggested that some children and young people enter the criminal justice system unnecessarily, and is likely to have a negative impact on them. Alternatives to this approach are available to police under the *Young Offenders Act 1997* (NSW), which is discussed in more detail later in this chapter.

Review 5.4

1. Outline the main allowable circumstances for police to arrest a young person in New South Wales.
2. Explain what is meant by the term 'interview friend'.
3. Describe when a young person's fingerprints can be taken by police.
4. Outline some of the criticisms that are made in respect to the way that some young offenders are dealt with under the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW).

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5.4 Children's Court – procedures and operation

The Children's Court of New South Wales was discussed in Chapter 3 under the topic of the court hierarchy. The Children's Court is a specialised court established in 1987 under the *Children's Court Act 1987* (NSW). It has a dual role:

- dealing with the criminal matters of children and young people under 18 years of age
- dealing with matters of care and protection of children and young people referred to it by the Department of Community Services.

Matters in the Children's Court are presided over by a magistrate, but there is no jury. Magistrates undergo specialist training by the Judicial Commission of New South Wales in dealing with youth matters and proceedings. Across New South Wales, there are 13 children's magistrates sitting in seven Children's Courts. Five of these are in metropolitan areas. There are also five children's registrars appointed to assist in the administration of matters before the Children's Court.

In its criminal jurisdiction, the Children's Court can hear the following matters involving children:

- any offence committed by a child, except a serious indictable offence (serious indictable offences, such as murder and manslaughter, armed robbery or sexual assault, will be heard in a higher court)
- committal proceedings of any indictable offence, including serious ones, where the accused is a child.

The Children's Court follows procedures laid out under the *Children's (Criminal Proceedings) Act 1987* (NSW). Section 6 of the Act requires the court to show regard for the following main principles:

- Children have rights equal to those of adults and have a right to be heard and participate in proceedings that affect them.
- Children are responsible for their actions but require guidance and assistance.
- Where possible, there should be no interruption to the education of a child.
- Where possible, a child should be able to reside in their home.

Additional principles under s 6 relate more specifically to the sentencing process.

In the Children's Court, as well as in children's matters heard in higher courts, trial formalities will be different from those in ordinary courts and will be aimed at protecting the interests of the child. Some of the main differences are outlined in the 'Legal Info' box.

Children's Court statistics

The NSW Commission for Children and Young People is an independent organisation that reports to the New South Wales Parliament and monitors trends in young offender rates, among its many tasks. The commission's rationale for doing this is that it believes children and young people who become involved in crime are usually involved in minor crimes, but that for a small group of these

Legal Info

Differences in children's criminal proceedings

- In the Children's Court, the matter will be heard summarily (with no jury), before a single magistrate.
- Children's proceedings are conducted in a closed court in order to protect the identity of the child – only parties to the proceedings are present, and reporters or family victims if the court allows.
- The media cannot publish the name of any child who is involved in the process, unless authorised by the court or the child is deceased.
- Courts in children's proceedings will need to consider the main trial and sentencing principles under s 6 of the *Children's (Criminal Proceedings) Act 1987* (NSW).
- The court will give the child the fullest opportunity to be heard and to participate.
- The court must take measures to be sure that the child understands the proceedings, and answer any questions that the child asks about the process or decision.
- Available penalties and sentencing procedures differ from those of ordinary courts.

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offenders regular contact with the criminal justice system becomes a way of life, which has drastic implications for their future.

The commission monitors data from the Children's Court, but statistics do not include diversionary methods such as warnings, cautions or conferencing. Some of the findings from its report, *A Picture of NSW Children,* are that on an average day in 2013–14 there were up to 155 children in sentenced detention New South Wales. Of these:

- boys were 14 times more likely than girls to be there
- it was 13 times more likely for 15–17-year-olds to be there than 10–14-year-olds
- Aboriginal children were approximately 26 times more likely than non-Aboriginal children.

On a positive note, of the 7515 young people between the ages of 10 and 17 who appeared before a New South Wales criminal court, detention continues to be the principal penalty for only a very small number of cases: approximately 1%.

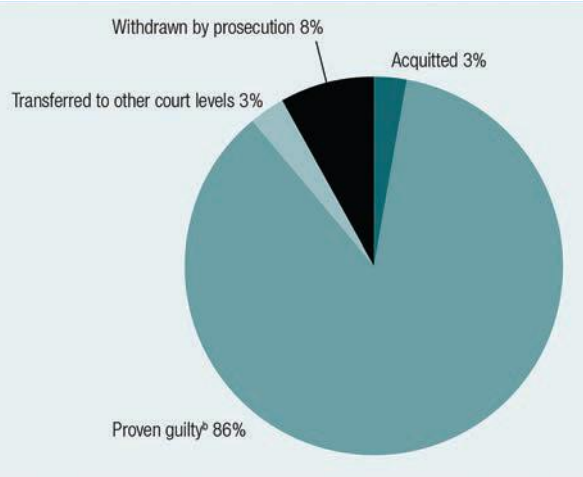

Figure 5.10 Criminal cases finalised in children's courts, by method of finalisation, 2011–12 (%). Source: Australian Institute of Criminology

The Children's Court Clinic

The Children's Court Clinic is an arm of the Children's Court and is established under the *Children's Court Act 1987* (NSW). The clinic's main function is to make clinical assessments of children and submit reports to the court. A magistrate or judge in a children's case can make an order for expert assessments of a child in a particular case – a clinician then assesses the child and writes a report to the court to help it make a decision in the best interests of the child.

Figure 5.11 A clinician assesses the child and writes a report to the court to help it make a decision in the best interests of the child.

In its criminal jurisdiction, the Children's Court may in certain cases decide that a child or young person requires assessment by the clinic after they have been found guilty of an offence but before they have been sentenced. Assessments will generally be performed in New South Wales by Juvenile Justice, but more recently they are done through the clinic. The clinic will be asked to complete an assessment where there are 'specific psychological, psycho-social or mental health issues present in the child's situation that the court needs to consider prior to passing sentence'. The assessment report

Review 5.5

1. Describe the types of offences that can be heard in the Children's Court.
2. Outline the differences between children's criminal proceedings and ordinary court proceedings.
3. Identify the recent trends in cases heard by the Children's Court and describe what the most common profile of offenders is.
4. Describe the role of the Children's Court Clinic.

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might deal with a variety of issues, such as mental health, intellectual disability, drug and alcohol use, violence, sexual abuse/assault, and/or psychological issues. The assessment report may take time, and the child's sentencing is likely to be postponed until the report is available.

5.5 Penalties for children

The purposes of sentencing were looked at in Chapter 4. However, in children's criminal proceedings, the purpose of rehabilitation is given primary weight. This is consistent with the *United Nations Convention on the Rights of the Child*, which acknowledges that children and young people have the best chance of any offenders of being rehabilitated and reintegrated into society. As mentioned above, factors under s 6 of the *Children's (Criminal Proceedings) Act 1987* (NSW) are to be considered in children's proceedings. Additional s 6 principles that relate more specifically to the sentencing process include that:

- The penalty imposed on a child shall be no greater than that of an adult for the same offence.
- Children should be assisted with reintegration into the community to sustain ties to their family and community.
- Children should take responsibility for their acts, and make reparation for them if possible.
- The effect on the victim should be considered, although this must be subject to other principles.

Table 5.1 Penalties that apply to children

Dismissal	The court can dismiss the charge without punishment or conviction, but may decide to issue a caution to the offender.
Conviction	For young offenders, the court can decide whether to record a conviction, but for children under 16 years old no conviction can be recorded.
Adjournment	The sentencing can be adjourned or deferred for up to 12 months to assess the child's prospects of rehabilitation, and reconsidered at that later date.
Bond	The child can be released on a good behaviour bond for up to a maximum of two years.
Youth justice	The child can be released subject to the child complying with a conference **youth justice conference** outcome plan.
Fine	A fine of up to 10 penalty units ($1100) can be imposed, but the court must take into account the child's age and ability to repay it.
Probation	A bond with a probation order of up to two years can be imposed, overseen by an officer of Juvenile Justice.
Community service order	A community service order is a severe penalty, and can be made for up to 100 hours if the child is under 16, and up to 250 hours if they are 16 or over; an assessment (as mentioned earlier) is required to confirm if the child is suitable for a community service order.
Suspended control order	Similar to a suspended sentence, a court can suspend a **control order** (see below) for up to two years, subject to good behaviour.
Control order	A control order is the most severe penalty, and is similar to an adult sentence of imprisonment except it involves detention in a **Juvenile Justice Centre**; the maximum time a child can be sentenced to a control order is two years.

youth justice conference
a measure under the *Young Offenders Act 1997* (NSW) to divert young offenders from the court system through a conference that addresses the offender's behaviour in a more holistic manner

control order
similar to an adult sentence of imprisonment, except served in a Juvenile Justice Centre

Juvenile Justice Centre
a detention centre housing young offenders subject to control orders

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Many of the mitigating or aggravating factors, both objective and subjective, that are relevant to ordinary proceedings might also be relevant to sentencing in children's proceedings. Victim impact statements have also recently been permitted in the Children's Court.

For most children's offences, penalties will be significantly less severe than in ordinary law and will be considered with the child's rehabilitation in mind. For specific serious indictable offences heard by higher courts (such as murder and manslaughter), ordinary sentences will be applied. For other serious offences, the higher court may decide whether the ordinary law or children's penalties should apply.

Section 33 of the *Children's (Criminal Proceedings) Act 1987* (NSW) lists the penalties that can be applied to children. These are outlined in Table 5.1 on page 111.

Juvenile Justice Centres

A control order is the most severe penalty available in children's criminal proceedings. It is similar to the adult penalty of imprisonment, except that the maximum time servable is two years and the young offender is not held at an adult correctional centre but at a Juvenile Justice Centre.

Juvenile Justice Centres are managed by Juvenile Justice, which is a part of the Department of Human Services. They are overseen by the *Children (Detention Centres) Act 1987* (NSW). The programs encourage rehabilitation and reintegration of young offenders into the community.

As for adult imprisonment, control orders are only to be used as a last resort. If used, the court must give clear reasons why it cannot impose any other penalty. Courts must also announce a non-parole period for any control order longer than six months, although young offenders may still be released before the end of their non- parole period.

The reality, though, is that many young offenders end up in Juvenile Justice Centres, and the effects of this incarceration are mostly negative, and detrimental to rehabilitation. Amendments to s 22A of the *Bail Act 1978* (NSW) enacted in 2007 also account for the increasing number of juveniles on remand in New South Wales, most for relatively short stays. These amendments set tougher bail conditions, such as movement restrictions and curfews, as well as ensuring that individuals can only make one application for bail.

This led to a 32% rise in the number of juveniles on remand from 2007 to 2011. As juvenile offenders are mainly remanded for welfare reasons such as a failure to comply with curfew, rather than offence-related reasons, and as four out of five young offenders held on remand do not get a custodial sentence once they've been to court, this amendment's provisions have added to the negative experience many young people have with the criminal justice system, reinforcing their negative perception of it. There are some young offenders who are a risk to the community, but even for them incarceration is not always the answer. Preventive and rehabilitative programs which are more resource-efficient are discussed later.

Further amendments were made to the *Bail Act 1978* (NSW) after repeated criticism from within the legal fraternity and the broader community that the 2007 amendments had fundamentally undermined the presumption of a bail hearing including young offenders. A new *Bail Act 2013* (NSW) was enacted and commenced operation in May 2014. For many young offenders restrictive bail conditions such as curfews and places of residence were unable to be met, and hence they ended up in remand centres. The new bail regime changed the approach to serious offences, such as murder: instead of having a presumption against bail, it instituted a general consideration of whether there was an 'unacceptable risk' of the accused person reoffending. After some high-profile cases where the accused were released on bail under the May reforms, the Baird government bowed to tabloid media criticism and after only a month of operation the Act was again amended to further restrict judicial discretion in bail applications with a revised test where the onus is on the accused to 'show cause' why their detention is not justified.

The extent to which this will influence the increasing number of young offenders in incarceration as opposed to appropriate diversionary programs remains to be seen. Figures from the Juvenile Justice annual report stated that in 2013–14 there were 315 young offenders in custody, of which 159 were on remand.

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Figure 5.12 Riverina Juvenile Justice Centre, in Wagga Wagga, New South Wales

Sentencing considerations for young offenders

Although the *Children's (Criminal Proceedings) Act 1987* (NSW) now clearly outlines the principles of children's criminal proceedings, and the primary importance of rehabilitation, the *Seen and Heard* report noted that, in sentencing, the courts needed to pay more attention to social factors such as homelessness, family circumstances, educational needs or the special health and other requirements of children and young people.

For example, the courts need to carefully consider issuing fines in light of the offender's ability to repay and the effect the fine might have on their chance of rehabilitation. Community service orders would be more beneficial if the services are close to home and as long as the conditions to fulfil them are not so difficult that they attract breaches. The very serious effects of any control order would, of course, need to be thoroughly considered and all other penalties dismissed before such a penalty could be imposed.

The seriousness of the offence is a significant consideration in determining the sentence. However, unlike for adult offenders, where purposes of retribution and deterrence would be likely to increase a sentence, with children and young people the court must keep the rehabilitative focus foremost in mind.

There may, however, be exceptions to this rule where a young offender is involved in repeated offences, or where they engage in **grave adult behaviour**, which is where the offender has acted like an adult in terms of the seriousness of the offence and/or the level of premeditation involved. The court may see that person as having acted like an adult, so other sentencing objectives might come into play. For example, see the case of *R v Pham & Ly* in the 'In Court' box on page 114.

grave adult behaviour
where a young offender has acted like an adult in committing the offence, in terms of the seriousness of the offence and other factors surrounding the behaviour, such as premeditation

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In Court

***R v GDP* (1991) 53 a Crim R 112**

Although now a relatively old case, *R v GDP* still outlines an important principle in child sentencing. The offender was 14 years old when he committed serious criminal damage to property with two of his friends. The damage included breaking through a window, drilling a safe, defacing cars, smashing furniture and lighting dangerous fires that in total added up to $550 000 in damage. GDP had had no prior incidents and was well regarded by his teachers. The judge in GDP's case sentenced him to a 12-month custodial sentence.

GDP appealed to the Court of Criminal Appeal, where a panel of three judges held that the sentence was manifestly excessive. In explanation, the court stated that sentencing principles for children are different from those for adults – general deterrence and retribution were not as important as they would be in the case of an adult. Rehabilitation is the primary aim with offenders as young as this. In this case a custodial sentence would have been positively damaging to GDP's rehabilitation; he was by this time commencing Year 12 and facing his HSC. The court reversed the original sentence and replaced it with a 12-month probation order.

In Court

***R v Pham & Ly* (1991) 55 a Crim R 128**

This case involved two main offenders, one just under the age of 18 at the time of the offence.

The young offenders broke into a house early in the morning, knowing the occupants were home. They bound and gagged their victims with stickytape and put a blanket over their heads. They then proceeded to rob the property, taking jewellery and a number of other items.

At the time, one of the offenders was on bail and the other was on probation. The original judge sentenced both offenders to 12 months on remand. The case was appealed in the Court of Criminal Appeal and the sentence was overturned as 'wholly inappropriate' and inadequate. It was ruled that, despite the offenders' ages, there must be reasonable proportion between the sentence, the seriousness of the crime committed and the need to protect the community. The case was referred for resentencing.

Review 5.6

1. Identify three penalties available for children and assess how they differ from penalties for adults.
2. Describe the primary factors to consider when sentencing a young offender.
3. Explain when a young offender may be liable to receive an adult sentence.

5.6 Alternatives to court

As for adult offenders, there are programs for children and young offenders that offer an alternative to the formal criminal justice process that is played out through the courts.

In New South Wales the *Young Offenders Act 1997* (NSW) provides the main alternative program for young offenders. The Act came into force in New South Wales in 1998 and was introduced to provide various diversionary measures for young offenders and police as an alternative to traditional criminal processes and court penalties. The aim is to encourage rehabilitation, reduce rates of recidivism and reduce the burden of more minor youth offences on the court system.

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The program only applies to summary offences and to indictable offences that can be tried summarily. It does not apply to serious offences, including robbery, sexual offences or any offence resulting in a person's death. The principles of the Act are that:

- where sanctions are applied, they should be as unrestrictive as possible
- children should be advised of their right to seek legal advice
- criminal proceedings are not to be started if there is an appropriate alternative for dealing with the matter.

Under the Act, children and young offenders who have committed an offence covered by the Act may proceed through a three-tiered system of diversionary processes – **warnings**, **cautions** and youth justice conferences.

warning
a notice given to a young offender (usually for a first minor offence) that is recorded by police but with no conditions attached; the offender must be told of the nature, purpose and effect of the warning

caution
a formal, recorded alternative to prosecution where the young offender admits to the offence and consents to receiving a formal police caution; it can later be taken into account in the Children's Court, but not in an adult court

Warnings

A warning is an official notice given to a young offender by an investigating officer, without any conditions attached. The warning is relatively informal – it can be given in any place, but the officer must tell the offender the nature, purpose and effect of the warning. A warning cannot be given for an act of violence, a repeat offence or at the discretion of the investigating officer. The officer must keep a record of the warning.

Cautions

Police may issue a caution to a young offender to discourage further offending. The caution is a formal, recorded alternative to prosecution where the young offender admits to the offence and consents to receiving a formal police caution. In deciding whether or not to give a caution, the investigating official will consider the severity of the offence, the level of violence involved, the harm caused and how many offences have been committed by the offender.

Although not a conviction, the caution may later be taken into account in the Children's Court and so can have important consequences. Steps are to be taken to ensure that the offender understands the nature and effect of the caution, and the offender must then sign a 'caution notice'. A specialist court officer or a court must make a record of a caution given by an officer or the court. Before an official caution is issued, the investigating officer may refer the matter to a specialist court officer to decide if the matter should instead be referred to a youth justice conference.

Youth justice conferences

The *Young Offenders Act* also allows for youth justice conferences, which can be used when a young offender admits to an offence and consents to having it dealt with by this method. The purpose of a youth justice conference is to allow the offender to take some responsibility for their actions, to promote better family understanding of the issues, and to provide the offender with appropriate support services to help them to overcome their difficulties.

Youth justice conferences also increase the rights of victims in the criminal justice process. Ultimately, the aim is to make decisions that respect the offender's rights and take into account their needs.

Figure 5.13 The purpose of a youth justice conference is to allow the offender to take some responsibility for their actions.

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Conferences hold the offender accountable, but empower families and victims in decisions about a child's offence and, where suitable, make reparation to the victim.

Those able to participate in a conference are the offender, a conference convenor, an investigating official, a member of the offender's family or extended family, the offender's legal representative, another adult chosen by the offender and a specialist youth officer. The victim can also attend, as well as any support people the victim may want present. The range of people present aims to provide a picture of what is going on in the child's life and enough expertise and experience to offer a more holistic approach to finding solutions for the offender's behaviour. A conference administrator ensures that records of the conference are kept.

Effectiveness

The *Young Offenders Act* has been well received by commentators. It embraces the welfare model of juvenile justice and encourages offender rehabilitation over traditional means of dealing with crime. It uses diversionary measures to find solutions to juvenile offending. Repeat offenders can also be dealt with by the Act (for example, through a second and/or third appearance at a youth justice conference).

The NSW Bureau of Crime Statistics and Research in its 2013 report, *The Impact of the NSW*

Legal Info

Juvenile offenders

A study of juvenile offenders released by the NSW Bureau of Crime Statistics and Research has shown that it is unusual for juveniles to receive more than three police cautions or youth justice conferences.

The bureau examined the characteristics of all (13 980) young people in 2010 who received a police caution (8558 or 61.2%), attended a conference (960 or 6.9%) or who had a proven appearance in the New South Wales Children's Court (4462 or 31.9%).

The vast majority (78.4%) of those who received a police caution had no previous caution. A smaller percentage (21.2%) had one or two previous cautions. Less than 1% (0.4%) had three or more previous cautions. More than 95% had no previous conference or court appearance.

Prior police cautions and prior conferences were more likely among those who received a conference or who were referred to court. Thirty-nine per cent of those who attended a conference had had one or two previous cautions. Nearly 15% had had three or more previous cautions.

Overall, as the number of contacts (cautions, conferences or court appearances) increases, the likelihood of being dealt with via a caution decreases. Thus 81.9% of those with no previous contacts were dealt with by a caution, compared with 8.5% of those with three or more previous contacts.

The likelihood of a court appearance also increases. Thus, whereas only 13.4% of juveniles with no previous contacts were referred to court, 80.3% of those with three or more previous contacts were referred to court.

Although the results suggest that hierarchy of sanctions established by the *Young Offenders Act* is being adhered to, the bureau noted that juvenile offenders are far more likely to be given a caution or referred to court than they are to be referred to a conference.

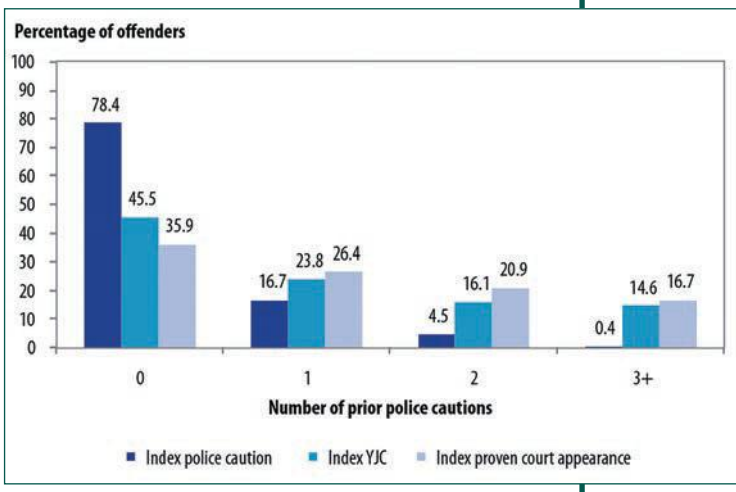

Figure 5.14 Number of prior police cautions by type of index contact. Source: NSW Bureau of Crime Statistics and Research

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Young Offenders Act (1997) on the Likelihood of a Custodial Order, found that the risk of receiving a custodial order dropped significantly: for Indigenous young offenders it fell by 17.5%, and for non-Indigenous young offenders by 16.3%.

One of the criticisms of the Act, however, is that it is not being used for a wide enough range of offences and therefore is excluding some young offenders from the benefits that conferencing offers and as a result may be perceived as a soft option. For example, the Shopfront Youth Legal Centre, in response to a 2003 review of the sentencing of young offenders carried out by the NSW Law Reform Commission, argued over 10 years ago that youth justice conferencing could be suitable for even very serious offences (see http://cambridge.edu.au/redirect/?id=6246 for the full response). It may be effective for more serious crimes because the young offender is compelled to think about the consequences of their actions, in particular the impact on the victim. Recidivism rates in Victoria, where conferencing is used for wider-ranging and more serious offences, are lower. As mentioned below, conferencing also needs to be supported by well-resourced rehabilitative programs.

Research 5.2

NSW Police provides information on youth justice conferencing. See http://cambridge.edu.au/redirect/?id=6247 and complete the following tasks.

1. Explain the difference between the following terms: 'warning', 'caution' and 'youth justice conference'.
2. Describe the process and the parties involved in a youth justice conference.

5.7 The effectiveness of the criminal justice system when dealing with young offenders

> Children today love luxury too much. They have execrable manners, flaunt authority, have no respect for their elders. They no longer rise when their parents or teachers enter the room. What kind of awful creatures will they be when they grow up?
>
> *Socrates, 469–399 BCE*

Even in Socrates' day, adults tended to think the worst of children and young people at times. On the face of it, the rate of young offenders compared with adult offenders would seem to justify that view. But it could also suggest that on the whole the criminal justice system is failing younger people.

Children can do little to control the circumstances they find themselves in – children who have been neglected or mistreated, or received poor and dysfunctional parenting or education, might find it challenging to make good decisions as they grow older. The age of criminal liability recognises a scaling level of responsibility as a person ages, up to adulthood. And as expressed in the purposes of the *Children's (Criminal Proceedings) Act 1987* (NSW), and attempted through programs available through the *Young Offenders Act 1997* (NSW), rehabilitation is intended to be the primary concern of the criminal justice system in relation to young offenders.

The Australian Institute of Criminology's 2009 study, *The Specific Deterrent Effect of Custodial Penalties on Juvenile Offenders*, found no difference in the rate of reoffending: young offenders given a custodial sentence were just as likely to reoffend as those given another form of sentence. The report states that the:

> adverse effects of imprisonment on employment outcomes and the absence of strong evidence that custodial penalties act as a specific deterrent for juvenile offending suggest that custodial penalties ought to be used very sparingly with juvenile offenders.

This has not happened in New South Wales. As mentioned above, a trend has been the increasing numbers of young people in Juvenile Justice Centres, which has predominantly come about because of amendments to the *Bail Act*. Eighty per cent of the young people on remand due to these changes do not go on to receive a custodial sentence, yet they suffer the negative effects of being incarcerated in such institutions.

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The average cost of detaining a young person in a Juvenile Justice Centre is approximately $150 000 per year; proven intensive rehabilitation programs can be run for a fraction of that cost. Accredited programs run by Marist Youth and Whitelion, for example, are funded by charities that have a high rate of success in reintegrating serial young offenders into the community. Though these programs are resource-efficient, they fail to receive government support. It has been suggested that this may be a result of the government's need to be seen to be tough on crime. Juvenile Justice was allocated a budget of $196.4 million in 2014 –15, of which approximately two-thirds was spent on detention.

Max Taylor, Convener of the Bail Reform Alliance, states:

> The Bail Reform Alliance seeks the restoration of the presumption in favour of bail, which restricts the number of applications for bail and removal of the limitation on bail set out in the 'special circumstances' clause. These changes are needed if the presumption of innocence is to have its full meaning and overcrowding in gaols and Juvenile Justice Centres is to be reduced.

The New South Wales Government continues to review, as mentioned earlier, and this will ultimately have an impact on young offenders in New South Wales. The media article on page 120 outlines where this process is at the time of its writing.

However, the *Young Offenders Act* has been particularly successful in diverting young people from custodial sentences. The Children's Court has the power to refer young people who appear before it to youth justice conferencing and some 50% of conference cases have been referred by the court. While this could suggest that matters might be unnecessarily referred to the Children's Court when they could be better dealt with elsewhere, youth justice conferencing remains an important alternative to incarceration.

Recent findings, however, point to conferencing needing to be supported by additional rehabilitative measures. In March 2012, the Director of the NSW Bureau of Crime Statistics and Research, Dr Don Weatherburn, said:

> [T]he conference regime established under the New South Wales *Young Offenders Act 1997* is currently no more effective than the NSW Children's Court in reducing juvenile re-offending among persons eligible for a conference.

Conferencing in Victoria produced lower reoffending figures, but it is suggested that this may reflect the fact that youth justice conferencing in that state considers more serious matters and is not as easy to dismiss as a soft option.

Dr Weatherburn went on to say:

> One can only speculate about the reasons for this, but one possible explanation is that [youth justice conferences] do not address the underlying causes of juvenile offending (e.g. drug and alcohol use, parental neglect and abuse, poor school performance, boredom and unemployment).

The NSW Commission for Children and Young People supported this in its submission to the review of the *Young Offenders Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW), and argued for further reforms. It believes the current legislation does not meet the needs of children and young people for the following reasons:

- Recent research has revealed a greater understanding that the development of the frontal cortex of the brain continues until the age of 25 years. Research also suggests that when abuse and neglect are evident when the brain is undergoing such change, the adverse effects can be long term. The commission has suggested that our understanding of the meaning of criminal responsibility for children and young people may need to be reassessed.
- The report goes on to say, '[T]he attempt to combine the so called justice and welfare models of juvenile justice in the legislation has created a complex and sometimes contradictory amalgam of community-based sanctions and controls alongside formal court processes and detention. It is possible that this has led to "net widening", as police warn, caution or refer to conferencing children who might otherwise have been dealt with informally'.

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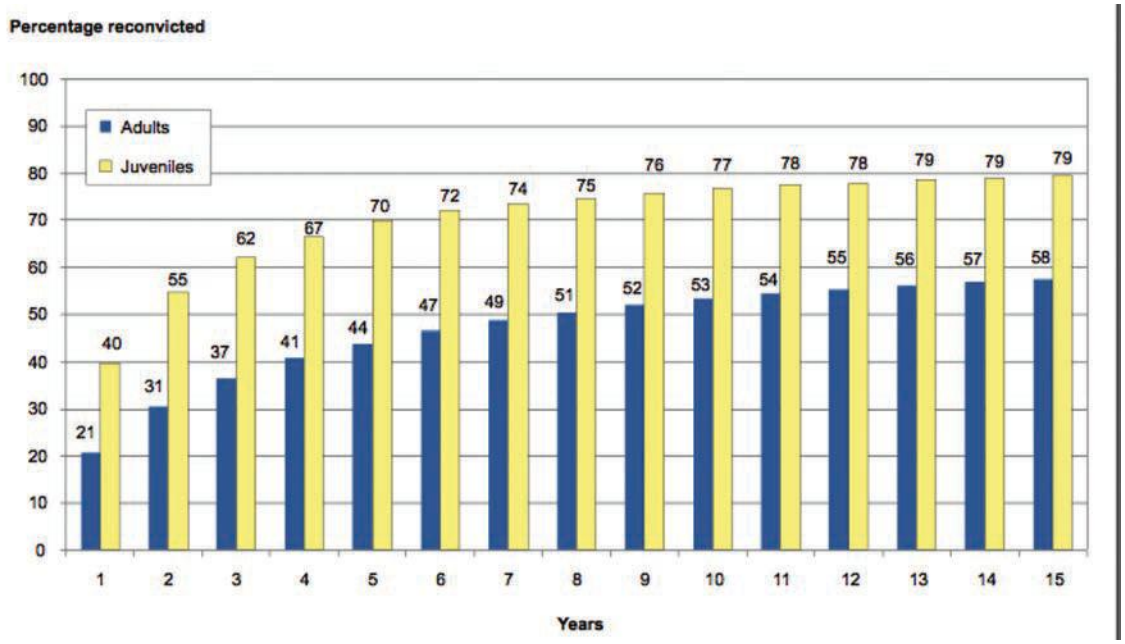

Figure 5.15 Cumulative percentage of adults and juveniles convicted in 1994 who were reconvicted each year to 2009 in New South Wales. It is as important today that preventative rehabilitative programs to interrupt the cycle of offending for young offenders be prioritised, given that rehabilitation is more likely to succeed with young offenders as opposed to adult offenders. Source: NSW Bureau of Crime Statistics and Research, 2012

- Lastly, it argues that the principles of restorative justice that underpin youth justice conferencing are contentious, and that there is insufficient evidence for the effectiveness of youth justice conferencing (in its current form) in reducing recidivism. This supports the view expressed by Dr Weatherburn above.

Many of these problems could be reduced by a police force dedicated to and trained in the principles of juvenile justice and diversion. This is the case in the Northern Territory and New Zealand: 84% of young offenders in New Zealand never go to court and the police run many of the programs for young people at risk. This becomes more effective from a number of perspectives when it is understood that 5% of 'life course' offenders commit approximately 50% of all juvenile crime in New South Wales. Many of these offenders have experienced a number of social and psychological problems from an early age.

As with all areas of the law, the law concerning young offenders requires a careful balance. Yet as studies have continually shown, and as Australia's international obligations and children's sentencing legislation both reinforce, rehabilitation of young offenders must remain the primary focus. The use of preventive measures alongside intensive, long-term, well-supported rehabilitation programs is essential to break the cycle of offending that confronts some young offenders.

Review 5.7

Read the article about the *Bail Act* on page 120 and complete the following tasks.

1. Identify the impact that changes to the *Bail Act* have had in New South Wales.
2. Outline some of the changes that were made to the *Bail Act* in 2014.
3. Explain why the *Bail Act* was amended again after only being in operation for a short time.
4. What effect might these changes have on children and young people in New South Wales accused of committing an offence where bail may be sought?

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News

New South Wales Bail Act: some freedoms more equal than others

Jacqueline Maley

Sydney Morning Herald, 3 July 2014

The NSW government has announced a 'review' of the new bail laws, barely a month after their commencement. The new laws replaced the presumption against bail for serious offences, such as murder, with a broad test of whether the accused poses an 'unacceptable risk' of re-offending.

In assessing that risk, the judge or magistrate has to consider four factors: whether the accused might not turn up at court, whether s/he might commit an offence while on bail, whether s/he might be a danger to their alleged victim or to the community, and whether s/he might interfere with evidence or witnesses while at liberty …

In 2011 then premier Barry O'Farrell's government asked the [NSW Law Reform Commission] to review it. The commission spent nearly a year doing so and delivered recommendations to the government in 2012. They were largely adopted and the new Bail Act was legislated last year and came into operation on May 20 this year, with a plan to review the legislation in three years. A better and more orderly public policy process you would struggle to find.

That's when the liberty lovers hit. One shock jock pronounced the laws 'buggered' and 'broken' after sensationalised tabloid coverage of two cases of accused men who were released on bail

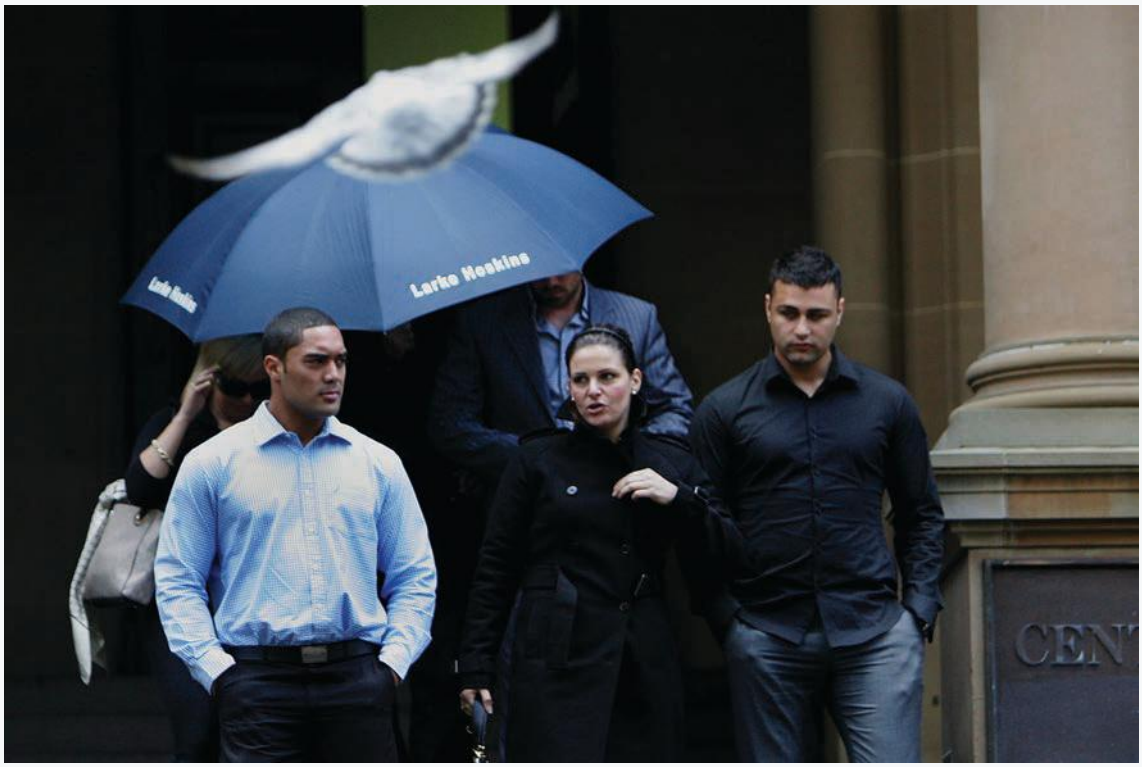

Figure 5.16 Comancheros bikie members Pomare Pirini (left) and Ismail Erden leave Central Local Court with their solicitor Lesly Randle on 9 July 2009. Pirini and Erden, charged with riot and affray in relation to the fatal Sydney Airport brawl in March 2009, were applying to have their bail conditions varied. Mahmoud 'Mick' Hawi also appeared in court via video link.

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News

under them. A little over a month after they came into effect, Premier Mike Baird announced a review of the laws.

The first case was Mahmoud Hawi, a 34-year-old former Comanchero boss who was convicted of murdering a Hell's Angel bikie by bashing him with a bollard at a Sydney airport brawl in 2009. The conviction was later quashed and while Hawi awaits his retrial, he has been released under the new bail laws. The second case was Steven Fesus, a 47-year-old accused of murdering his young wife in 1997. He was released pending his trial.

Both of these men, unsavoury though their alleged crimes may be, are, in the eyes of the law, innocent as you or me before conviction. As such, society takes very seriously any deprivation of their right to liberty. …

'It is in the Universal Declaration of Human Rights, it is in the International Covenant on Civil and Political Rights. It is enshrined in civil and case law in Australia,' former NSW Director of Public Prosecutions Nicholas Cowdery says.

This liberty sits alongside another ancient and fundamental common law right, that is, the right to habeas corpus, or a fair hearing. As Cowdery says: 'A presumption of innocence has to be more than a collection of words.' …

Even if we cast aside fancy debates about enlightenment philosophy, there are good social and economic reasons to keep people out of jail where appropriate. The state's prison population is at a record high of 11 000. This is despite the fact that crime rates have fallen across all categories over the past decade. It costs $100 000 a year to keep a person in jail, so that is an annual taxpayer bill of roughly $1.1 billion. Jailing more people does not push crime rates down. In fact, many argue it has the opposite effect.

In any case, as Cowdery and other experts point out, it is impossible to review the efficacy of laws that have been in place a month. The data doesn't exist yet.

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Chapter summary

- There are two main approaches to young offenders in the criminal justice system – the welfare model and the justice model.
- The law recognises differing levels of criminal responsibility for young offenders on a scale of age.
- Children and young people have additional rights and protections in the face of police powers as the law recognises their higher level of vulnerability.
- The Children's Court has jurisdiction to hear any offences (other than serious indictable offences) involving children and young people.
- Children may receive a range of penalties that differ from adult penalties, from fines to control orders in a Juvenile Justice Centre.
- When handing down penalties for a child or a young person, the court must take into account the offender's age and chances of rehabilitation.
- Judges may consider other objectives of punishment if the offence is particularly serious.
- Diversionary programs for young offenders include the use of warnings, cautions and youth justice conferences.
- The Children's Court and diversionary programs have been reasonably successful in relation to young offenders, but there is still significant room in the criminal justice system for improvement.

Questions

Multiple-choice questions

1 *Doli incapax* refers to which of the following?

A The children's court jurisdiction to hear matters pertaining to young offenders
B The incapacity to cause criminal harm
C Mitigating factors when sentencing
D The incapacity of young offenders to make decisions about their future in court proceedings

2 Of the following statements, which is correct with respect to young offenders under arrest?

A They cannot have their fingerprints taken.
B They are not able to be interviewed.
C They must have an interview friend present.
D They will have a criminal record.

3 A 'warning' under the *Young Offenders Act 1997* (NSW) is:

A an informal verbal reprimand without consequences
B formal recorded admission by consent with potential consequences
C an official recorded notice without conditions
D an informal written reprimand without conditions

4 Which of the following statements is correct with respect to the jurisdiction of the Children's Court?

A It can hear committal proceedings and minor matters against children and young people.
B It can hear committal proceedings and all but serious indictable matters against children and young people.
C It can hear serious indictable matters and committal proceedings against children and young people.
D It can hear all matters and committal proceedings against children and young people.

5 What types of penalties can young offenders receive?

A Dismissal, fine, community service order, adjournment, control order, youth justice conference, life imprisonment
B Dismissal, fine, community service order, adjournment, home detention, control order, youth justice conference
C Dismissal, community service order, fine, control order, youth justice conference
D Dismissal, fine, community service order, suspended sentence, adjournment, control order, youth justice conference

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Chapter summary questions

1. Describe the law in New South Wales relating to the age of criminal responsibility. Explain why the laws differ between children and young people.
2. Identify the rights of young offenders when questioned and arrested, and discuss how they differ from the rights of adults.
3. Discuss why young people are treated differently from adults in the criminal justice system. Provide examples in your answer.
4. Analyse the main purposes of youth sentencing and explain how they differ from those of adult sentencing.
5. Evaluate the effectiveness of the criminal justice system in dealing with young offenders with respect to two issues studied in this chapter.

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Chapter 6
International crime

Chapter objectives

In this chapter, students will:

- define international crime
- describe a range of legal measures used to deal with international crime
- evaluate the effectiveness of the domestic and international legal systems in dealing with international crime.

Key terms/vocabulary

Australian Federal Police (AFP)
bilateral agreements
crime against humanity
crime against the international community
extradition
Geneva Conventions
genocide
human trafficking
international crime
International Criminal Court (ICC)
International Criminal Police Organization (INTERPOL)
Nuremberg trials
peacekeeping
Rome Statute
state sovereignty
transnational crime
universal jurisdiction
war crime

Relevant law

IMPORTANT LEGISLATION

War Crimes Act 1945 (Cth)
Geneva Conventions Act 1957 (Cth)
Australian Federal Police Act 1979 (Cth)
Extradition Act 1988 (Cth)
Criminal Code Act 1995 (Cth)
Australian Crime Commission Act 2002 (Cth)
International Criminal Court Act 2002 (Cth)
International Criminal Court (Consequential Amendments) Act 2002 (Cth)

SIGNIFICANT TREATIES, PROTOCOLS AND CONVENTIONS

Rome Statute of the International Criminal Court
Convention on the Prevention and Punishment of the Crime of Genocide
Geneva Conventions
United Nations Convention against Transnational Organized Crime

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Legal oddity

We normally think of cross-border smuggling as involving drugs, or perhaps firearms or wildlife. But people can also purchase items legally in one country, and then smuggle them into another country that, for one reason or another, does not allow them. In 1992, the United States Congress passed the Energy Policy Act, which mandated low-flush toilets – specifically, a limit 1.6 gallons (approximately 6 litres) of water, rather than the previously-allowed 3.5 gallons (over 13 litres). Larger capacity toilets were still legal in Canada, so some people started smuggling them across the border.

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6.1 Defining international crime

Historically, crime has been an issue that states have dealt with inside their own borders. Societies within individual states have determined which acts are punishable as crimes, and how those crimes are dealt with and punished in their local criminal jurisdiction. As a result, criminal laws have traditionally reflected the dominant social and cultural values of each country, varying from state to state. This concept was discussed in Chapter 1 in the context of defining crime.

Keeping criminal laws defined and contained within national boundaries is for most states a crucial part of **state sovereignty**. Many countries view the criminal law as a critical area for individual states alone to decide, without any interference from outside influence, but this has changed with a growing international interest in ensuring that the human rights of people in all countries are respected. This has affected the national sovereignty of states. The legal systems and constitutions of many countries prohibit any encroachment into state jurisdiction and laws. But over time societies have evolved, with increased cooperation between states and changes in the way that states see their role in the international community, which is evidenced in the growth of international law and international organisations, in particular the United Nations (UN). Together with such cooperation has been a growing recognition that certain actions committed within sovereign state jurisdictions may be so extreme, and so universally condemned, as to constitute a crime that ought to be universally condemned as a **crime against the international community** – genocide or crimes against humanity, for example.

In more recent years, with globalisation, plus increased international travel and advances in technology, opportunities for crimes that were in the past committed only locally to cross national borders or involve international actors have increased. Such **transnational crimes** have become increasingly problematic within domestic borders, which may be where the crimes originate, and/or where their effects are felt, and/or where the victims or perpetrators reside.

state sovereignty
the authority of an independent state to govern itself (for example, to make and apply laws; impose and collect taxes; make war and peace; and form treaties with foreign states)

crime against the international community
a most serious crime, of concern to the international community as a whole, and recognised by the international community as requiring punishment

transnational crime
crime that occurs across international borders, either in origin or effect

'**International crime**' is a broad term that could cover any crime with international origin or consequences. There are many types of international crimes, and many international crimes have existed since before states themselves were even formed. But until only recently most such crimes have not been considered outside the context of domestic law.

international crime
a broad term covering any crime that is punishable by a state, but that has international origin or consequences, or a crime recognised by the international community as punishable

International crime poses considerable challenges legally, financially and socially, as there are differing ideas about what constitutes an international crime, who should deal with it, who should fund them, and what the process should be. Increased cooperation between states is fundamental if international crimes are to be addressed and justice is to be achieved. This chapter explores some of the issues related to international crime, describes a range of measures that the international community has implemented to combat international crime, and evaluates the effectiveness of these measures.

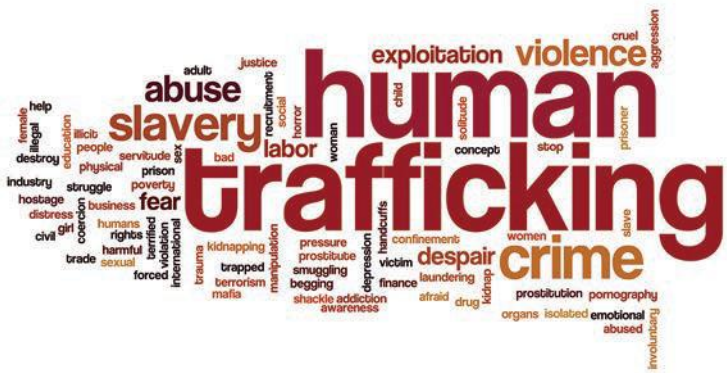

Figure 6.1 International crime can take many forms.

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6.2 Categories of international crime

For the purposes of this chapter, international crimes need to be distinguished from crimes that are merely violations of domestic jurisdiction with some international element. For example, an Australian citizen who, while travelling in a foreign country, steals a car or assaults another person will be criminally liable in accordance with that country's laws – and liable to any applicable judgement and sentence that country imposes. Likewise, a foreign citizen in Australia will be subject to Australia's criminal laws. This is a case of domestic crime with some international element, most often the nationality of the perpetrator.

Similarly, there are instances where Australian legislators have deemed it necessary to criminalise acts committed by Australians travelling abroad – one example of such a law is under Division 272 of the Commonwealth *Criminal Code* (on child sex offences outside Australia), which makes it an offence for an Australian citizen or permanent resident to engage in sexual activity with a child under 16 years old while overseas. Even though the criminal act occurs in another jurisdiction, the offender is still liable under Australian domestic law, or under foreign criminal law if the act is also a crime in that jurisdiction. This is because of the serious nature of the crime and the desire to discourage Australians from pursuing activities abroad that would be illegal had they been committed in Australia.

International crimes, however, differ from these examples in that they involve some crossing of international borders in the commission or planning of the crime, or in some way involve a breach of the criminal standards set by the international community, in the form of international treaties or conventions or international customs of law. International crime can be broadly divided into two main categories:

- crimes against the international community
- transnational crimes.

Crimes against the international community

Crimes against the international community are an entirely different class of crimes. Unlike domestic or transnational crimes, crimes against the international community are a collection of offences that are recognised by the international community as being of universal concern. They include some of the most extreme crimes possible – crimes that are deemed so serious that they are condemned by the majority of the international community and may be punishable internationally.

However, there is no fully agreed list of such crimes. Many countries will disagree about specific aspects of an offence, or about the inclusion of certain crimes, but they almost always include crimes such as **genocide**, war crimes, piracy (at sea), hijacking of aircraft and slave trading on the list of international crimes.

The prosecution of crimes against the international community can be controversial. Such crimes may be committed in the context of military conflict. They may be highly politically motivated, or they may have been ordered or committed by the state itself. States can sometimes be unwilling or unable to prosecute individuals for these crimes, as in some instances those responsible are still in positions of power. In other instances, the offenders have fled to a different jurisdiction in an attempt to escape prosecution.

The importance of all states condemning crimes against the international community is that the criminals may then be unable to escape prosecution simply because they are still in power or have fled the jurisdiction. Other states condemning the action may have a right to prosecute the offender under a claim of **universal jurisdiction**, where a state claims a right to prosecute a person based on the common international belief that the alleged crime is so serious that normal laws of criminal jurisdiction do not apply. Some states, such as Belgium, Spain and the United Kingdom, may be more likely to assert a claim of universal jurisdiction over such serious criminals – these cases are generally very high profile and politically controversial.

genocide
the deliberate extermination of a national, ethnic, racial or religious group

universal jurisdiction
where a state claims a right to prosecute a person for actions committed in another state, based on the common international opinion that the alleged crime is so serious that normal laws of criminal jurisdiction do not apply

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International jurisdiction over universally condemned crimes represents a fundamental change to the traditional view of state sovereignty, and is based on the idea that some acts are so extreme and universally condemned that they can no longer be permitted under the laws of any state.

International Criminal Court (ICC)

The establishment of the **International Criminal Court (ICC)** in 2002 in The Hague, The Netherlands, was a significant development in the law of crimes against the international community. The court's establishment followed years of international negotiations and deliberations, with the treaty eventually signed at a 1968 UN conference in Rome. The treaty setting it up became known as the *Rome Statute of the International Criminal Court*, or **Rome Statute**. It came into force in July 2002, when the requisite number of states (60) had formally ratified it. As of January 2016, there are 123 state parties to the ICC. These are the states who have ratified or acceded to the Rome Statute. Of those states, 34 are African, 19 are from the Asia–Pacific, 18 are from Eastern Europe, 27 are from Latin America and the Caribbean and 25 are from Western Europe. Other states, such as the Russian Federation, have signed but not yet ratified the Rome Statute.

International Criminal Court (ICC)
an independent international court established by the Rome Statute in July 2002 to prosecute and try international crimes of the most serious nature

The ICC was established by the international community as a permanent court and a separate international entity from the UN. It is independent of the UN and from any state other than through their influence. The ICC does, however, require a referral from the UN Security Council to prosecute certain individuals outside the court's normal jurisdiction. It consists of 18 judges, each from a different signatory country, who operate in pre-trial, trial and appeals divisions.

Rome Statute
the *Rome Statute of the International Criminal Court*; the international treaty that established the International Criminal Court

The Rome Statute gives the ICC jurisdiction over three broad categories of international crime: genocide, **crimes against humanity** and **war crimes**. These are discussed in more detail in the following pages. The ICC also has jurisdiction to prosecute crimes of aggression, but member states have not yet agreed on its definition. The Rome Statute states that while the crime of aggression is one of the 'most serious crimes of concern to the international community', the ICC is not able to exercise its jurisdiction over this crime until there is international agreement.

The ICC is a court of last resort. It is intended to complement, rather than exclude, existing national criminal justice systems – it can only prosecute a case when state courts cannot or are not willing to do so. This means that the main responsibility for investigating and prosecuting these crimes still lies

Figure 6.2 Member states of the International Criminal Court

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with the member states. The ICC can only exercise jurisdiction where:

- the accused is a national of a member state of the treaty
- the alleged crime occurred in the territory of a member state, or
- the situation is referred to the ICC by the UN Security Council.

Where the ICC convicts an individual, it can impose a sentence of imprisonment up to life imprisonment (but not the death penalty), which will be served in a state prison designated by the court. In addition to imprisonment, the court can order a fine or forfeiture of assets.

crime against humanity described in the Rome Statue as an act 'committed as part of a widespread or systematic attack directed against any civilian population'

war crime action carried out during a time of war that violates accepted international rules of war

Figure 6.3 The International Criminal Court in The Hague, The Netherlands

Preamble to the Rome Statute of the International Criminal Court

The States Parties to this Statute,

Conscious that all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time,

Mindful that during this century millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,

Recognizing that such grave crimes threaten the peace, security and well-being of the world,

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation,

Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes,

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,

Reaffirming the Purposes and Principles of the Charter of the United Nations, and in particular that all States shall refrain from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations,

Emphasizing in this connection that nothing in this Statute shall be taken as authorizing any State Party to intervene in an armed conflict or in the internal affairs of any State,

Determined to these ends and for the sake of present and future generations, to establish an independent permanent International Criminal Court in relationship with the United Nations system, with jurisdiction over the most serious crimes of concern to the international community as a whole,

Emphasizing that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions,

Resolved to guarantee lasting respect for and the enforcement of international justice,

Have agreed as follows …

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Review 6.1

Read the Preamble to the *Rome Statute of the International Criminal Court* on page 129 and complete the following tasks.

1. Identify some of the historical incidents the Preamble refers to in its opening paragraphs.
2. Describe the nature of crimes that the Rome Statute aims to deal with.
3. Describe the main duty that the Rome Statute imposes on member states.
4. Identify the Rome Statute's position on international war.
5. Explain how the Rome Statute interacts with state jurisdictions.

Genocide

Article 6 of the Rome Statute gives the ICC criminal jurisdiction over acts of genocide that occurred after July 2002. Genocide includes various brutal acts intended to destroy all or part of a national, ethnic, racial or religious group. The Rome Statute defines the crime of genocide as including:

- Killing members of the group;
- Causing serious bodily or mental harm to members of the group;
- Deliberately inflicting on the group conditions of life calculated to bring about the its physical destruction in whole or in part;
- Imposing measures to prevent births within the group;
- Forcibly transferring children of the group to another group.

Genocide has long been condemned by the international community as a crime so serious that the international community has a responsibility to punish it. Acts of genocide were criminalised in one of the first ever treaties established by the UN – the *Convention on the Prevention and Punishment of the Crime of Genocide*, signed in 1948.

Genocide is extremely difficult to prove and cases involve enormous amounts of documentary evidence, forensic evidence, review of killings and military orders, testimony, expert opinions and more. It can involve accusations of the killing of countless people, from hundreds to millions. The court will need to prove beyond a reasonable doubt an intention to destroy all or part of the particular group.

There are numerous tragic examples of genocide throughout history. However, claims of genocide are often extremely controversial and in some cases vehemently opposed by the groups accused of perpetrating the crime. The most universally recognised genocide is the killing of six million European Jews in World War II, under a program of deliberate extermination that was planned and carried out by the National Socialist German Workers Party (also known as NSDAP or the Nazi Party), and led by Adolf Hitler. Scholars suggest that under the widest definition of genocide, and including the deliberate extermination of Slavs, Romani, homosexuals, the mentally ill, political opponents and Jehovah's Witnesses, the death toll was as high as 17 million.

Prior to the establishment of the ICC in 2002, genocide, war crimes and crimes against humanity were often dealt with by the international community in specific ad hoc tribunals set up to prosecute particular incidents; examples are the International Criminal Tribunal for the Former Yugoslavia (ICTY), established to prosecute those most responsible for crimes committed during the break up of the former Yugoslavia, and the International Criminal Tribunal for Rwanda (ICTR), set up to prosecute

Figure 6.4 United Nations forensic experts unearth victims from a mass grave in Srebenica, Bosnia. The victims are among the estimated 8000 civilians killed by Bosnian Serb soldiers in July 1995.

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Figure 6.5 Defendants in the dock at the Nuremberg trials

those most responsible for crimes committed during the Rwandan genocide. Since its creation, the ICC has not yet succeeded in convicting any person of genocide.

Crimes against humanity

Crimes against humanity are acts 'committed as part of a widespread or systematic attack directed against any civilian population'. Included under art 7 of the Rome Statute, the scope of crimes against humanity is significantly broader than genocide – see the definition below.

Unlike genocide, which requires proof of 'intention to destroy' all or part of a group (national, ethnic, racial or religious), crimes against humanity can occur against any civilian population; the requirement is only that the acts be widespread or systematic. The Rome Statute requires multiple commissions of any of the listed acts, which need to be carried out under a state or organisational policy. In effect, genocide and crimes against humanity can involve the same or similar devastating acts. Under the current definition, crimes against humanity may be easier to prosecute by the ICC because of the broader definition and issues of proof. The fact that the term 'genocide' holds such enormous political weight also means that political agreement between states to prosecute it may be difficult to achieve.

While there might be important symbolic differences between calling something 'genocide' rather than a 'crime against humanity', this does not lessen the severity of the crime. Initially, genocide was considered a type of crime against humanity. In the **Nuremberg trials** following World War II, the Allied powers prosecuted prominent leaders of Nazi Germany for crimes against the international community. The founding documents of the tribunals charged the leaders with crimes against humanity, as well as war crimes. Although the crimes against humanity that were charged included references to genocide, genocide was only later separated and individually defined by the 1948 *Convention on the Prevention and Punishment of the Crime of Genocide*.

Nuremberg trials
a series of military tribunals that took place in Nuremberg, Germany after World War II (from 1945 to 1946); they were organised and run by the victorious Allied powers, and are famous for their prosecution of prominent leaders of defeated Nazi Germany for crimes against humanity and war crimes

Formerly, crimes against humanity were considered as having been committed within the context of war, although the genocide convention contains no such restriction. This was because the crimes were generally considered as in addition to war crimes, but arising from the same incidents. However, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has since clarified that crimes against humanity do not have to be committed within the context of an armed conflict. The current ICC definition contains no restriction to a war context.

Crimes against humanity – art 7 of the Rome Statute

For the purpose of this Statute, 'crime against humanity' means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:
(a) Murder;
(b) Extermination;
(c) Enslavement;
(d) Deportation or forcible transfer of population;

Continued

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(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law;
(f) Torture;
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
(h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
(i) Enforced disappearance of persons;
(j) The crime of apartheid;
(k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Review 6.2

Consider the Rome Statute's definition of crimes against humanity and complete the following tasks.

1. Identify some of the differences between the crime of genocide and crimes against humanity.
2. Explain some of the reasons why crimes against humanity might be easier to prosecute than the crime of genocide.
3. Article 7(2) of the Rome Statute contains extended definitions of the acts outlined above. You can find the Rome Statute on the ICC's website (see http://cambridge.edu.au/redirect/?id=6248). Looking at art 7(2), describe what is meant by the terms 'extermination', 'torture' and 'forced pregnancy'.

War crimes

In its broadest definition, a war crime is an activity performed during a time of war that goes against the rules of war as accepted by the international community. A number of international agreements outline actions in war that constitute criminal violation – the most well known are the **Geneva Conventions**. The Geneva Conventions date back to 1864 and are a series of treaties (and additional protocols to the treaties) that set standards for humanitarian treatment of the victims of war, such as civilians, the sick and wounded, prisoners of war and medical or religious personnel.

Geneva Conventions
four treaties, with three extra protocols, that set the international law standards for the humane treatment of the victims of war, whether military or civilian

Article 8 of the Rome Statute also provides an extensive list of activities that can constitute war crimes. The actions must have taken place during an armed conflict, either international or domestic, and in particular the ICC has jurisdiction where the acts are part of a plan or policy, or part of any large-scale commission of war crimes.

The Rome Statute includes as war crimes any 'grave breaches' of the Geneva Conventions, as well as a long list of serious violations of the laws of international armed conflict. It is universally understood that during the hostilities of armed conflict there is a need to protect innocent civilians and their communities from violence. For example, war crimes listed under the Rome Statute include:

- torture or inhuman treatment, including biological experiments
- wilful killing or wilfully causing great suffering or serious injury
- extensive and militarily unjustified destruction or appropriation of property
- intentionally directing attacks at civilian populations or objects
- intentionally directing attacks at humanitarian personnel or equipment.

Transnational crimes

Transnational crimes are crimes that take place across international borders. Unlike crimes against the international community, which are a class of extremely serious crimes punishable internationally, transnational crimes are similar to domestic crimes,

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Case Study

Prosecution of Sudanese President Omar al-Bashir

On 14 July 2008, ICC prosecutors filed a number of charges against the President of Sudan, Omar al-Bashir, over a series of ongoing atrocities against three tribal groups in Darfur. The situation had had large-scale international attention and been subject to intensive campaigning by political leaders, human rights groups and high-profile celebrities.

Ten of the charges were for war crimes, five for crimes against humanity, three for genocide and two for murder. Prosecutors presented evidence that al-Bashir 'masterminded and implemented a plan to destroy in substantial part the Fur, Masalit and Zaghawa groups, on account of their ethnicity'.

On 4 March 2009, the ICC issued a warrant for President al-Bashir's arrest for war crimes, intentionally directing attacks against a civilian population and pillaging, and for crimes against humanity, including murder, extermination, forcible transfer, torture and rape. The charge of genocide had not been pursued. This was the first arrest warrant issued by the ICC against a sitting head of state, and it was opposed by the African Union, the League of Arab States, the Non-Aligned Movement, and the governments of China and the Russian Federation.

While the initial charges against al-Bashir did not include genocide, on appeal by the prosecutor's office, the pre-trial chamber was found to have improperly dismissed the genocide charges, and was ordered to re-examine the evidence. On 12 July 2010, the pre-trial chamber found that there was enough evidence, and so second arrest warrant, which included three counts of genocide, was later issued.

However, on 26 December 2014 the ICC suspended the case against al-Bashir, on the grounds that nothing had been done to secure his arrest. This further highlighted the difficulty in gathering sufficient political will, especially in the UN Security Council, to mount such cases and ensure the accused appear before the court. The court's prosecutor, Fatou Bensouda, stated that she was shelving the Darfur investigation because of a lack of support from the UN Security Council.

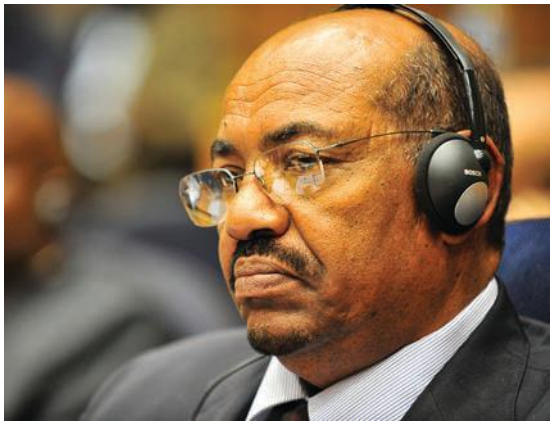

Figure 6.6 Sudanese President Omar al-Bashir

Research 6.1

Visit the ICC website (http://cambridge.edu.au/redirect/?id=6249) and then do the following.

1. Research art 8 of the Rome Statute and identify a list of activities considered to be war crimes.
2. Research the circumstances that led to the issuing of the arrest warrant for the Sudanese President Omar al-Bashir and identify any recent developments in the case.

such as fraud, hacking or drug trafficking, but have movement across international borders as an element of the criminal act. Transnational crimes may originate in one country but be completed in another, or may be committed in one country but the result or injury may occur in another.

Some transnational crimes have existed for centuries, whereas others have been made possible

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by the development of modern technologies. Due especially to the rise of rapid international telecommunications and international travel, local authorities and policy-makers increasingly have to confront offences and offenders whose origins are outside their jurisdiction. The move to a global economy, as well as the increased volume and diversity of migration, has also led to more opportunities for transnational crime.

Some of the main types of transnational crimes include:

- **human trafficking** and people smuggling across borders
- international fraud and white-collar crime (for example, tax evasion or money laundering)
- transnational internet crimes, including data theft, internet fraud, copyright infringement and spam networks
- international terrorism, including cyber-terrorism such as disruption of infrastructure, including via electrical systems or computer networks
- creation and trafficking of child pornography
- transnational trade in illegal substances, including via international air, shipping and postal networks.

human trafficking
the commercial trade or trafficking in human beings for the purpose of some form of slavery, usually involving recruiting, transporting or obtaining a person by force, coercion or deceptive means

It is impossible to itemise all forms of transnational crime as there may be a number of crimes and parties involved and various methods employed to commit the crime. Some crimes may cross many borders; for example, terrorism may be planned in one country, while training can occur in another, funds or materials can be sourced in another country, and the act itself is carried out in the target country. Organised crime rings can have operations across many countries and various elements of the crimes may take place at different locations.

Causes of transnational crimes might include:

- differences in socioeconomic conditions between countries; for example, human trafficking or internet fraud may originate in less advantaged countries

Figure 6.7 The rise of rapid international telecommunications means local authorities and policy-makers increasingly have to confront offences and offenders whose origins are outside their jurisdiction.

- the desire for prohibited goods or services, where suppliers are based in one country and consumers in another
- differences in political or ideological viewpoints (for example, international terrorism or international hacking for political or ideological reasons)
- hope that the transnational element will prevent detection (for example, international money laundering or tax evasion)
- opportunistic desire for power or financial gain.

Transnational crimes will usually be prosecuted under the law of one or another country's domestic jurisdiction. For many crimes, the elements of the crime will not be complete until the border has been crossed, so the target country will often be the enforcer, through its local legislation and law enforcement.

The nature of transnational crime can make prosecution very difficult. For example, a person in Nigeria who sends bulk spam or fraudulent emails to Australian addresses will be very difficult for Australian law enforcement authorities to track down or prosecute. Similarly, the creation and dissemination of child pornography throughout the world is a major concern – authorities in Australia and around the world find it difficult to break through the anonymity of child pornography rings that operate in many countries.

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Due to the difficulties in trans-border detection and enforcement of criminal laws, many laws relating to such crimes are now underpinned by cooperation agreements between a pair or group of countries affected in some way by those crimes. Some of the methods used to enforce these laws are discussed below.

Review 6.3

1. Explain how transnational crimes differ from ordinary crimes.
2. Identify some of the types of transnational crime.
3. Assess some of the causes of transnational crimes and the difficulties in combating them.

6.3 Dealing with international crime

Dealing effectively with international crime requires an approach that combines domestic and international measures. The methods used to deal with crimes against the international community and transnational crimes are considered separately below.

Domestic measures

Domestic responses to international crime are limited by jurisdiction. Australian law enforcement cannot operate in a foreign country, Australian courts do not have jurisdiction over crimes committed under foreign laws, and Australian parliaments cannot make laws that affect the laws of other countries. As a result, the ability of the Australian legal system to respond is inhibited unless there is cooperation with foreign countries.

There are specific circumstances where exceptions may be possible, such as where express permission has been granted for the presence of Australian law enforcement by the host country (for example, assisting in crisis relief efforts), where parliament legislates on actions of Australian residents abroad (for example, child sex tourism laws) or where an Australian court claims jurisdiction under a rule of international law (for example, universal jurisdiction). However, many other important actions have been taken in Australia to combat international crime; these are considered below.

Crimes against the international community

The most significant recent development in Australia in terms of dealing with crimes against the international community was the signing and ratification of the Rome Statute. Australia was one of the first signatories, signing on 9 December 1998. Australia ratified the statute on 1 July 2002, which was the date the statute came into force internationally.

Prior to the introduction of the Rome Statute, Australia had legislated to criminalise a number of recognised crimes against the international community: the *War Crimes Act 1945* (Cth) and in particular the *Geneva Conventions Act 1957* (Cth), which outlawed the recognised war crimes listed in the Geneva Conventions, for example. Coinciding with Australia's ratification of the Rome Statue, the federal government passed the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) to ensure that Australia's domestic laws would comply with the statute.

In addition to procedural amendments, the legislation introduced a new chapter to the Commonwealth *Criminal Code*: Chapter 8 – Offences against Humanity and Related Offences. The new chapter made all the crimes listed in the Rome Statute offences in Australia. It did the same for some existing offences, such as many of the war crimes listed under the *Geneva Conventions Act 1957* (Cth).

As a consequence, any crime against the international community outlawed by the Rome Statute is also a crime in Australia. The ICC's role as a court of last resort was discussed earlier in this chapter. The ICC is intended to complement rather than exclude existing state criminal justice systems and it can only prosecute a case when state courts cannot or are not willing to do so. Australia now has primary jurisdiction to investigate and prosecute such crimes if they occur in Australian territory or involve Australian citizens.

Australia also has a role to play as a state party to the ICC and actively participates in discussions

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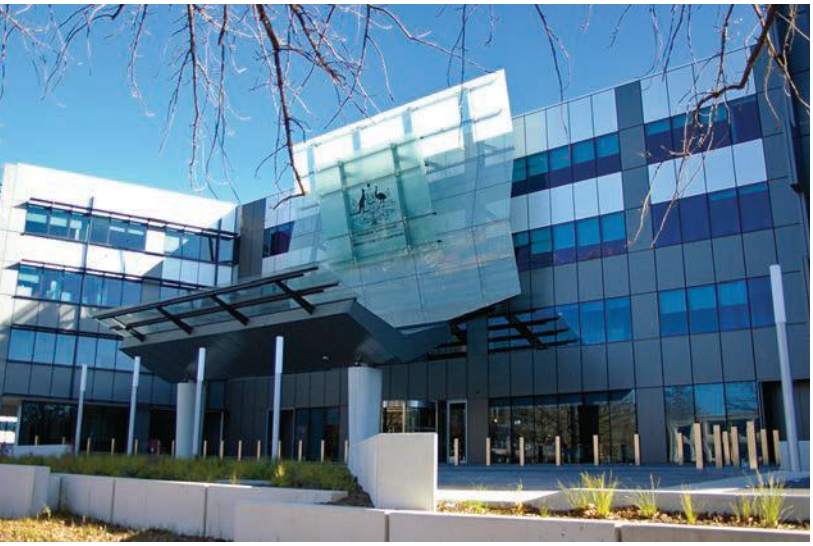

Figure 6.8 Head office of the Attorney-General's Department in the Australian Capital Territory

among the state parties and in administration of the court. At the time of publication, there has yet to be an Australian judge appointed to the court. Under the Australian legislation, the Commonwealth Attorney-General must report annually on the operations of the ICC, and on any impact it has had on the Australian legal system. According to the report of the Attorney-General's Department for 2008–09, there have so far been no Australian prosecutions for crimes under the Act, and the ICC has had 'no discernible impact' on Australia's legal system.

Transnational crime

The Australian Government, like many governments around the world, has moved in recent years to combat the rise of transnational crimes. The following are some of the measures in place to monitor and respond to issues of transnational crime.

Australian Federal Police (AFP)

The **Australian Federal Police (AFP)** was established under the *Australian Federal Police Act 1979* (Cth) to uphold Commonwealth criminal law and to guard Australia's interests from crime in Australia and overseas. The AFP interacts with a variety of law enforcement groups at state, territory, Commonwealth and international levels.

Australian Federal Police (AFP)
Australia's Commonwealth police force, established to uphold Commonwealth criminal law and to guard Australia's interests from crime both in Australia and internationally

The role of the AFP has grown considerably in recent years with the growth in transnational crime. In addition to its many domestic duties, the AFP is also engaged in various international activities. This includes posts in more than 25 countries, deployment of Australian police for international capacity-building, monitoring and **peacekeeping**, and specialist training for international law enforcement agencies to help prevent transnational crimes at their source and encourage greater international cooperation.

peacekeeping
the activity of creating conditions for sustainable peace in countries affected by conflict, through the use of force, quite often provided by a number of countries and consisting of soldiers, civilian police and civilian personnel

Some of the AFP's international operations include child protection, counter-terrorism operations, stopping human trafficking and drug operations. For example, the Jakarta Regional Cooperation Team has helped Indonesian police investigate and arrest suspects in relation to the 2002 Bali bombings in Indonesia and the bombings of the Australian Embassy and the Marriott Hotel in Jakarta in 2004 and 2005, respectively. The AFP has also established the Jakarta Centre for Law Enforcement Cooperation, which aims to increase the skills of regional law enforcement to deal with transnational crime. Over 5000 participants have now completed the Jakarta Centre's programs, which include training in criminal intelligence, forensics and financial investigation.

The AFP is also continuing to develop relations with other regional bodies such as the Southeast Asian Regional Centre for Counter Terrorism in Kuala Lumpur and the International Law Enforcement Academy in Bangkok.

Commonwealth Attorney-General's Department

The Commonwealth Attorney-General's Department plays varied roles in relation to transnational crimes. It reports and provides valuable advice on Australia's compliance with its international obligations,

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oversees the operation of legislation relating to transnational crimes and provides advice on its implementation, and provides general information to the public and to parliament on the status of Australia's efforts against transnational crime.

Australian Crime Commission (ACC)

The Australian Crime Commission (ACC) is a national statutory body established under the *Australian Crime Commission Act 2002* (Cth) to combat serious and organised crime. It investigates matters of national concern, and in coordination with other international law enforcement agencies it delivers specialist law enforcement capabilities to assist in investigating and analysing intelligence concerning national and transnational crimes. According to the ACC's 2011 report, *Organised Crime in Australia*, most significant organised crime groups operating in Australia have an international dimension to their interests. Some areas that the ACC specifically investigates include Southeast Asian organised crime (the primary source of the heroin that comes into Australia), money laundering and tax fraud, identity crime, and human trafficking for sexual exploitation.

Australian Border Force

Australian Border Force (formerly the Australian Customs and Border Protection Service) is a national

Legal Info

Ending human trafficking

Human trafficking is a very serious issue in transnational crime. It involves the movement of people by force, coercion or deceptive means, often of women and children into the sex industry. The global trade in people is a complex and difficult crime to eradicate and estimates suggest there are between 500 000 and 4 000 000 victims annually. In the last decade, over 250 trafficking matters in Australia were referred to the AFP.

The Australian Government has introduced a number of measures since 2003 to combat human trafficking. Various offences related to human trafficking are listed in the *Criminal Code Act 1995* (Cth), including slavery or any commercial transaction involving a slave, sexual servitude or deceptive recruiting, or trafficking in people and forced labour. Similar legislation has been passed in Australian states and territories. The government has also dedicated a significant amount of money (about $60 million from 2003) to the problem, involving numerous government bodies and attempting to tackle the issue from initial recruitment to eventual reintegration of victims, including:

- AFP funding to strengthen its ability to detect, investigate and provide specialist training for tackling the crime
- a National Policy Strategy to combat trafficking of women for sexual servitude
- support measures and special visa arrangements for victims of trafficking
- cooperation with regional and international agencies in tackling the sources and prosecuting the offenders
- support and training for the Commonwealth Director of Public Prosecutions to help prosecute people trafficking.

The issue of human trafficking is explored in more detail in Chapter 9.

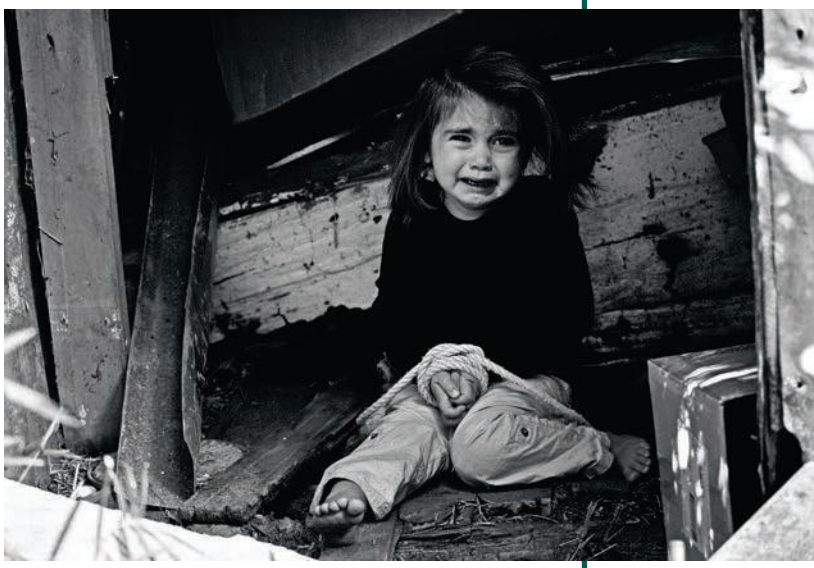

Figure 6.9 Many women and children are victims of human trafficking.

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agency that looks after the security and integrity of Australian borders. The agency works closely with other government and international agencies to prevent illegal transfer of goods or people across Australia's borders.

Australian High Tech Crime Centre (AHTCC)

The Australian High Tech Crime Centre (AHTCC) was created in 2002 to coordinate all Australian law enforcement authorities in fighting serious types of crime that involve the use of technology. It now forms part of the AFP's High Tech Crime Operations. Its main functions include:

- coordinating a national approach to serious, complex and multi-jurisdictional crimes
- assisting all Australian jurisdictions in their ability to deal with high-tech crime.

The AHTCC has representatives from every Australian jurisdiction and is funded by all states and territories.

State and territory bodies

There are numerous state and territory bodies that investigate transnational crimes due to their cross-jurisdictional nature. In New South Wales, some of these include the Independent Commission Against Corruption (ICAC), the New South Wales Crime Commission, the Police Integrity Commission and divisions within the NSW Police Force. Intelligence sharing and cooperation and coordination between national, state and territory bodies are essential in combating transnational crime.

Review 6.4

1. Describe the domestic regime in Australia applying to crimes against the international community.
2. Outline some of the domestic measures available to Australia to combat transnational crime.
3. Evaluate the effectiveness of using domestic measures alone in dealing with international crime.

International measures

There have been many international measures aimed at tackling international crime. These measures can be generally divided into the following categories:

- cooperation among governments through international treaties and international organisations targeted at specific types of international crime
- international courts and tribunals to deal with enforcement of international law
- cooperation and intelligence sharing between national and sub-national agencies to tackle problems of trans-border crime.

Crimes against the international community

Most of the international efforts aimed at preventing or prosecuting crimes against the international community have been discussed above. Governments have showed continuing commitment and close cooperation in their development of international treaties such as the Geneva Conventions and the *Rome Statute of the International Criminal Court*. It is in the nature of such crimes that the international community recognises and universally agrees to condemn them.

Courts and tribunals

Before the establishment of the ICC, international crimes were usually dealt with on a domestic level by courts or military tribunals. However, throughout the 20th century, and particularly in the 1990s, various ad hoc international tribunals were also established in order to prosecute atrocities relating to particular events. This began with the Nuremberg trials and the Tokyo trials, which prosecuted crimes against humanity and war crimes relating to World War II. More recently, the International Criminal Tribunal for the former Yugoslavia (ICTY) was established in 1993 by the UN Security Council to investigate and prosecute individuals for war crimes, crimes against humanity and genocide committed during the Yugoslav conflict in the 1990s.

The International Criminal Tribunal for Rwanda (ICTR) was established in 1994, also as a Security Council ad hoc court to prosecute those most responsible for crimes committed during the Rwandan genocide from April to June of that year. Following this, two hybrid international courts

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Figure 6.10 International flags outside the Yugoslavia Tribunal building.

Legal Info

Situations under ICC investigation as of January 2016.

- Uganda
- Democratic Republic of the Congo
- Darfur, Sudan
- Central African Republic (two situations)
- Kenya
- Libya
- Côte d'Ivoire
- Mali
- Georgia.

Legal Links

TRIAL (Track Impunity Always) is an independent Swiss association that works for justice against the perpetrators, accomplices and instigators of genocide, war crimes and crimes against humanity. It occasionally appears before courts, including the ICC, on behalf of victims. Its website tracks the progress of cases involving crimes against the international community (see http://cambridge.edu.au/redirect/?id=6250).

Research 6.2

On the website of the ICC (http://cambridge.edu.au/redirect/?id=6249) and on the internet generally, research two of the situations listed in the 'Legal Info' box and complete the following tasks.

1. Explain what events the situation relates to.
2. Identify when the situation was referred to the ICC and who referred it (for example, a state or the UN Security Council).
3. Identify some of the accused people and describe what stage their matter is currently at (for example, pre-trial, trial or appeal).
4. Describe any new situations that have been referred to the ICC.

were established for the conflicts in Sierra Leone and Cambodia. Hybrid courts are distinct from ad hoc tribunals in that while they both focus on international crimes, the hybrid tribunals are established by agreement between the government in question and the UN, whereas the ad hoc tribunals are imposed upon a government.

The world's first non-conflict specific tribunal was established in 2002 in the form of the ICC. It has launched investigations and prosecutions into a number of more recent events. To date, a number of state parties have requested investigations into internal matters and one matter has been referred to the court by the UN Security Council.

Extradition treaties

One of the most important tools in fighting international crime is **extradition** treaties. Extradition is the process whereby one country surrenders a suspect or convicted criminal to another country to face criminal charges or sentencing. For example, if a person commits murder in another country and flees to Australia before they are caught, they might be extradited back to the original country. It is relevant to all types of crimes, including international crimes.

extradition
the legal surrender of a suspect or convicted criminal by one jurisdiction to another to face criminal charges or sentence

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Extradition is generally governed by a series of **bilateral agreements** with other countries. Australia currently has extradition agreements with about 130 countries – more information is provided on the website of the Commonwealth Attorney-General's Department (see http://cambridge.edu.au/redirect/?id=6251).

bilateral agreement
an agreement between two countries

However, a few international agreements, including the Rome Statute and the Geneva Conventions, also have their own specific extradition arrangements. For example, Australia has received three extradition requests from the ICTY against people residing in Australia who are accused of committing war crimes.

In Australia, extradition is governed by the *Extradition Act 1988* (Cth). The Act sets out the criteria for extradition to be granted. It must be determined that the accused has a case to answer on the evidence and that the accused will receive a fair trial in the state to which they are being returned. It must also be shown that the offence is a crime in both Australia and the target country.

Extradition is an extremely important method of combating international crime as it ensures that an offender cannot simply flee the jurisdiction where the offence was committed in order to escape prosecution for their crime. Australia is obliged under the Rome Statute to fulfil its obligations in regard to war criminals that may be living in our jurisdiction. The case of Dragan Vasiljkovic (discussed in the media article on page 141) illustrates some of the issues that may arise under an extradition request.

Review 6.5

Read the media article on page 141 and complete the following tasks.

1. Identify the types of crimes Mr Vasiljkovic is accused of and the international situation that they allegedly occurred in.
2. Explain the nature of the extradition request and identify the main issue that Australian courts have raised.
3. Outline the court process that Mr Vasiljkovic's case has progressed through.
4. Evaluate whether or not you think justice can be properly served in this case.

Transnational crimes

There is a long list of international organisations and international treaties that aim to combat transnational crimes, either in general or in relation to specific crimes. Some specific examples of these are provided below.

International Criminal Police Organization (INTERPOL)

INTERPOL is the world's largest international police organisation, and to date it has 188 member countries, including Australia. INTERPOL was created in 1923 as a means of improving cooperation between police around the world. Its mission is to prevent or combat international crime. Its headquarters are in Lyon, France.

International Criminal Police Organization (INTERPOL)
the world's largest international police organisation, established in 1923 to facilitate collaboration among intelligence agencies around the world

At any given time, the organisation is engaged in numerous operations, investigating and providing advice to states' law enforcement agencies on

Figure 6.11 Police from different nations at the 82nd INTERPOL General Assembly, 2013

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News

Croatia to appeal to High Court over Dragan Vasiljkovic extradition

Angus Hohenboken

The Australian, 12 February 2010

The High Court has granted the Croatian Government special leave to appeal a full Federal Court decision preventing the extradition of Serbian paramilitary leader 'Captain Dragan' to Croatia to face questioning over his alleged involvement in war crimes.

The Croatian Government argues the decision has wide implications for Australia's ability to pursue the alleged perpetrators of international crimes. In its application the Croatian Government said that the Federal Court was wrong to conclude that Mr Vasiljkovic, an Australian citizen, could not receive a fair trial in Croatia because of his political beliefs.

Under section 7c of Australia's Extradition Act, an accused person can be exempted from extradition if on surrender to the extradition country 'the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of race, religion, nationality or political opinions'.

The full Federal Court found in its September judgement that Croatia's courts had allowed [the country's] own soldiers to rely upon their service in the Croatian armed forces during the Balkans' 'homeland war' to mitigate sentences in criminal matters, but [that] Serbian soldiers had not received the same consideration.

The Federal Court concluded that, if convicted, Mr Vasiljkovic might be incarcerated for a longer period than a Croatian counterpart, largely as a consequence of his political beliefs.

The Croatian Government will argue that the Federal Court wrongly concluded that Mr Vasiljkovic might receive a longer sentence if convicted because of his political beliefs, and that the mitigating factor applied to Croatian soldiers was irrelevant to Mr Vasiljkovic.

Mr Vasiljkovic was the commander of a paramilitary unit known as the Red Berets during the ethnic conflict in the Balkans between 1991 and 1993.

The republic of Croatia wishes to question Mr Vasiljkovic in relation to allegations against him including that he directed his troops to commit the war crime of torture and committed the war crime of torture during his time in Srpska Krajina, a Serbian-dominated part of Croatia, until 1993.

He has vigorously denied the claims …

Last February, a Federal Court judge dismissed a challenge by Vasiljkovic against a magistrate's finding that he was eligible for surrender to the Republic of Croatia.

But in September, a full bench of the court allowed Mr Vasiljkovic's appeal, and he was released from Sydney's Parklea prison after almost four years in custody.

transnational crimes. For example, some of its current operations include targeting organised crime in Asia and Eurasia, international counterfeiting and money laundering, trafficking in arms and drugs, and international terrorism.

There has recently been some movement towards developing a 'global police force', as advocated by INTERPOL in cooperation with the UN, to improve the skills of police peacekeepers and the sharing of communications networks and criminal data. One

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result of sharing resources and developing common standards might be an increase in the ability to track the movement of criminals around the world.

Research 6.3

INTERPOL's website contains detailed information on transnational crime. Select one of INTERPOL's priority crime areas and research it on INTERPOL's website, and then complete the following tasks.

1. Identify the types of transnational crimes that are included in that priority area.
2. Describe the background to one of the crimes as explained by INTERPOL.
3. Assess some of the measures that INTERPOL is taking to deal with the crime.

United Nations Convention against Transnational Organized Crime

The *United Nations Convention against Transnational Organized Crime* is regarded as the main international instrument in the fight against transnational organised crime. It began operation in 2000 and has three protocols that countries become a party to once they sign the convention.

These are:

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children
- Protocol against the Smuggling of Migrants by Land, Air and Sea
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

Signature states commit themselves to ensuring that their own domestic criminal law makes offences of the activities of organised crime, money laundering and other aspects of corruption. States must also adopt broad changes to extradition procedures, commit to providing 'mutual' legal assistance and cooperation among law enforcement agencies, and undertake to upgrade the capacity of national authorities to deal with organised transnational crime networks.

Legal Links

For more information on the *United Nations Convention against Transnational Organized Crime* and its protocols, visit the website of the UN Office on Drugs and Crime (see http://cambridge.edu.au/redirect/?id=6252).

Pacific Transnational Crime Network (PTCN)

The Pacific Transnational Crime Network (PTCN) was formed in July 2002 as a response to increases in regional transnational crime. It was an initiative of the AFP, who realised that strong relationships were needed between Australia and its Pacific neighbours if it were to combat the problem of transnational crime. The network's headquarters are now at the Pacific Transnational Crime Coordination Centre (PTCCC) in Apia, Samoa.

The PTCN, with the AFP, has created a regional network of transnational crime units in Pacific states with a focus on combating cross-border criminal activity such as drugs and arms smuggling or money laundering. It manages, coordinates and enhances law enforcement intelligence and data across the region. Pacific countries have been identified as particularly vulnerable to the threats of transnational crime, especially from organised crime groups. They may also have fewer resources to tackle law enforcement or to detect and prosecute such crimes, and the PTCN provides technical assistance, training and resource sharing and helps to strengthen the rule of law in Pacific countries. The PTCCC was opened in 2008 to coordinate and analyse criminal intelligence data in the Pacific region. It acts as a 'one-stop' agency for the flow of information for the Transnational Coordination Units (TCUs) set up around the region.

The PTCN has been successful in the region. For example, in 2004 it discovered and dismantled a methamphetamine laboratory in Suva, Fiji – the largest in the southern hemisphere. The laboratory posed serious environmental and physical danger to local communities, and the drugs could have been intended for markets in Australia and New Zealand, Europe and the United States. Recently, there have

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been some high-profile arrests of Pacific regional figures engaged in various immigration, financial fraud and money-laundering activities.

6.4 The effectiveness of measures dealing with international crime

Some of the most significant measures used to combat international crime were described above. However, due to the complex and difficult nature of transnational crimes, the effectiveness of those measures is not always as great as we would hope.

Transnational crime

In transnational crime, there are often complex organised criminal groups at work using sophisticated measures to avoid detection. Authorities around the world have to combat a number of crimes, including identity fraud, internet crime, paedophilia rings and the trafficking and smuggling of people and contraband. Some states may lack the skills, training and resources to combat such crimes or may be unable to do so due to political unrest or high levels of state corruption. Such states may become targets or breeding grounds for transnational crime affecting other states, making it very difficult to combat the problem.

The main areas for efforts against transnational crime to address include:

- the extent of international cooperation between states – the provision of adequate resources and the effectiveness of coordination among international agencies, including the exchange of information
- the level of compliance among weaker or poorer states – states where the rule of law may be weak become targets by organised crime groups.

To be successful, states will require cooperation and the sharing of skills, resources, funding and intelligence on an unprecedented scale. To date, some important measures, both domestic and international, have been put in place to cope with transnational crime and they have had some success. However, as with domestic crime, transnational crimes are unlikely to disappear any time soon and, as the world changes, an increased effort will be needed to tackle the issues they present.

Crimes against the international community

Clearly the most significant development in combating crimes against the international community has been the establishment of the ICC, which followed numerous specific ad hoc tribunals set up to cope with crimes committed in specific situations, such as Rwanda and Yugoslavia.

Generally, ad hoc war crimes tribunals have been reactive and extremely resource-inefficient if the number of prosecutions is a measure of performance. The International Criminal Tribunal for the Former Yugoslavia (ICTY) has had more success than any other such body, having indicted close to 260 people, with all but one of these cases having being dealt with. This is a victory for international justice, but the cost has run to billions of dollars. Eventually ad hoc war crimes tribunals will run their course as matters are resolved or remain unprosecuted and the ICC is used to prosecute more recent offences.

A permanent court such as the ICC is symbolically very powerful, and sends a message

Figure 6.12 Crimes such as smuggling can spread across multiple states and countries.

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to leaders or other criminals that they can no longer hide behind immunity in their own state when they have committed appalling acts. Also, the threat of later prosecution may act as a deterrent, stopping rogue leaders using any such tactics. It also offers enormous support to victims of the crimes by attempting to bring to justice those responsible for these atrocities. The ability of the ICC to deal with these issues is, however, questionable.

The tribunals and the ICC have not been without criticism. In particular, the courts are established to deal with these atrocities after they have been committed, and there is valid criticism that international law and the international community have been too slow to stop these atrocities before they occur, or even while they are occurring. Short of intervention by the UN Security Council, which has been rare, there is also no international force or police that can capture such offenders, especially when they remain inside their own state.

This is particularly evident, for example, in the conflict in Darfur, Sudan, where charges by the ICC were not laid against President al-Bashir until 2008, five years after the atrocities began, and ultimately were dropped as discussed previously. This was some 15 years after the world had witnessed the gruesome genocide in Rwanda, where 500 000 people were killed within just 100 days: the international community had condemned this and vowed never to let such a thing happen again.

The enormous cost of such investigations and prosecutions also needs to be borne by member states. As such it is never likely to be possible for the international community to prosecute all the offenders who commit these crimes. So the ICC is primarily focused on the 'main players' orchestrating the commission of the crimes outlined in the Rome Statute. As is the case with other international tribunals and courts, it must prosecute those 'most responsible'. The Special Court for Sierra Leone (SCSL) was mandated to prosecute those most responsible for crimes committed during the Sierra Leone civil war, but only nine have been convicted. On 26 April 2012, the former President of Liberia, Charles Taylor, was convicted of crimes relating to his role in the conflict and was later sentenced to 50 years' imprisonment.

It should also be noted that Australia, with a refugee intake from areas of the world where war crimes and crimes against humanity have occurred, has shown little political will to investigate the possibility of such people living within the Australian community. Having signed and ratified the Rome Statute, Australia is in fact obliged to do so.

Having said this, a permanent court, with established investigative and court mechanisms as well as permanent staff, is a step towards greater efficiency. The effectiveness of any international institution will usually come down to the sum of its parts. While the ICC now has over 110 member states, it lacks some of the world's most important and influential countries. These include some of the world's major powers (such as the United States, China and India), as well as some very influential countries (such as Pakistan, Vietnam and Indonesia).

Most objecting states claim that joining the ICC would violate their state sovereignty. As discussed above, one of the biggest advantages of the court is that it can act independently of state jurisdictions where they are unwilling or unable to do so. However, critics claim that in many cases states fear subjecting themselves to investigation of their own affairs – India over Kashmir, or China over Tibet or Xinjiang, for example. Nevertheless, the ICC only has jurisdiction for crimes committed after its establishment, and it still has jurisdiction over any individuals from non-member states who commit crimes against or in the territory of a member state. Supporters of the court argue that the danger of crimes against the international community occurring again without independent oversight or responsibility ought to outweigh the national interests of state parties.

In 2012, the ICC successfully prosecuted its first case. Congolese warlord Thomas Lubanga Dyilo was found guilty of war crimes (see the media article on page 145).

The continued development of the international criminal justice system is a promising tool to combat crimes against the international community. With adequate resources and political determination from states around the world, the ICC has the potential to make a significant difference in preventing further atrocities or bringing to justice those responsible where they do occur. However, strengthening the rule of law and combating other conditions that lead to conflict are ultimately more

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News

United Nations News Centre

16 March 2012

The Security Council today noted with appreciation the issuance of the first verdict of the ICC, which this week found Congolese warlord Thomas Lubanga Dyilo guilty of conscripting child soldiers under the age of 15 into his militia.

'War crimes involving the most vulnerable members of society, such as children, are of particular concern and this verdict is an important step towards ensuring that those responsible for such crimes are held accountable,' the Council said in a press statement read by Ambassador Mark Lyall Grant of the United Kingdom, which holds the Council's presidency this month.

The Court's trial chamber found Mr Lubanga Dyilo guilty of the war crimes of conscripting and enlisting children under the age of 15 into the Patriotic Forces for the Liberation of Congo, and using them to participate actively in hostilities in the Ituri district of northeastern Democratic Republic of the Congo (DRC) from September 2002 to August 2003.

'The members of the Security Council reaffirm their strong opposition to impunity for the most serious crimes of international concern,' the Council's statement said.

The 15-member body said that it recognised that this is an important moment for the victims who suffered as a result of Mr. Lubanga Dyilo's actions and expressed its sympathy to the survivors and others who have endured similar crimes during hostilities in DRC.

Yesterday, ICC Prosecutor Luis Moreno-Ocampo told reporters in Geneva that he will on 18 April ask the Court to sentence Mr Lubanga Dyilo to a prison term that is close to the maximum 30 years.

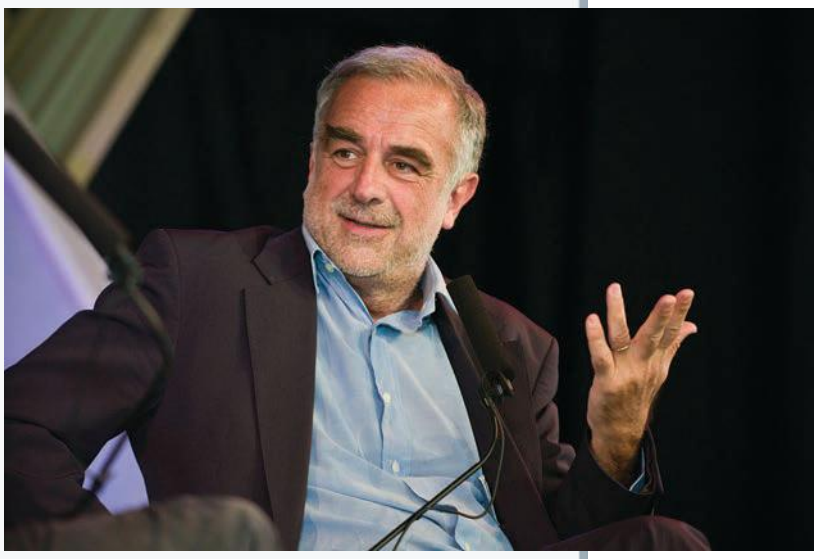

Figure 6.13 Luis Moreno-Ocampo, the ICC's first Prosecutor, who was replaced by Fatou Bensouda on 16 June 2012

resource-efficient than drawn-out prosecutions under the Rome Statute. At this stage it is too early to genuinely comment on the international criminal justice system's success – its true effectiveness will be judged as history unfolds throughout the 21st century.

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Figure 6.14 Child soldier in the Lord's Resistance Army

Legal Info

Investigations by the ICC

There were 23 cases in seven situations under investigation by the ICC at the start of 2016. The majority of these come out of Africa. This is a contentious point in legal scholarship: while African conflicts are the focus of international tribunals, including the ICC, European and more generally Western individuals who commit similar crimes are not pursued. At http://cambridge.edu.au/redirect/?id=6253 you can monitor the progress of these cases and others as they arise.

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Chapter summary

- International crime includes transnational crimes and crimes against the international community.
- Crimes against the international community include genocide, crimes against humanity and war crimes. These crimes are punishable internationally.
- Transnational crimes are crimes that occur across international borders, in their origin or effect.
- The main development in dealing with crimes against the international community is the establishment of the ICC in The Hague, The Netherlands.
- Extradition is an agreement between states that allows transfer of suspects and prisoners between states for trial or sentencing.
- There has been a growth in the federal and state agencies responding to the threat of transnational crime.
- Greater coordination of international agencies and sharing of resources are considered essential in combating transnational crimes regionally and internationally.
- Greater state agreement and support, as well as improved methods of enforcement, are required to effectively prevent crimes against the international community.

Questions

Multiple-choice questions

1 Which of the following contains an example of both a transnational crime and a crime against the international community?

A Genocide and war crime
B Drug trafficking and human trafficking
C Murder and money laundering
D Genocide and human trafficking

2 Genocide is most accurately defined as acts which have the intention of destroying all or part of:

A a political, ethnic, racial or religious group
B a national, social, ethnic or religious group
C a national, ethnic, racial or religious group
D a political, ethnic, social or religious group

3 Which of these statements is the most correct explanation of the complementary jurisdiction of the ICC?

A It allows member states' courts to investigate crimes against the international community.
B It allows member states' courts to investigate and prosecute crimes against the international community.
C It allows regional courts to investigate and prosecute crimes against the international community.
D None of the above

4 The *Extradition Act 1988* (Cth) ratifies a number of international treaty agreements entered into by the federal government. Which of the following statements best reflects the criteria used by the federal government when deciding whether or not to return an offender to another state?

A The offence is criminal in both states and the accused will receive a fair trial.
B The accused has a case to answer on the evidence, the accused will receive a fair trial in the country to which they are being sent, and the offence is criminal in at least one of the states.
C The accused has a case to answer on the evidence, the accused will receive a fair trial in the country to which they are being sent, and the offence is criminal in both states.
D The accused has a case to answer on the evidence, the accused will meet bail conditions, and the offence is criminal in at least one of the states.

5 Which of the following has *not* been attributed as a cause of the growth in transnational crimes?

A Better communication
B Growth of technology
C Ease of movement between jurisdictions
D Lack of cooperation between law enforcement agencies

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Chapter summary questions

1. Define international crime and describe how it differs from ordinary domestic crime.
2. Explain the difference between genocide and crimes against humanity.
3. Identify two domestic responses to international crime and assess their effectiveness in dealing with the problem.
4. Evaluate the effectiveness of the ICC in dealing with crimes against the international community.
5. Evaluate the effectiveness of international measures dealing with transnational crime.

Themes and challenges for Part I Crime

The role of discretion in the criminal justice system

- Discretion acknowledges that the law can be a blunt instrument in delivering justice. It allows individual circumstances to be taken into account when applying the law. It is considered important if the criminal justice system is to balance the rights of the community with the rights of individuals – the accused and victims – and if it is to address the tension between these competing interests. Discretion can also be used in a biased or corrupt way undermining justice.
- Discretion is a part of most steps in the criminal justice system.
- There are many people in authority who have discretionary power in the exercising of their roles. Police have discretionary powers of arrest in certain matters and they also have discretion in the exercising of their powers when carrying out their duties. References to course material can be used here and critiqued.
- The Director of Public Prosecutions (DPP) has discretion with respect to what matters it will prosecute. It examines if there is enough evidence and if it is in the public interest to prosecute.
- Magistrates and judges have discretion in matters pertaining to bail, rules of evidence and procedure as well as in sentencing matters. They also have discretion in matters on appeal.
- Reference to these areas, and more, and an evaluation of the course content are essential.

Issues of compliance and non-compliance in regard to criminal law

- The majority of individuals within a society obey the law most of the time. Individuals also enjoy the freedoms and protection a well-organised and, at times, well-regulated society gives. It is partly for this reason that the majority complies with the law. The law can also enforce compliance and sanction violations on behalf of society where individuals do not comply.
- Some of the reasons why people do not comply with the law include greed, self-interest, thrill, peer pressure, addiction, mental illness, political need or necessity. There is no set pattern and the specific reason for an individual's non-compliance may vary.
- Issues that could also be critiqued could include ways in which the criminal justice system tries to ensure greater compliance through:
  - crime prevention (situational and social)
  - more effective investigation of crime
  - the purposes of punishment to reduce criminal behaviour (the lack of success with high rates of recidivism)
  - emphasis on rehabilitative initiative with young offenders (such as youth justice conferencing)
  - measures to combat transnational crime.

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The extent to which the law reflects moral and ethical standards

- Crimes are actions that individual societies have decided should be illegal. For this reason, jurisdictions differ in what actions constitute a crime, and crimes change over time.
- Most crimes are the result of moral and ethical judgements by society (public morality) about behaviour that may be deemed harmful and therefore warrant sanctions by the state.
  In other words, what currently exists in international law, statute and common law is a reflection of our public morality. The ways the law may change to respond to shifts in public morality, and the areas today that are in a state of flux, reflect the moral and ethical standards of our community. Examples include:
  - specific domestic legislation and international treaties concerning international crime that reflect a degree of public morality
  - areas where there have been law reforms or changes to the law as a result of shifting public morality – sentencing laws, sexual assault laws, decriminalisation of certain behaviours, legislation concerning young offenders, and the growth of the international criminal justice system.

The role of law reform in the criminal justice system

Any example where the law changes is law reform. There are many examples already contained in the previous chapters. Agencies of law reform such as law reform commissions, parliaments, courts and other non-legal measures can be examined here with examples of how they have reformed the law. Some examples of law reform in the criminal justice system include:

- laws of sexual assault
- majority verdicts in juries
- guidelines in charge negotiation, alternative methods of sentencing such as circle sentencing, and restorative justice
- youth justice conferencing or other alternatives for young offenders
- alternatives to full-time imprisonment such as periodic detention, home detention or community service orders
- international crime – the ICC, INTERPOL or initiatives of the AFP
- failure of the existing law to deal effectively with sexual assault matters (low reporting and conviction rates)
- rehabilitation, rates of recidivism – refer to the prison system
- gathering of evidence – DNA, surveillance, remote witness facilities and transcript evidence; balancing police powers with the rights of the individual; and reliability and the process of such evidence contributing to delays in the court system.

The extent to which the law balances the rights of victims, offenders and society

- This picks up on part of the principal focus of the topic: the 'tension between community interests and individual rights and freedoms'. In many instances society's needs may outweigh the rights of individuals in light of, for example, anti-terrorism legislation or restriction in bail laws, where individual civil liberties have been eroded in the name of protection of the community. The law and order debate that has been ongoing in some areas has gained the upper hand in the balancing act that is the tension mentioned above.
- Areas that could be critiqued include police powers against the rights of suspects, or the criminal trial procedures that aim to balance the rights of victims, offenders and society. The right to a fair trial, supported by strict rules of evidence and procedure, is fundamental to the criminal justice system and this balancing act. The criteria used by judges when sentencing are also features of this balance and ongoing tension. This balance is further reflected in the decision to grant bail, charge negotiations negotiated by the DPP and the ability of the international criminal justice system to bring offenders of mass atrocities to justice. These are just some of the areas to be addressed in respect to this theme.

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The effectiveness of legal and non-legal measures in achieving justice

- This is a very broad theme that can be applied across all aspects of the crime topic. The legal measures include all institutions and processes enabled by law to deal with aspects of the criminal justice system. Non-legal measures must also be critiqued as change agents that can help improve and develop awareness of law, or pressure law-makers to regulate or deal with an area of concern within the criminal justice system.
- Broad areas of criminal law that outline the statute/common law responses, such as young offenders, international crime or the sentencing process, may be chosen. Non-government organisations, the media and so on can also be highlighted here and their role outlined and evaluated.

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Part II
Human rights

20% of course time

Principal focus

Students investigate the concept of human rights while discovering how the legal system attempts to protect and promote our rights by examining current issues and examples.

Themes and challenges

Themes and challenges covered in Part II include:

- changing awareness in the connection between human rights and state sovereignty
- dealing with compliance and non-compliance in respect to human rights
- how changing ethical standards and values are reflected in the development of human rights
- how law reform helps to continually protect human rights
- effectively protecting human rights through legal and non-legal measures.

HSC external examination information

The HSC examination will be a written paper worth a total of 100 marks. The paper will consist of three sections.

Questions relating to Part II of the syllabus – 'Human rights' – will appear in sections I and II of the examination.

Section I: Core 20 marks total (5 of the possible 20 marks will be based on 'Human rights')

Section I will consist of objective response (that is, multiple-choice) questions. Questions to the value of 5 marks will be drawn from 'Human rights'. Some of these questions may be based on, or refer to, stimulus materials.

Section II: Core 30 marks total (15 of the possible 30 marks will be based on 'Human rights')

Section II will be divided into two parts: Part A and Part B. Only Part A will relate to 'Human rights'. There will be three or four short-answer questions to the value of 15 marks. These questions may be in parts. These questions may refer to stimulus materials.

Chapters in this Part

Chapter 7 **The nature and development of human rights**

Chapter 8 **Promoting and enforcing human rights**

Chapter 9 **Contemporary human rights issues**

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Chapter 7
The nature and development of human rights

Chapter objectives

In this chapter, students will:

- define the concept of human rights
- explain the origins of the modern concept of human rights
- describe the achievements of the various movements for human rights
- identify the various types of human rights that have developed over the last two centuries
- locate the details of key human rights treaties
- discuss the significance of the *Universal Declaration of Human Rights* (UDHR) for the postwar development of international human rights law
- communicate the main features of the UDHR, the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- evaluate the effectiveness of the *International Bill of Rights*.

Key terms/vocabulary

abolitionism
collective right
debt slavery
Four Freedoms
hard law
human rights
human trafficking
inalienable right
Industrial Revolution
International Bill of Rights
International Covenant on Civil and Political Rights (ICCPR)
International Covenant on Economic, Social and Cultural Rights (ICESCR)
international customary law
International Labour Organization (ILO)
labour rights
Magna Carta
natural law
non-government organisations (NGOs)
positivism
ratify (ratification)
right to peace
self-determination
slavery
soft law
suffrage
suffragette
trade union
transatlantic slave trade
Universal Declaration of Human Rights (UDHR)
universal education
universal suffrage

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Relevant law

IMPORTANT LEGISLATION

Magna Carta (1215)
Constitution of the United States of America 1787 (US)
Bill of Rights 1789 (US)
Slave Trade Act 1807 (Great Britain)
Slavery Abolition Act 1833 (Great Britain)
Education Act 1870 (UK)
Trade Unions Act 1871 (UK)
Public Instruction Act 1880 (NSW)
General Act of Brussels (1890)
Representation of the People Act 1918 (UK)
Treaty of Versailles (1919)
Slavery Convention (1926)
Charter of the United Nations (1945)
Universal Declaration of Human Rights (1948)
International Covenant on Civil and Political Rights (1966)
International Covenant on Economic, Social and Cultural Rights (1966)
Stockholm Declaration (1972)
African Charter on Human and Peoples' Rights (1981)
Declaration on the Right of Peoples to Peace (1984)
American Convention on Human Rights (1988)
Rio Declaration (1992)
Kyoto Protocol (1997)
United Nations Declaration of the Rights of Indigenous Peoples (2007)

SIGNIFICANT CASES

R v Knowles; ex parte Somersett (1772) 20 State Tr 1
United States v Libellants and Claimants of the Schooner Amistad 40 U.S. (15 Pet.) 518 (1841)

Legal oddity

Towards the end of the 19th century, women in democratic countries began campaigning for the right to vote. In 1908 over 300 000 people took part in a march through London. To further draw attention to their cause, some women began committing acts of civil disobedience, such as chaining themselves to railings, smashing windows and even detonating bombs. More than one thousand women were sent to prison for public order offences, and many went on hunger strikes while imprisoned. In response, the British Government passed the *Prisoners (Temporary Discharge for Ill Health) Act 1913*, (also known as the Cat and Mouse Act), which meant that women whose health deteriorated due to hunger striking would be released from prison, but readmitted later to finish their sentence. This way, the government could not be blamed if the women died, and it also meant the released women would be too weak and ill to engage in further activities.

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7.1 The definition of 'human rights'

The Preamble to the ***Universal Declaration of Human Rights* (UDHR)**, adopted by the General Assembly of the United Nations (UN) in 1948, sets out the fundamental purpose for recognising **human rights**. It states that 'recognition of the inherent dignity of and the equal and **inalienable rights** of all members of the human family is the foundation of freedom, justice and peace in the world'.

***Universal Declaration of Human Rights* (UDHR)**
a declaration of rights adopted by the UN in 1948; the first universal acceptance of the idea of human rights and the reference point of all subsequent human rights treaties. In 1948 the UDHR was hailed as being 'a Magna Carta for all humanity.'

human rights
in a general sense, basic rights and freedoms believed to belong to all human beings

inalienable right
a right that cannot be taken away

The precise nature of human rights is not fixed, however, and is often the subject of debate. In a general sense, human rights refer to fundamental rights and freedoms that are believed to belong to all human beings. As stated in the UDHR, these rights differ from ordinary rights under domestic law in that they are considered to be *universal*, *inalienable* and *inherent in all people*. The UDHR is the international declaration of these rights that has formed the basis for laws, constitutions, international treaties and ongoing international debate on human rights. It arose out of World War II and is the first internationally asserted declaration of human rights.

Figure 7.1 The ***Magna Carta*** was signed by King John in 1215. It has since been seen hailed as a symbol of the rule of law.

Human rights are a collection of fundamental standards, decided upon by the international community, for the treatment of individuals. They aim to protect individuals from injustice, allow people to achieve their full potential in society, and prevent discrimination against groups of people because of their physical characteristics or beliefs. Countries around the world are seen to have a moral and legal obligation to respect and uphold these rights.

The generic term 'human rights' is relatively new and has only come into use since the late 19th century. But the rights themselves have developed gradually over many centuries. They relate to theories of the law itself, such as 'divine will', **natural law** and **positivism.** Historical sources include:

- the laws of ancient civilisations in Mesopotamia, Ancient Rome and India
- philosophers and religious scholars
- historical events/documents
- major conflicts.

Today, the term is used in many different contexts and human rights have evolved into an essential ingredient of justice, occupying an important place in law, society and international relations.

natural law
the theory that certain laws come from an unchanging 'natural' body of moral principles that are the basis for all human conduct, and so have validity everywhere

positivism
the theory that laws are valid simply because they are enacted by authority or from existing decisions, and that moral considerations do not apply

Magna Carta
a document signed in 1215 which recognised the principle that everyone, including the king, was subject to the law; 2015 was this historic document's 800th anniversary

However, human rights continue to be violated in many countries around the world. This can make human rights a perplexing concept. It may seem odd to read about the various treaties and laws that protect human rights, while knowing that these same rights are often ignored or suppressed. Despite this, the concept of human rights is central

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Figure 7.2 Many basic human rights are still violated, such as the right to seek asylum from persecution as stated in art 14 of the UDHR.

Review 7.1

1. How do human rights differ from ordinary rights under domestic law?
2. Identify five rights in the UDHR which are particularly relevant to Australia at this time.
3. Explain why respect for human rights is essential for the maintenance of a healthy democracy.

to the operation of law in modern democratic societies and is an integral part of the international legal system.

7.2 The abolition of slavery

Universal Declaration of Human Rights – abolition of slavery

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Slavery is a type of forced labour in which a person is considered to be the legal property of another. For most of human history, slavery was taken for granted and was considered integral to society and the economy. Slavery predates recorded history – it was common in antiquity and continued worldwide in various forms throughout the Middle Ages. Slavery was practised legally in many parts of the world until the 20th century.

In the ancient Mediterranean, the most common forms of slavery included **debt slavery** (being forced to pay a loan with labour rather than money), slavery as a punishment for crime, or prisoners of war committed to slavery. Children could be born into slavery and spend their entire lives as slaves, possibly paying off debts that were incurred generations earlier.

slavery
a type of forced labour in which a person is considered to be the legal property of another

debt slavery
slavery in order to pay off a loan with forced labour rather than money

Types of slavery differed around the world, but slavery was usually used as a way to fill certain roles in society for little or no cost, without needing to pay wages. Slaves were forced to carry out menial or labour-intensive jobs, in return receiving food and accommodation, in places where the structure of the modern welfare state did not exist. Some slaves were well educated and highly valued in their households, and occasionally could be awarded freedom (as freedmen). But in many instances slaves were mistreated and brutalised, and had no real legal rights and no means of escape. Laws generally treated slaves as objects, rather than as subjects of the law.

Moves to abolish slavery and slave trading in European cities and states began as early as the 12th century. Iceland, for example, officially abolished slavery in 1117. Although slavery of European citizens gradually became uncommon, slavery was still widely practised on the fringes of Europe and elsewhere in the world. As Europeans began to conquer the New World and their empires expanded, they required more and more resources to grow and support their new colonies. Slave labour was sought from newly discovered populations or races. European empires supported the use of slaves from new territories, but particularly from trade posts in Africa. Although the Roman Catholic Church prohibited the export

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of Christian slaves, it legitimised the use of non-Christian slaves in overseas territories.

Known as the **transatlantic slave trade**, this operated from the 17th century to the early 19th century – European ships would trade products for slaves in West Africa, where slavery was still widely practised, and carry the slaves to the New World colonies to grow and manufacture cash crops such as sugar. The profits would be returned to the European powers, and the trade cycle would continue. An estimated 12 million Africans were shipped from Africa to the Americas during this period, into often appalling conditions of slavery.

transatlantic slave trade
the trading of African people by Europeans, who transported them as slaves from Africa to the colonies of the New World

However, as the horrors of the slave trade became known in Europe, a political movement aimed at abolishing it began. Known as **abolitionism**, the movement began in the 18th century and gradually grew. Rationalist thinkers began to criticise slavery as violating the rights of man, and evangelical Christians began to criticise it as 'unchristian'. In Britain, slavery was ruled illegal in the common law of England in a 1772 judgement by the Court of King's Bench in the case of *Somersett (R v Knowles; ex parte Somersett* (1772) 20 State Tr 1, which arose during a period when many African, Indian and East Asian slaves were being brought to England to work as servants. The judge, Lord Mansfield, held that slavery was no longer legal in England – but this did not affect slavery elsewhere in the British Empire.

abolitionism
a worldwide political movement that sought to abolish slavery

Anti-slavery campaigns continued in Britain, led in particular by British politician and campaigner William Wilberforce, and exerted pressure on the British Government to end the trade in slaves in its overseas territories. Although fiercely opposed by those with interests in the trade, importation of slaves to the colonies was officially ended in the British Empire with the passing of the *Slave Trade Act 1807* (UK). The United States followed in 1808.

However, it was not until the *Slavery Abolition Act 1833* (UK) that slavery itself was abolished, and all remaining slaves in the British Empire were freed the following year. Most European countries ceased exporting slaves in the following decades. Many countries in Latin America abolished it during the wars of independence from Spain (1810–22).

Figure 7.3 A postage stamp from the United Kingdom commemorating William Wilberforce (1759–1833) and his campaign against slavery, which led to its abolition in 1807

Following the 1776 US *Declaration of Independence*, the northern states began to abolish slavery. Although the declaration stated that 'all men are created equal', slavery continued in the southern states, where it was still a powerful social and economic institution, particularly in the agricultural industry. The US abolitionist movement campaigned vigorously against slavery and it became one of the main causes of the American Civil War (1861–65). By the start of that war, the slave population had grown to over four million. The then newly elected US president, Abraham Lincoln, was an abolitionist who, the southern states believed, threatened their way of life. All US slaves were freed by the end of the war in 1865, and slavery was abolished by the addition of the Thirteenth Amendment to the *Constitution of the United States of America 1787* (US).

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Figure 7.4 A major cause of the American Civil War (1861–65) was the increasing difference in views on human rights issues between the slave-holding southern states and the non-slave-holding northern states.

The abolitionist movement continued in the rest of the world, but by this stage there was agreement among many countries that slavery was no longer acceptable. In 1890, European countries met in Brussels, Belgium to sign the *General Act of the Brussel's Conference relating to the African Slave Trade*. This was the first ever major collaboration of international states to abolish slavery and was aimed mainly at the slave trade in European protectorates in Africa. The next significant attempt was the *Slavery Convention*, a comprehensive international convention on abolishing slavery worldwide, passed in 1926 after the end of World War I by the League of Nations, the precursor to the UN.

After the end of World War II, the member states of the UN made a clear statement that slavery was prohibited, under art 4 of the UDHR. In some parts of Africa, Asia and the Islamic world, slavery persisted as a legal institution further into the 20th century,

In Court

The *Amistad* case 1841: *United States v Libellants and Claimants of the Schooner Amistad* 40 U.S. (15 Pet.) 518 (1841)

This case was fought in the northeastern US state of Connecticut. The central issue was the fate of a group of slaves who mutinied on the ship *La Amistad* against slave-traders who had kidnapped them from Africa in order to sell them in the southern United States. The US Supreme Court was given the task of deciding whether the Africans should be freed or sent back into slavery. John Quincy Adams, former US President, acted as the slaves' defence lawyer and argued for their freedom. The 1997 film by Steven Spielberg, *Amistad*, details the legal case.

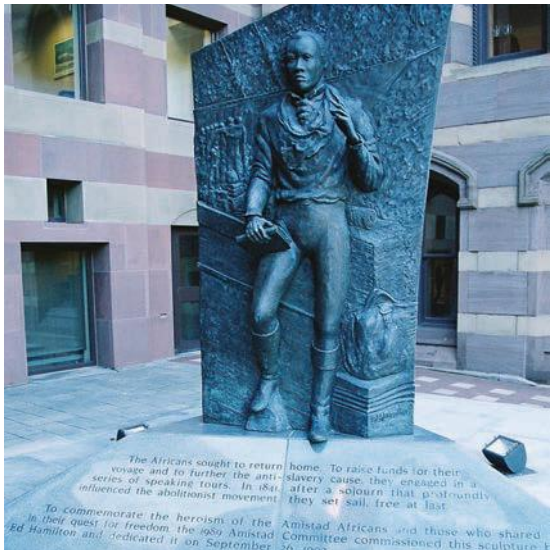

Figure 7.5 Memorial to the *Amistad* case, set up in New Haven in 1992

Research 7.1

Read the above 'In Court' box, and either view the film *Amistad* or refer to http://cambridge.edu.au/redirect/?id=6254 and http://cambridge.edu.au/redirect/?id=6255 to complete the following tasks.

1 What legal principles were contested in this case?
2 In what court was this case finally decided and what was the outcome of this case?

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and later treaties addressed issues of ongoing slavery in more detail.

The last state to officially abolish slavery was Mauritania (West Africa) in 1981. However, despite centuries of anti-slavery efforts, slavery still occurs today, with an estimated 27 million people enslaved worldwide. **Human trafficking**, child labour, sexual slavery and forced labour are still serious issues around the world and new measures have begun to be taken to try to combat these forms of slavery. Slavery still exists, but its forms have changed. The issue of human trafficking is discussed in more detail in Chapter 9.

human trafficking
the commercial trade or trafficking in human beings for the purpose of some form of slavery; usually recruiting, transporting or obtaining a person by force, coercion or deceptive means

Review 7.2

1. Describe the transatlantic slave trade.
2. What was abolitionism and what impact did it have on slavery?
3. How was slavery progressively outlawed from the mid-19th century?

7.3 Trade unionism and labour rights

Universal Declaration of Human Rights – labour and trade union rights

Article 23

(1) Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
(2) Everyone, without any discrimination, has the right to equal pay for equal work.
(3) Everyone who works has the right to just and favourable remuneration, ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.
(4) Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

As discussed, slavery was an institution of forced labour, where slaves were considered legal property of the owner (master), without legal rights of their own. As the world progressed and forced labour was made illegal, conventional labour was the only legal means of securing large groups of workers.

Employment law as we know it today is a relatively recent development. Rights to a minimum wage, safe working conditions or paid holidays were not recognised in older legal systems. Although much of the work carried out in ancient times was done by slaves, non-slave labour groups also existed. For example, recent archaeological evidence suggests that the Egyptian pyramids were not, as previously thought, constructed by slaves, but by craftsmen and farm hands who were given food and accommodation for three-month periods and possibly a small wage. In Rome, the purchase of slaves was probably the cheapest means of securing labour, but hired labour was also frequently used.

In early Europe, regulation of the workplace was more generally based on status. Some groups of labourers and craftsmen formed associations based on their trades, known as craft guilds. Serfs, who were agricultural labourers tied to the land, were the lowest but largest social class and in many ways resembled slaves. As serfdom diminished in England, there was some form of legislative regulation of labour and wages, but these laws were generally designed to compel labourers into work rather than to protect them.

In Europe, labour law as protection for workers, including demands for better conditions and the right to organise, arose with the **Industrial Revolution** and the introduction of mechanised manufacture. The Industrial Revolution, which occurred during the 18th and 19th centuries, began in the United Kingdom and spread to Europe, America, Australia and most of the rest of the world. Major changes in the fields of manufacture, agriculture and transport

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redefined society and acted as the catalyst for changes to labour laws.

Industrial Revolution
the rapid development of industry in the 18th and 19th centuries, characterised by changes in manufacturing, agriculture and transport

Trade unions first emerged during the Industrial Revolution in response to the appalling conditions, lack of safety, low wages and long working hours in the factories of the new industrial cities. Large numbers of employees in industry, particularly manufacturing, began to demand better working conditions and wages, while employers tended to deny improvements and keep wages low to decrease costs. It was only through action by all the workers in a factory that employers could be forced to improve conditions for workers. If all the workers went on strike, the employer would have to listen to their demands – they could not sack their entire workforce. For this reason, employers also sought to deny employees any right to organise.

trade union
an organisation of workers created to preserve and further their rights and interests

The earliest trade unionists faced difficult conditions. Laws were created to criminalise workers' involvement in trade unions and heavy penalties were applied. For example, in 1834 a group of farm labourers in Tolpuddle, England, formed a society to campaign for higher wages. Six of the leaders were arrested and sentenced to transportation to Australia for seven years. They became known as the 'Tolpuddle martyrs'. After many similar struggles, the first Trades Union Congress took place in 1868. By the time of the second congress, in 1869, the 40 representatives who attended represented over a quarter of a million workers in the United Kingdom.

Figure 7.6 Trade unions first emerged during the Industrial Revolution. Now they are an important feature of a democratic society.

Finally, the British Parliament passed – under pressure – the *Trade Unions Act 1871* (UK), which secured the legal status of trade unions. Since then, trade unions have played an integral role in securing rights for workers in the United Kingdom. Similarly, in Australia the union movement developed from the 19th century. Due to harsh tactics employed by governments and employers to break large-scale strikes in the 1890s, the unions in Australia joined together to form their own political party, the Australian Labor Party (ALP).

Trade unions worked to ensure that fair wages and conditions were maintained, and many working conditions taken for granted today in industrialised countries came about due to union action (for example, minimum wages and working conditions, equal pay, long service leave, paid public holidays, maternity leave, annual leave, occupational health and safety laws, and workers' compensation). A series of laws was passed in the late 19th century aimed at improving safety and working conditions in many of the prime industries, such as mining and textiles.

Late in the 19th century, associations of workers began to link up with similar organisations in other countries to protect workers' rights internationally. The First International (1864–76) and the Second International (1889–1916) were gatherings of representatives of unions and political parties from around the world to urge improved conditions for workers.

In 1919, following the end of World War I, a group of pioneering scholars, social policy experts and politicians succeeded in creating the **International Labour Organization (ILO)** to discuss social reforms and put them into practice. It was formed as an agency of the League of Nations, with its office in Geneva, Switzerland. The organisation's aim was to improve conditions for workers around the world, and over time it has been responsible for many conventions on working conditions and rights. In addition to slavery, this was one of the few areas

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in which the League of Nations promoted modern human rights. After the League of Nations was disbanded, the ILO became an agency of the UN, and it continues its work today.

International Labour Organization (ILO)
an international agency of the UN, created with the aim of improving conditions for workers around the world

Labour rights were finally enshrined in the UDHR under arts 23 and 24. Later treaties, such as the ***International Covenant on Economic, Social and Cultural Rights* (ICESCR)** (1966), as well as the ongoing work of the ILO, have further defined those rights and sought to implement them around the world.

labour rights
rights at work, including rights to safe working conditions, minimum wages, paid leave or to join a trade union

***International Covenant on Economic, Social and Cultural Rights* (ICESCR)**
the binding international treaty creating obligations on states to respect the economic, social and cultural rights of individuals

Review 7.3

1. Describe the reasons for the emergence of trade unions.
2. How did trade union movement give birth to the Australia Labor Party?
3. Outline the key rights and conditions that were due to the trade unions' campaigns in the past.

7.4 Universal suffrage

Universal Declaration of Human Rights – universal suffrage

Article 21.

(1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
(2) Everyone has the right of equal access to public service in his country.
(3) The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The theory of democracy, that the authority of government should be based on the will of the people as expressed through genuine periodic elections, is not a new concept; it can be traced back to ancient times. However, even where democracies have existed throughout history, the right to vote, known as **suffrage**, was usually restricted (for example, by status, gender, race, age, beliefs or nationality). The concept of **universal suffrage** is only a recent development in the world, but where it has been achieved, it is now considered an essential human right.

suffrage
the legal right to vote in a democratic election

universal suffrage
the right of all citizens to vote in political elections, regardless of status, gender, race or creed

The first modern countries to achieve democracy allowed only a limited number of men to vote, usually only those men with higher status – those who owned large amounts of property or came from certain backgrounds. This was usually due to a mistrust or suspicion of the general population, or an assumption that they could not understand the affairs of government.

Demands for suffrage for all males began in world democracies in the 19th century. For example, in the United Kingdom, rights for male voters were only gradually extended – to males who rented land of a certain value (1832), to all male householders (1867) and to males in the countryside (1884). However, this still represented only about 60% of the adult male population. It was not until the *Representation of the People Act 1918* (UK) that the vote was extended to the whole adult male population.

Among democratic countries, pressure grew to extend voting rights to women. Women who campaigned for the right to vote were known as **suffragettes**. They waged a long and difficult campaign for the right to vote in democracies dominated by male interests. The right to vote

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Figure 7.7 Delegates to the April 1915 Womens' Congress at The Hague. A key point that came out of this congress was that giving all women the vote in all countries would help prevent future wars.

regardless of gender was an important symbol of the struggle of women for equality in general. In 1893, New Zealand became the first country in the world to give women an equal right to vote. The Australian state of South Australia followed in 1894, with the Australian Commonwealth granting women's suffrage in 1902. It was not until 1918, after the end of World War I, that the United Kingdom gave women a limited right to vote; this was not made equal with men's rights until 1928. The United States passed the Nineteenth Amendment, allowing women to vote, in 1920.

suffragette
a supporter of women's right to vote (or women's suffrage); the term was first used in Britain at the end of the 19th century

Apart from status and gender, race was another issue that conflicted with rights to vote. For example, in the Americas, social stigma was strongly attached to certain races, particularly native Americans and the African-American populations. In 1870 in the United States, following the American Civil War, the right to vote was extended by the Fifteenth Amendment to all adult males, regardless of 'race, color or previous condition of servitude'. In New Zealand, Māori voters were not expressly excluded from voting, but a requirement of property ownership effectively excluded them. In 1867, this requirement was removed, extending the vote across the male population. This legislation also established Māori representation in the lower house of parliament.

In Australia, Indigenous peoples had the right to vote since the time of Federation in 1901, if their state of residence granted them that right, and some South Australian Aboriginal men and women voted for the first Commonwealth Parliament. However, due to later interpretations by the government and discriminatory measures adopted by the states, Indigenous peoples were effectively denied the right to vote until 1962. In that year, the Commonwealth legislated to ensure that Indigenous peoples had the right to vote regardless of their state voting rights although, unlike other Australians, voting was not compulsory for them. A 1967 constitutional referendum finally gave Indigenous Australians the right to be counted in the Australian Census. The constitutional amendment became a symbol of public recognition of the rights of Indigenous Australians.

The right to vote was recognised as a universal human right in art 21 of the UDHR. By 2015, 89 countries, representing 46% of the world's total population, were classified as democratic. However, 51 countries, representing 26% of the world's population, were still classified as 'not free'. The remaining 55 countries were 'partly free'. The 1990s was a time of optimism about the spread of democracy. After the initial optimism of the Arab Spring in 2012, the tide may be turning against democracy with increased violence and chaos in various regions around the world, notably the Middle East.

Legal Links

Freedom House is an independent organisation established in 1941 to encourage democratic freedom around the world. The Freedom House website at http://cambridge.edu.au/redirect/?id=6256 has up-to-date statistics on the state of freedom in every country.

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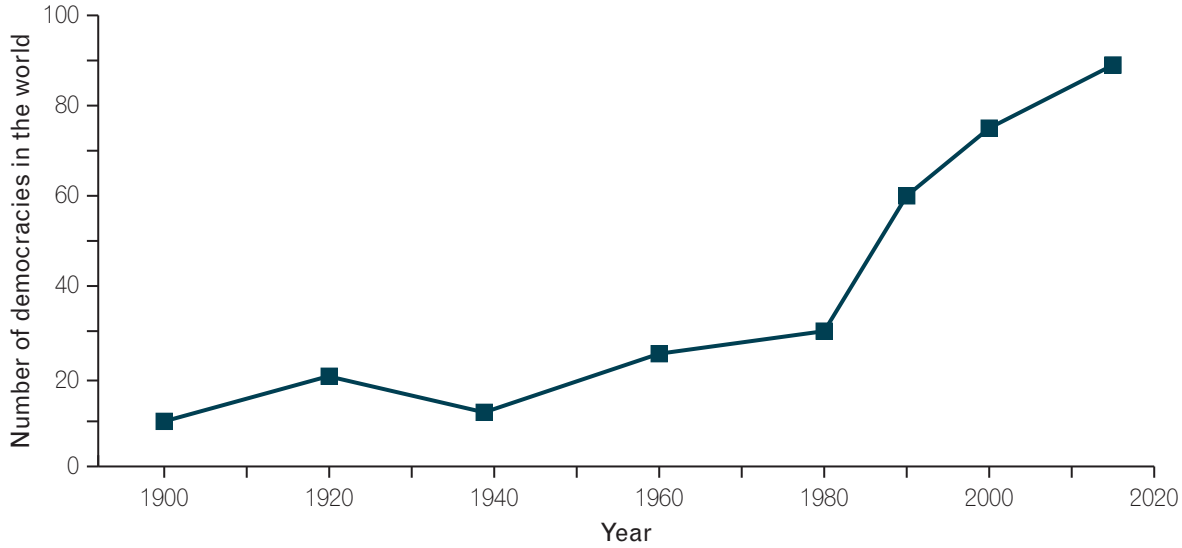

Figure 7.8 Growth of democracy since 1900

Review 7.4

1. Explain the importance of universal suffrage to a healthy democracy.
2. Identify three major advances in the campaign for universal suffrage.
3. Assess the extent to which the principle of the right to vote has been accepted by nations in the world today.

7.5 Universal education

Universal Declaration of Human Rights – universal education

Article 26

(1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.

(2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

Universal education is the idea that all human beings have a right to an education. This concept has only achieved wide acceptance in relatively recent history. Although today some type of education is compulsory for children in almost all countries, in early civilisations formal education was generally associated with wealth and power or with certain trades, beliefs or religions. Most people would have received informal education from their families and community, with other skills learnt directly through their daily work.

universal education
free and compulsory education for all children

With the development and spread of writing systems, it became possible for ideas and information to be accurately passed on over time and space, and

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writing became associated with law, commerce, religion and civil administration. But until recent times, illiteracy was still the norm in most of the world and formal schooling was only available to a select few. The push for universal education within individual countries did not really begin until the 19th century. There were some exceptions. For example, one Aztec tribe was one of the first communities in the world to have compulsory education for nearly all children, regardless of gender or rank – in the 14th to 16th centuries.

In Europe, the church was generally the first to take on the role as educator for all, and it was only much later superseded by the state. For example, in Scotland in 1561, the Church of Scotland put forward the principle of free education for the poor and a school teacher for every parish. In Norway in the 16th century, cathedral schools were turned into Latin schools (what we would call grammar schools) and made mandatory for every market town – later, in 1736, training in reading was made compulsory for all children. In England in the 19th century, churches began giving free education on Sundays, originally called 'Sunday schools'. They were designed to teach students reading, writing and arithmetic. By the mid-1800s in Europe, the increasing demands of industrialisation, competition between countries and widening suffrage required a literate and educated population. European governments began providing funding for schools, and over time governments also administered these schools. In 1870, the British Parliament passed the *Education Act 1870* (UK), and in 1880 education was made compulsory for all British children from the age of five to the age of 10; this was extended to 12 years in 1889. In France, by 1880 all children under the age of 15 were required to attend school, with free and secular public instruction.

Similarly, laws were passed in the Australian states to make education free and compulsory at primary level. In New South Wales, the *Public Instruction Act 1880* (NSW) led to government taking control of all the church-run schools, except those run by the Catholic Church, and making education free, secular and compulsory. The first government school for Indigenous Australians was also created, but fewer than 200 out of 1500 eligible children were being taught. These schools were later merged into the general public system. Today, it is compulsory for all Australians to attend school from at least the ages of six to 15; there are variations from state to state. From 2010, the school leaving age in New South Wales was raised to 17 years. The Australian population now has a 99% literacy rate.

By the 20th century and the end of World War II, free and compulsory education had spread throughout developed countries and was regarded as not only a desirable goal for all governments to pursue but also a basic human right. The UN made education a major priority of its economic and social development programs, and the right to free education for all human beings was included under art 26 of the UDHR, which goes on to state that children's elementary (primary) education should be compulsory and be made widely available.

Although free and compulsory education is now available in almost all countries, there are still many children who for numerous reasons cannot access education. In 2001, all member states of the UN agreed to a series of Millennium Development Goals, which aimed to improve economic and social conditions in the poorest countries of the world. The second goal was for children everywhere to be able to complete a full course of primary schooling. By the end of 2015, the target date for achieving this goal, enrolment in primary education in developing regions had reached 91%.

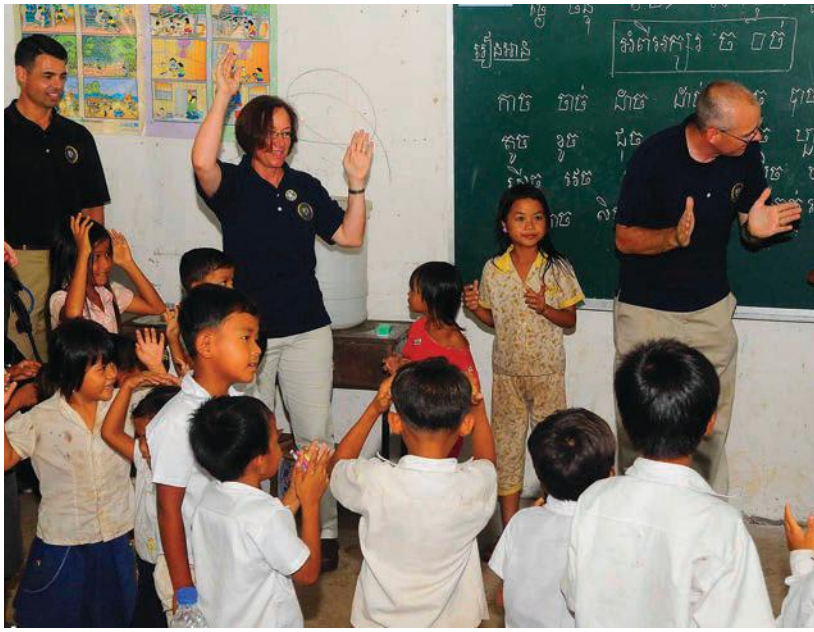

Figure 7.9 The second Millenium Development Goal was for children everywhere to be able to complete a full course of primary schooling.

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Review 7.5

1. Describe what education was like in ancient societies.
2. Explain how universal education evolved in Europe.
3. How does the UN view education?

7.6 Self-determination

Charter of the United Nations – self-determination

Article 1 The purposes of the United Nations are …

(2) To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.

International Covenant on Economic, Social and Cultural Rights

All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

The rights discussed so far have been rights of the individual, such as the right of an individual to join a trade union or the right to universal education. However, the right to **self-determination** differs from individual rights – it is a **collective right**, a right of a group or a people. The collective right to self-determination means that people of a territory or national grouping have the right to determine their own political status: the group has the right to choose how it will be governed without undue influence from another country.

self-determination
the right of people to determine how they will be governed, or their political status based on territory or national grouping

collective right
a right belonging to a group or a people, as opposed to an individual right

Political self-determination is something that has been fought for throughout history by peoples against various powers and regimes. It is closely related to democratic rights in that it involves the consent of the people as the basis for a sovereign state. Self-determination as a right became particularly important after world colonisation by European powers, where people around the world were placed under direct control of imperial powers, rarely if ever with their interests in mind. Over the centuries, bloody conflicts arose in Africa, the Americas, Asia, the Middle East and Oceania against colonial rule. Europe itself experienced constant conflict between groups wishing to exercise self-determination and ever-changing imperial powers.

The rise of self-determination as a right began perhaps most clearly with the 1776 US *Declaration of Independence* against British colonial rule. The right of self-determination was also fought for in Europe during the French Revolution of 1789–99, and in Latin America in the various wars of independence from the 18th century onwards against European colonial rule. However, it was World Wars I and II that truly began the push for international recognition of the right as a path to peace.

The 1919 establishment of the League of Nations was a consolidation of many of the new states that arose following World War I, but it lacked the membership of the United States. It was the establishment of the *Charter of the United Nations* (UN Charter) in 1945, following the atrocities of World War II, that led to the first universal recognition of the right to self-determination. Article 1(2) of the UN Charter calls for respect for the principle of self-determination, and is further strengthened by art 15 of the UDHR, which states that:

1. Everyone has a right to a nationality.
2. No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

The *International Covenant on Social, Economic and Cultural Rights* (ICSECR), adopted by the UN in 1966 and in force since 1976, includes self-determination as its primary right, under art 1(1).

Self-determination of peoples was one of the conditions the United States imposed on the Allied

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forces before entering World War II. Chapter 13 of the UN Charter later provided for a Trusteeship Council of the UN to provide international supervision for the transition of 'trust' territories to self-government after the end of World War II. The last trust territory was Palau, which achieved independence in 1994. Colonial powers were encouraged to oversee the independence of their territories in the best interests of the territories' peoples. Between 1960 and 1993, 53 territories became self-governing independent states. The most recent country to be granted independence was South Sudan, which achieved UN membership in July 2011. It is a member of the UN, the African Union and the Intergovernmental Authority on Development. There are still many groups in the world claiming a desire to self-govern, and it is likely that more independent territories will be recognised in future years.

A more recent issue of self-determination is that of indigenous peoples. There are over 5000 indigenous peoples recognised in the world, made up of over 300 million people in more than 70 countries. In many countries, indigenous people have been regularly excluded from the democratic process, forcefully assimilated, economically exploited or generally oppressed. In 2007, the UN adopted the *Declaration of the Rights of Indigenous Peoples*. This declaration took over 20 years to complete and, as with the UDHR, it is a declaration non-binding on member states. Only four states rejected the declaration, of which Australia was one; however, a number of others abstained from voting. The Howard Coalition government, at the time, stated its reason for rejection as 'there should only be one law for all Australians'. However, in April 2009, the Rudd Labor government formally endorsed the declaration on behalf of Australia.

East Timor exerted its right to self-determination when in 1999 the East Timorese people voted on whether they should be independent of Indonesia. The majority voted for independence and Timor-Leste was recognised a nation state by the UN in 2002. However, there are many groups in the world today who would like to exercise their right to self-determination but have failed to do so, such as the Palestinians, the Kurds and the people of Irian Jaya.

There is every indication that the declaration will be a significant stepping stone to greater awareness and protection of the world's indigenous peoples. As we know, the UDHR itself was only a declaration but, as we have learnt, it became the foundation for all international human rights law.

Figure 7.10 The people of East Timor exercised their right to self-determination in 1999 and East Timor became Timor-Leste in 2002.

Review 7.6

1. Explain the right to self-determination.
2. Identify the milestones in the gradual recognition of the right to self-determination.
3. Identify three groups in the world today who desire self-determination but have failed to achieve it.

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7.7 Environmental rights

African Charter on Human and People's Rights – environmental rights

Article 23

All peoples shall have the right to a general satisfactory environment favourable to their development.

Second Protocol to the American Convention on Human Rights

Article 11 Right to a Healthy Environment

(1) Everyone shall have the right to live in a healthy environment and to have access to basic public services.
(2) The States Parties shall promote the protection, preservation, and improvement of the environment.

More recent discussions of human rights have been focused on the possibility of universally recognised environmental rights. Environmental rights are unlike individual rights, or even collective rights, but are argued to relate to many existing agreed rights. For example, the rights to life, health or property are already contained in human rights declarations, treaties and many other international agreements. Supporters of environmental rights argue that these rights cannot be fully realised without the right to a healthy, safe and adequate environment. This right is said to relate not only to current generations but also to future generations.

Figure 7.11 Changes to our planet due to global warming will have impacts on the rights of the most vulnerable people first.

Environmental rights have been recognised in some international agreements. For example, the *African Charter on Human and Peoples' Rights*, which came into force in 1981 and has been adopted by 53 African states, includes the right to a satisfactory environment under art 23. Similarly, the *American Convention on Human Rights*, under the Organization of American States, includes in its second Protocol, which opened for signature in 1988, the explicit right to a healthy environment and the obligation of all state parties to protect, preserve and improve the environment.

Although there has been no universal recognition of environmental rights, there have been numerous treaties that attempt to deal universally with specific environmental threats. For example, the *Stockholm Declaration* (1972), the *Rio Declaration* (1992) and the Kyoto Protocol (1997) are all attempts by the international community to deal with environmental problems, such as global warming, the spread of epidemics, marine pollution, the depletion of the ozone layer and atmospheric pollution.

Again, one of the main problems in achieving progress in this area is the failure of all states to commit to measures to benefit the global community when they may seem to be to the short-term disadvantage of their national interest. This is particularly true of countries who rely heavily on environmentally damaging practices to support their economy. Yet failure to achieve global consensus on environmental issues could see dramatic deterioration in the rights and living standards of millions of people globally. The UN Climate Change Conference in December 2015 produced the Paris Agreement, a plan to stabilise global warming below 2°C above pre-industrial levels.

Another area in which environmental rights are being dealt with under international law is in the International Criminal Court (ICC). There are many examples in history where peoples' environmental rights have been violated (for instance, with unscrupulous national leaders destroying the natural environment to achieve strategic goals in wartime). Australian lawyer Steven Freeland argues in his recent book, *Addressing the Intentional Destruction of the Environment during Warfare*, that the intentional destruction of the environment in wartime should be

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treated as an international crime and should be dealt with under the Rome Statute of the ICC.

Review 7.7

1. Explain how environmental rights are linked to other human rights.
2. Identify international measures that have been taken to protect environmental rights.
3. Describe how the ICC might become involved in enforcing environmental rights in the future.

7.8 Peace rights

Charter of the United Nations – peace and security

Article 1

The purposes of the United Nations are:
(1) To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace …

In 1919, the countries that emerged victorious from World War I held a peace conference at Versailles, France. This became known as the Paris Peace Conference. The parties to the conference produced the treaties that officially ended World War I, including the *Treaty of Versailles*, but also established for the first time in history a world body with the primary aim of preventing war: the League of Nations. The main purpose of the League of Nations was expressed in the first line of the Covenant of the League of Nations: 'to promote international co-operation and to achieve international peace and security'.

Despite some successes, the League of Nations was unable to stop the military aggression of those major powers – Germany, Italy and Japan – and World War II broke out in 1939. In the aftermath of World War II, the UN was formed, with the United States leading the other Allied forces in joining. The *Charter of the United Nations*, signed on 26 June 1945, explicitly made maintaining peace the primary purpose of the UN, in art 1(1). The first line of the charter states its purpose as 'to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind'. Article 1(1) of the charter also, most importantly, gives the UN the power to take measures to prevent and remove threats to peace.

These statements, in possibly the most significant agreement in history, effectively outlaw war, except in specific circumstances. They can be taken to declare the right of every state, and individuals within those states, to live in peace. Until the 20th century, there was no concept of a **right to peace** in international law. In fact, for all of human history until recently, war was generally seen as a legal and legitimate means of solving disputes and determining political and economic control over territories and populations.

right to peace
the right of citizens to expect their government to do all in its power to maintain peace and work towards the elimination of war

On 12 November 1984, the UN General Assembly adopted Resolution 39/11 titled the *Declaration on the Right of Peoples to Peace* with 92 votes in favour, none against, and 34 abstentions. Although as a declaration it is non-binding, it proclaimed that all 'peoples of our planet have a sacred right to peace'.It also declared that promoting and implementing the right to peace is a fundamental obligation of states, and that government policies should be:

directed towards:
- elimination of the threat of war, particularly nuclear war
- renunciation of the use of force in international relations
- the settlement of international disputes by peaceful means on the basis of the UN Charter.

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The establishment of the right of peace, plus an international body to oversee it, and international means to enforce it, is a worthy objective. Though the idea of a right to peace may seem extremely difficult to promote or enforce, there are many nation states in favour of giving greater clarity to this right under international law. Also, there is a continuing campaign, spearheaded by academics, lawyers and **non-government organisations (NGOs)**, for acceptance of this right as an international norm. In 2013, the Human Rights Council passed Resolution 23/16 in support of the 1984 General Assembly resolution, with 30 votes to nine and eight abstentions. So it is apparent that, unlike the UDHR, the 1984 *Declaration on the Right of Peoples to Peace* does not have near-unanimous support. Nevertheless, there is a determination on the part of the proponents of peace rights to pursue their full acceptance as a norm under international law. In 2015, a Working Group was established by the Human Rights Council and tasked with finding a non-binding statement reflecting the international community's consensus what a 'right to peace' implies.

non-government organisation (NGO)
an independent non-profit group that often plays an important role in advocating, analysing and reporting on human rights worldwide

Despite the fact that the UN bodies are at a stalemate regarding the right to peace, civil society has taken up the cause. The theme of the International Day of Peace on 21 September 2014 was a commitment to reaffirming the 1984 *Declaration on the Right of Peoples to Peace*. Peace groups around the world looked back to this important resolution on this significant international day.

In international law, the right of peace is balanced against the right of self-defence. Article 51 of the UN Charter declares that states have a fundamental right to collective or individual self-defence if there is an armed attack against them, and under art 39 the UN Security Council can authorise actions to maintain or restore peace. Many wars have been considered legal on this basis. This right is often abused: the 2003 invasion of Iraq by the United States, the United Kingdom and allies was claimed by the parties to be legal under a resolution made by the Security Council under art 39 (Resolution 1441), for example, yet the intention of that resolution and the legality of the invasion are still in dispute.

Figure 7.12 Dr Zeny Edwards (fourth from the left), UN International Day of Peace Director, with some volunteers from the 2015 Day of Peace team in Sydney

The right of peace, especially the *Declaration on the Right of Peoples to Peace*, makes it clear that peace for all people should be the paramount consideration. Legal or illegal, a war has tragic and catastrophic effects on individuals and communities. Where a state commences an illegal war, it is considered a breach of the peace, or a 'war of aggression'. Where any war, legal or illegal, is conducted, all parties must comply with the various laws of war that aim to minimise the effect of war on peace and the community. The ICC, established in 2002, has jurisdiction to try individual people for war crimes and other crimes against the international community. Since a definition of the crime of 'aggression' was added to the Rome Statute after a review conference in Kapala, Uganda in 2010, it has become theoretically possible to hold individuals to account for acts of aggression. For more on the ICC, see Chapter 6.

Review 7.8

1. Explain the reasoning behind the right to peace.
2. List the rights contained in the *Declaration on the Right of Peoples to Peace* (1984). What is the status of this UN declaration?
3. Identify a legal mechanism designed to deal with violations of the right to peace.

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7.9 Formal statements of human rights

This chapter has considered how various rights developed over time into modern and internationally recognised human rights. These rights have only recently been given formal recognition by the international community. The catalyst for recognition of many of these rights was the horrors of the two world wars, and the sense of shared purpose of the international community at the end of these wars. This shared purpose led to the establishment in 1945 of a body to oversee the international community and act as a forum for discussion for all states – the UN.

The General Assembly of the UN gave the international community a voice for their concerns and a place to agree on measures that needed to be put in place throughout the world. It quickly became a forum for developing and expanding international laws through international treaties and declarations of shared intent. Almost immediately, formal recognition of human rights was placed on the international agenda.

Universal Declaration of Human Rights

Pressure for an international bill of rights had been growing for some time, but it was World War II that finally stirred the world into action.

In 1941, US President Franklin Roosevelt called for the protection of **Four Freedoms** for all people: freedom of speech and conscience, and freedom from fear and want. With the formation of the UN in 1945, human rights were brought to centre stage: the second purpose listed in the UN Charter, after the purpose of peace, was 'to reaffirm faith in fundamental human rights, in the dignity and worth of the human person'. It also created an obligation to promote 'universal respect for and observance of human rights and fundamental freedoms for all'.

Four Freedoms
the freedoms for all people called for by US President Franklin Roosevelt in his 1941 State of the Union address: freedom of speech and conscience, and freedom from fear and want

The UN Charter did not define what those human rights and fundamental freedoms were. A

Figure 7.13 Eleanor Roosevelt holding the *Universal Declaration of Human Rights* in November 1949

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formal statement of universal rights was needed and work began on developing one. The UDHR, the first declaration written by the UN, became the high point in the quest for the recognition of human rights. The UN Commission on Human Rights entrusted with drafting the document was chaired by former US First Lady and delegate to the General Assembly, Eleanor Roosevelt. The commission referred to historical documents containing rights as well as worldwide political, philosophical and religious movements. Its membership was broad, including representatives from Australia, Chile, Egypt, France, India, Iran, the Soviet Union and Uruguay, as well as from the United States and the United Kingdom.

The declaration was adopted on 10 December 1948 and was originally signed by 48 of the 58 states that existed in the world at that time. The UN General Assembly proclaimed in the statement made on this day that 'Governments of Member States show their adherence to Article 56 of the Charter by using every means within their power solemnly to publicize the text of the Declaration and to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories'. The UDHR has 30 articles, covering rights such as the right to life, liberty, security, thought, religion, education, work, equality of movement and asylum. The right to join a trade union, have an adequate standard of living and be able to participate fully in cultural life are also included, as are the rights to freedom from slavery and torture. Each of these rights is extremely important and has potentially enormous implications for society and the individual.

The UDHR was adopted as a declaration, rather than a fully binding treaty, for the purpose of defining 'fundamental freedoms' and 'human rights' in the UN Charter, which is binding on all member states. As a declaration, the UDHR is **soft law**, meaning officially non-binding but still influential, rather than containing enforceable **hard law** obligations. In hindsight, this was probably the correct decision because it meant that the maximum number of countries were willing to sign it. When the UDHR was first adopted, Eleanor Roosevelt was quoted as saying that it would create a 'curious grapevine [that] may seep in even when governments are not anxious for it'. One particular grapevine that she may have had in mind was NGOs, which are non-profit groups that often play an important role in advocating, analysing and reporting on human rights worldwide, and 'shaming' governments into action. The number of NGOs worldwide has grown exponentially over the last century.

soft law
international statements, such as declarations, that do not create legal obligations upon states but do create pressure to act in accordance with them

hard law
conventions and treaties that under international law create legally binding obligations

The UDHR has become an enduring statement that has inspired more than 200 international treaties, conventions, declarations and bills of rights in the last 50 years. It is possibly the most important of all human rights documents and has stood the test of time. Despite ongoing human rights abuses by some countries, the UDHR has gained wide acceptance by the international community. Even though it is not a formal treaty, it has arguably become part of **international customary law**, and has become the foundation for eight core human rights treaties, two of which are discussed below, as well as various treaty bodies that continue to monitor and report on the state of human rights around the world.

international customary law
actions and concepts that have developed over time to the extent that they are accepted by the international community and have become law

Research 7.2

Access the full text of the UDHR at http://cambridge.edu.au/redirect/?id=6258 and complete the following tasks.

1. Examine the Preamble to the UDHR and briefly describe the reasons behind the creation of the UDHR.
2. Critically assess how arts 1 and 2 of the UDHR relate to its overall purpose.
3. Identify five rights listed in the UDHR that are not discussed in this chapter and describe which articles they are contained in.

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International Bill of Rights

When the UDHR was drafted, it was intended to include three components: the declaration itself, an international treaty relating to it, and measures of implementation. However, once the UDHR was approved by the General Assembly, it was many years before any binding covenants relating to the rights were finally established.

The formation of a binding treaty of rights would oblige states to guarantee human rights in their domestic legislation. The UN Commission on Human Rights was given the task of drafting this document. However, Cold War tensions in the 1960s led to a dispute over what rights should be covered in the treaty. The Western European and American states wanted only civil and political rights covered, while the communist countries wanted only economic and social rights dealt with.

To resolve this problem the covenant was split in two: the ***International Covenant on Civil and Political Rights* (ICCPR)** and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR). Together, the UDHR and these two covenants are collectively known as the ***International Bill of Rights***.

***International Covenant on Civil and Political Rights* (ICCPR)**
the binding international treaty creating obligations on states to respect the civil and political rights of individuals

International Bill of Rights
the informal term collectively describing the UDHR, ICCPR and ICESCR combined

International Covenant on Civil and Political Rights (ICCPR)

The ICCPR and ICESCR were both drafted and approved in 1966, but neither came into force until 1976, when they were finally **ratified** by the requisite number of countries: 35. Unfortunately, neither of the covenants received much support from the superpowers of the time – the United States and the USSR.

ratify (ratification)
the process of a state formally approving a treaty, making it legally binding

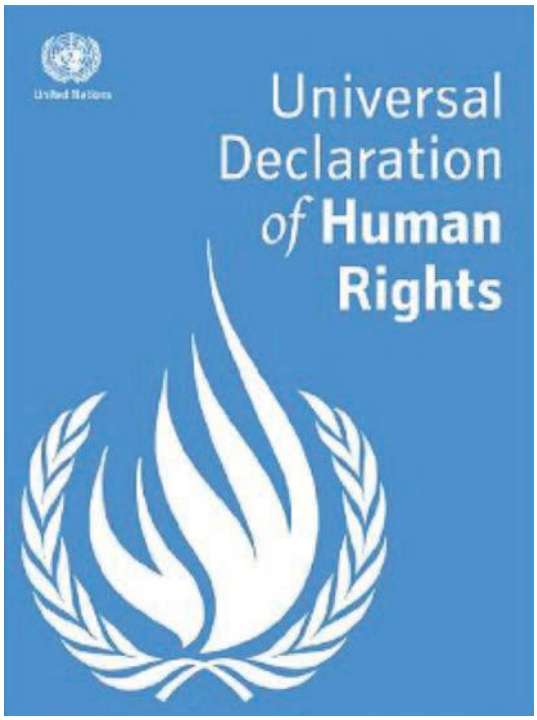

Figure 7.14 Written in 1948, the UDHR is a very small document consisting of 30 statements about human rights, yet it forms the foundation for all international human rights law.

The ICCPR creates an obligation on states to respect the civil and political rights of individuals, including equality between men and women (arts 2 and 3), the right to life (art 6), the right to freedom of movement, the right to a fair trial and the right to be presumed innocent until proven guilty (arts 9 and 14). It also guarantees freedom of thought, conscience, speech, religion and assembly (arts 18, 19, 27 and 22). In addition, it states that people have the right to marry whoever they wish and have a family, and it provides for all children to be given special protection under the law (arts 23 and 24). Torture and slavery are outlawed and prisoners must be treated with respect (arts 7 and 8). Finally, the covenant guarantees the right to vote and receive equal protection under the law, and ensures that ethnic minorities have the right to enjoy their own cultures (art 26).

The ICCPR contains monitoring and periodic reporting arrangements for member states. It is overseen by the Human Rights Committee (a separate body from the Human Rights Council), which reports on compliance by member states and investigates violations. At the beginning of 2016,

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Figure 7.15 The General Assembly in 1948 urged all governments to educate school students about the UDHR.

the ICCPR had been ratified by 168 states. Notable exceptions include China and Cuba, both of which have signed but not ratified the treaty. The United States ratified the ICCPR in 1992 but added many reservations that significantly reduced its domestic effects. A number of countries, including Burma, Malaysia, Saudi Arabia and Singapore, have to this day neither signed nor ratified the ICCPR.

International Covenant on Economic, Social and Cultural Rights (ICESCR)

Like the ICCPR, the ICESCR was approved in 1966 and came into force in 1976. It created an obligation on states to work towards granting economic, social and cultural rights to individuals. The ICESCR includes labour rights, such as the right to just conditions and fair wages at work, and the right to join trade unions. It also created rights to an adequate standard of living, including the right to adequate food, clothing, housing and health care. Finally, the right to education is guaranteed – it states that primary education should be compulsory and free for all.

The ICESCR is overseen by the UN Committee on Economic, Social and Cultural Rights. At the beginning of 2015, the ICESCR had also been ratified by 164 states. Notably, the United States signed the ICESCR in 1979 but has never ratified it. South Africa has also signed but never ratified the covenant. Notable countries that have neither signed nor ratified the ICESCR include Burma, Malaysia and Saudi Arabia.

Review 7.9

1. Explain why two treaties were created in 1966 based on the UDHR.
2. Identify five key rights in each treaty.
3. Which nations have not ratified the ICCPR and the ICESCR?
4. Explain how these two treaties enhance the rights in the UDHR.

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7.10 Early development of domestic and international documents and treaties

Refer to the digital versions of this textbook for information relating to the early development of domestic and international documents and treaties, including the *Magna Carta* (1215), English *Bill of Rights* (1688), the US *Constitution of the United States of America 1787* and *Bill of Rights 1789*, and the French *Declaration of the Rights of Man and of the Citizen* (1789).

GO

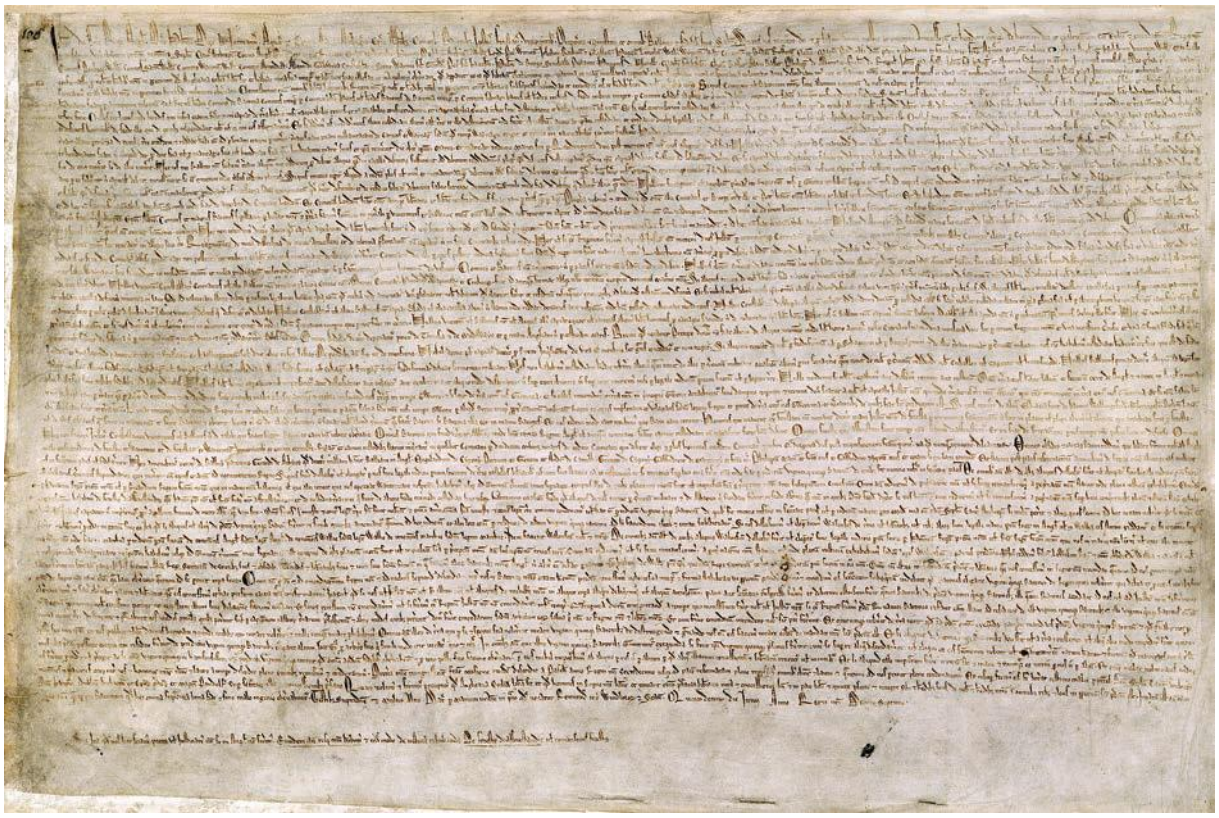

Figure 7.16 One of four surviving copies of the 1215 *Magna Carta*

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Chapter summary

- The term 'human rights' came into existence in a formal way in the 20th century and refers to fundamental and inalienable rights and freedoms of every person.
- Human rights are now an integral part of international law.
- Slavery was for most of human history a legitimate institution and has only recently been outlawed in international law.
- Trade unions fought long and hard campaigns for labour rights in many countries but the right to join one was not always guaranteed.
- Universal suffrage has only become a feature of many countries' governments in the last 120 years or so.
- Universal education came to be valued by European governments little more than 100 years ago, but hundreds of millions of people in developing countries are not yet guaranteed a full primary school education.
- The collective right of self-determination was long fought for and followed centuries of colonisation, yet some indigenous peoples around the world are still struggling to have their rights respected.
- Environmental rights are a type of collective right that advocates say should be protected as a human right.
- Peace rights are recognised as fundamental to the UN, yet war still continues.
- The *Universal Declaration of Human Rights* (UHDR) was created in 1948 and is the formal international statement of human rights.
- The UDHR, the ICCPR and the ICESCR together make up what is called the *International Bill of Rights*, and together impose obligations on states to respect and promote human rights.

Questions

Multiple-choice questions

1 Which international conference advocated that giving the right to vote to all women would help prevent future wars?

A Paris Peace Conference (1919)
B Hague International Congress of Women (1915)
C Congress of Vienna (1815)
D First Hague Peace Congress (1899)

2 The right of self-determination was first recognised internationally by the:

A *Geneva Convention* (1864)
B *Charter of the United Nations* (1945)
C *International Covenant on Civil and Political Rights* (ICCPR) (1966)
D *Declaration of the Rights of Indigenous Peoples* (DRIP) (2007)

3 The *Universal Declaration of Human Rights* (UDHR) of 1948 was influenced by President Franklin Roosevelt's Four Freedoms speech in 1941. The main ideas in this speech were:

A freedom of belief and freedom of speech, freedom from fear and want
B free trade, freedom of movement, freedom of religion, freedom of information
C freedom of the seas, freedom of the press, freedom of opinion, free enterprise
D freedom of parliament and of the legislature, executive and judiciary

4 The *International Bill of Rights* consists of the:

A *Magna Carta*, English *Bill of Rights* and US *Bill of Rights*
B *Genocide Convention*, *Geneva Convention* and *Refugee Convention*
C UDHR, ICCPR and ICESCR
D All of the above

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5 Which of the following is *not* something that in the UN General Assembly's *Declaration on the Right of Peoples to Peace* (1984) says government policies should be directed towards?

A Renunciation of the use of force in international relations

B Promotion of international cooperation to achieve international peace and security

C Elimination of the threat of war, particularly nuclear war

D The settlement of international disputes by peaceful means on the basis of the UN Charter

Chapter summary questions

1 Identify the key steps in human rights becoming a key component of international law.

2 Slavery was an accepted legal institution for most of human history. Explain how the world moved to a position of making slavery an illegal institution.

3 To what extent could it be argued that the peace rights are still developing?

4 Explain how the UDHR of 1948 became the foundation of all international human rights law.

5 Given that 2018 is the 70th anniversary of the UDHR, how should the community be educated on the significance of this historic document?

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Chapter 8
Promoting and enforcing human rights

Chapter objectives

In this chapter, students will:

- evaluate the effect of state sovereignty on the protection of human rights
- describe the role of the various UN agencies and programs in advancing the cause of human rights
- describe the role of various non-government organisations and the media in promoting human rights
- identify the international and domestic courts and tribunals that investigate and enforce human rights
- explain how international human rights treaties become integrated into Australian domestic law
- outline the sections of the *Australian Constitution* that give some protection of human rights
- explain how the High Court can protect human rights
- discuss the arguments for and against having a charter of rights.

Key terms/vocabulary

delegated legislation
division of powers
dualist system
Economic and Social Council (ECOSOC)
express rights
heads of power
implied rights
incorporation
International Court of Justice (ICJ)
international humanitarian law
monist system
nation
Office of the United Nations High Commissioner for Human Rights (OHCHR)
ratify (ratification)
residual powers
resolutions
Secretariat
separation of powers
state
state sovereignty
Trusteeship Council
UN General Assembly (UNGA)
UN Human Rights Council (UNHRC)
UN Security Council (UNSC)

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Relevant law

IMPORTANT LEGISLATION

Universal Declaration of Human Rights (1948)
International Covenant on Civil and Political Rights (ICCPR) (1966)
International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Disability Discrimination Act 1992 (Cth)
Human Rights (Sexual Conduct) Act 1994 (Cth)
International Criminal Court Act 2002 (Cth)
International Criminal Court (Consequential Amendments) Act 2002 (Cth)
Age Discrimination Act 2004 (Cth)

SIGNIFICANT CASES

Mabo v Queensland (No. 2) (1992) 175 CLR 1
Toonen v Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994
Croome v Tasmania (1997) 191 CLR 119
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520
ABC v Lenah Game Meats Pty Ltd [2001] HCA 63
Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) International Court of Justice, 9 July 2004
Roach v Electoral Commissioner [2007] HCA 43
Giller v Procopets [2008] VSCA 236
Australian Crime Commission v Louise Stoddart and Anor [2011] HCA 47

Legal oddity

Mauritania is a North African nation that has tried and failed three times, most recently in 2007, to end slavery within its borders. Though the most recent attempt set up greater legal penalties – two years imprisonment for 'promoting' slavery and 10 years for possessing slaves – the usage remains widespread, with an approximate half million Mauritanians enslaved (around 20 percent of the population). Mauritanian slaves are prohibited from legal custody of their own children, a surname or owning property.

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8.1 Introduction

Historically, human rights have developed through various campaigns, which first achieved partial and scattered recognition, and finally resulted in a formal declaration and binding international treaties. As with any type of rights, however, the effectiveness of recognition depends on the will of the community to implement the rights, and the mechanisms in place to ensure that they are respected, promoted and enforced.

Human rights are advanced on two broad levels – internationally and domestically. On each level there are governing bodies responsible for complying with and promoting them, courts responsible for enforcing them, and various organisations and pressure groups that report on them and expose violations.

8.2 Human rights in the international community

Since the establishment of the United Nations (UN) in 1945 and the recognition of universal human rights through the *Universal Declaration of Human Rights* (UDHR) in 1948, the idea of universal human rights has gained importance in the international community. However, the concept remains a controversial one: the international community has failed to agree on what should be prioritised as far as human rights are concerned, some states have argued that human rights treaties and their implementation have an impact on state sovereignty, and there are widely divergent cultural, religious and social views and priorities among the UN member states. So despite formal recognition and the development of binding treaties, progress has been gradual in securing governments' respect for human rights and universal conformance with the treaties. While some states have functioning and independent institutions, a politically free and active population and funds available to tackle the problems, other states lack the resources, structures or political will to enforce those rights.

Today, the promotion and enforcement of human rights commands a great deal of attention from both governments and citizens, but also from the international community, including:

- numerous branches of the UN
- international courts, tribunals and other authorities
- intergovernmental organisations (IGOs)
- non-government organisations (NGOs) media groups.

Each of these will be considered in turn below. First, however, one of the most important issues of human rights in international law, and perhaps one of the largest hurdles impeding their success, will be considered – the issue of **state sovereignty**.

state sovereignty
the authority of an independent state to govern itself (for example, to create and implement laws; impose and collect taxes; make war and peace; and form treaties with foreign states)

Figure 8.1 The UN Human Rights Council headquarters located in Geneva, Switzerland

Figure 8.2 The International Committee of the Red Cross (ICRC) world headquarters in Geneva, Switzerland. The ICRC is one of the largest NGOs in the world.

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8.3 State sovereignty

The concept of state sovereignty is central to international law and to the capacity of the world to enforce states' compliance with recognised human rights. States often cite infringements of their state sovereignty as a justification for failing to comply with international human rights standards.

Statehood

To understand state sovereignty, the concept of a 'state' needs to be clarified. A **state** is the basic unit of the international system. Generally known as countries, states are the only entities in international law capable of exercising full political capacity.

state
a government and the people it governs; a country

Statehood should not be confused with political entities within a federal system, such as the domestic states of Australia or the United States. Strictly speaking, a state should also be distinguished from a **nation**, which is a people who share a common heritage, language, culture or race – nations do not always correspond with state borders. Nations or peoples seeking independent statehood will often claim a right to self-determination.

nation
a people that share a common heritage, language or culture and sometimes a common race

In international law, recognition as a state requires a number of factors. Outlined in art 1 of the *Montevideo Convention on the Rights and Duties of States* (1933), their characteristics must include:

a) a permanent population
b) a defined territory
c) government; and
d) capacity to enter into international relations.

A sovereign state is a geographical area that is controlled by a central government which exercises supreme independent authority over that area internally and externally. A state must therefore also be recognised by a number of other states so that it can exercise its full political and legal capacity. This recognition is sometimes controversial. In most cases, membership of the UN will be the clearest mark of statehood, but there is no clear definition of statehood that binds the international community, and in practice the granting is usually a political matter, with recognition by leading nations being the most influential factor, rather than legal considerations.

The issue of statehood can have implications for human rights. People may be unable to claim protections under the international human rights regime if they live within the territory of an unrecognised state, or if they live in a state with which relations have broken down. For example, in 2009 the Taiwanese Parliament ratified both the *International Covenant on Civil and Political Rights* (ICCPR) and the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) into domestic law. As they live in an unrecognised state without UN membership, Taiwan's 23 million citizens do not have access to the international human rights framework, which includes the right to complain to the UN Human Rights Committee. It also means that no other state can submit any complaint about Taiwan to the committee.

Figure 8.3 By 2015 ISIS had occupied sections of Iraq and Syria, claiming that they had established an Islamic state. To some analysts at the time it came close to having the characteristics of a state.

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Legal Info

How many states are there?

The exact number of states in the world is disputed. In 2016, the status of states and disputed states was as follows:

- There were 193 fully recognised state members of the UN, though there were 196 states in the world.
- The last state to become a UN member was South Sudan in 2011.
- Vatican City (the Holy See) is a recognised state, but only has observer status at the UN.
- Taiwan (Republic of China) has the characteristics of a state, but its international status is disputed. It originally represented all of China in the UN, but it was replaced in 1971 by the People's Republic of China. Currently, Taiwan has no UN representation but continues to function as a state, with informal diplomatic relations. China, the main state opposing Taiwan's recognition as a state, has veto power on the Security Council, further evidence that states are recognised as a result of political rather than legal considerations.
- Though Kosovo has been recognised as a nation state by over 90 other states by 2012, it is still not a member of the UN due to opposition from Russia, which, like China, can use its veto to block Kosovo's bid for UN membership.

Five states have veto power in the UN – the United States, Russia, China, France and the United Kingdom. The makeup of the Security Council has been much contested. While every member state of the UN has a vote, the reality is that the states which are more powerful politically and militarily, and those that donate and support developing countries, use those ties to wield additional influence. There are many disputed territories claiming statehood, including Somaliland, Abkhazia and Palestine, some with growing international recognition. Their claim to statehood may be strongly disputed by other states; this highlights a long-held argument in international law over when a state becomes a state not just in the eyes of the international community but also for the purposes of the application of international law.

Sovereignty

The sovereignty of states is one of the most essential components of the international system. State sovereignty refers to the ultimate law-making power of a state – its independence and freedom from external interference in its affairs. Sovereignty is the source of a state's legal and political power to make laws over its own population and to enforce those laws.

It is also a major issue in human rights, as in its strictest sense it means that no foreign state or law can interfere in another state's domestic jurisdiction, unless it has the consent of that state. Under the UN Charter, all states are fundamentally equal – art 2(1) of the charter states: 'The [UN] is based on the principle of the sovereign equality of all its Members.'

Critically, however, in the modern international system a state's sovereignty is not absolute. It is limited under international law by certain duties owed to the international community. Without any such limitations, a system of international anarchy would result – allowing governments to attack each other without cause, abuse their own citizens or commit genocide on their own populations, with no fear of consequences nor any means for their citizens to seek help. Such a system is reminiscent of the atrocities committed by Nazi Germany or the Empire of Japan during World War II.

State sovereignty and human rights

In regard to human rights, one of the major problems of state sovereignty is that not all governments equally accept the idea that their own people have certain rights. While robust democracies may have developed institutional respect for their citizens' rights, with internal mechanisms to enforce them,

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Figure 8.4 The Holocaust memorial in central Berlin. The international community now imposes limitations on state sovereignty to try to prevent mass atrocity crimes, like the Holocaust, from happening again.

some countries without democratic processes may rely on sovereignty to justify mistreatment of their own citizens. In extreme cases, such countries may commit human rights abuses with impunity, with little or no avenue for their citizens to respond. In such cases, state sovereignty may be used as a shield against outside interference.

However, countries do not exist in a vacuum. They form part of a community and are interdependent and interrelated – politically, financially, environmentally and legally. In particular, states have signed numerous international agreements (treaties), including the UN Charter, that create concrete legal obligations. These agreements are by nature consensual so do not infringe on sovereignty, but they do put responsibility squarely on the sovereign state to uphold its commitments or face the agreed consequences, which may be severe.

For example, at the beginning of 2016, 168 states had ratified the ICCPR and another 164 states had ratified the ICESCR – and all UN states are subject to the UDHR. Known collectively as the International Bill of Rights, these treaties create concrete legal obligations on states to comply with their human rights provisions, which include submitting periodic reports to the Human Rights Committee, allowing other states to submit complaints about them and, for most members, allowing their own citizens to complain to the committee about their treatment in the state.

Review 8.1

1. List the characteristics of statehood as laid down by the Montevideo convention of 1933.
2. Briefly describe three examples of where statehood is disputed.
3. Explain how state sovereignty can either promote or impede human rights.

These and other mechanisms, including the capacity of the UN to intervene, are discussed next.

8.4 The role of the United Nations

The UN is a vast organisation with substantial power, consisting of 193 member states, including almost every sovereign state in the world, and has responsibility for almost every aspect of international affairs. It is the avenue through which much of the world's international development assistance and the majority of international cooperation takes place. The UN has five principal organs under the

Figure 8.5 The UN Trusteeship Council has been inactive since 1994, but it was originally responsible for overseeing transition of UN trust territories after decolonisation.

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UN Charter (not including the former **Trusteeship Council**) – all of these have some role to play in the promotion or protection of human rights.

Trusteeship Council
inactive since 1994 but originally responsible for overseeing the transition of UN trust territories to self-government after decolonisation

Organs of the UN – human rights responsibilities

- **UN General Assembly (UNGA)** – consisting of representatives from all member states with equal voting power (in theory), this is the main forum for international discussions, deliberations, declarations and recommendations, many relating to issues of human rights. Numerous committees, programs and funds are attached to the General Assembly, such as the UN Development Program. The UN's principal human rights body, the **UN Human Rights Council (UNHRC)**, reports directly to the General Assembly.
- **UN Security Council (UNSC)** – this is the UN organ charged with preservation of international peace and security. It exercises its power through legally binding **resolutions**, and can authorise military actions, sanctions or peacekeeping operations. The UNSC has five permanent members who have the power to veto decisions (the United States, the United Kingdom, China, Russia and France) and 10 non-permanent members with two-year terms. The council, it is argued, has the power to intervene in the most serious of human rights abuses by states. Numerous proposals have been made to change the structure and power of the Security Council to more accurately reflect today's world, but this has yet to occur.
- **Economic and Social Council (ECOSOC)** – this body has 54 rotating members meeting annually to assist in promoting international economic and social cooperation and development. It includes various committees and acts as the central forum for discussion of economic, social, environmental and humanitarian issues. It used to house the Commission on Human Rights, but in 2006 this body was transferred to the General Assembly to become the UNHRC.
- UN **Secretariat** – this is the main administrative body of the UN with over 40 000 staff working worldwide. It provides the various information, studies, tasks and facilities needed by the UN. It includes the UN's departments and offices, including the **Office of the High Commissioner for Human Rights (OHCHR)**. The Secretariat is headed by the UN Secretary-General, Ban Ki-moon, the most visible and influential figure in the UN.
- **International Court of Justice (ICJ)** – this is the primary judicial organ of the UN. The ICJ has jurisdiction, under the UN Charter, to settle international disputes submitted to it by member states, and produce advisory opinions on matters of international law submitted to it by international organs and the UN General Assembly. Its cases will only rarely relate to issues of human rights.

Figure 8.6 The UN Security Council (UNSC) is the most powerful organ of the UN.

UN General Assembly (UNGA)
the UN organ representing all UN member states; acts as a forum for global discussion and runs numerous committees and programs

UN Human Rights Council (UNHRC)
the UN forum of member states responsible for overseeing and making recommendations on human rights in all member states

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UN Security Council (UNSC)
the UN organ responsible for preservation of international peace and security; has power to authorise military action and other measures

resolution
a decision passed by the UN General Assembly or Security Council; when passed by the Security Council it can be legally binding on all member states

Economic and Social Council (ECOSOC)
the UN organ that acts as a forum for international economic and social cooperation and development

Secretariat
the UN administrative body headed by the UN Secretary-General; contains the departments and offices of the UN

Office of the High Commissioner for Human Rights (OHCHR)
the UN human rights office responsible for monitoring and reporting on human rights worldwide

International Court of Justice (ICJ)
the primary judicial organ of the UN; has jurisdiction to hear disputes submitted by member states and issue advisory opinions

Office of the UN High Commissioner for Human Rights (OHCHR)

The Office of the UN High Commissioner for Human Rights (OCHR) is an administrative agency under the UN Secretariat that works to promote and protect the human rights contained in the UDHR and international law. Established in 1993 after a World Conference on Human Rights held by the UN, the OHCHR's purposes include:

- advancing universal ratification and implementation of the UDHR and human rights standards and treaties
- promoting universal enjoyment of human rights and international cooperation, including education, information and technical assistance, taking preventive action and responding to serious human rights violations
- providing support and information for other UN human rights bodies and treaty-monitoring bodies, including the UNHRC and the Human Rights Committee.

The office is headed by the High Commissioner for Human Rights, who reports directly to the Secretary-General. On 1 September 2014, Zeid Ra'ad Al Hussein, a former Jordanian Ambassador to the United States and veteran UN diplomat, was appointed as the seventh High Commissioner for Human Rights. Mr Al Hussein is the first Muslim to be in charge of the OHCHR. His term as High Commissioner is expected to last until at least 2018. Mr Al Hussein played a central part on the establishment of the International Criminal Court (ICC) in 2002.

UN Human Rights Council (UNHRC)

The UNHRC is a relatively new intergovernmental body under the UN General Assembly, made up of representatives of member states – its 47 member seats are rotated on three-year terms. It aims to address human rights violations worldwide and make recommendations, and works closely with the OHCHR to perform its duties.

The UNHRC was established in 2006 following a General Assembly resolution – it was set up to replace the previous Commission on Human Rights, which had been a part of ECOSOC since 1946, but had been heavily criticised for failing to achieve its purpose. The previous body had allowed states with some of the poorest records on human rights to be members, effectively preventing criticism of those states' actions and allowing the abuses to continue.

The UNHRC has recently adopted a series of specific measures that aim to increase its power to address human rights abuses, including:

- a complaints procedure allowing individual people to bring issues to the council's attention if they have been a victim of human rights abuse in a state
- compulsory periodic reviews of the human rights situation in all 193 member states (not just those who are signatories to the ICCPR and other treaties)
- an Advisory Committee to provide expertise and advice and recommend issues for the council to consider.

Because the UNHRC is relatively new, it is too early to judge its success. The United States, under former President George Bush, originally refused to participate in the UNHRC, but in 2009 US President Barack Obama reversed the United States' position and joined the council, thereby strengthening its international influence.

However, the council has already received some criticism, from current and former Secretary-Generals Ban Ki-moon and Kofi Anan, as well as from the former High Commissioner for Human Rights. It has been criticised for acting not in the

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interests of human rights, but according to political considerations – particularly influential states, including China and Russia, have also been accused of backing and controlling certain candidates to block criticism of themselves. It remains to be seen if or how effective the council can become. Despite heavy criticism of Australia over the issue of asylum seekers in the past, the Australian Government showed strong interest in lobbying other UN member states to support Australia's election to the UNHRC in 2018.

MDGs and SDGs

In 2002, all member states of the UN agreed to a declaration at the end of a conference on world poverty. This became known as the *Millennium Declaration*. The declaration outlined eight ambitious Millennium Development Goals (MDGs) that all member states pledged to try to reach by 2015. The goals were to:

- eradicate extreme poverty and hunger
- achieve universal primary education
- promote gender equality and empower women
- reduce child mortality rates
- improve maternal health
- combat HIV/AIDS, malaria and other diseases
- ensure environmental sustainability
- global partnership for development.

By 2015, many countries had improved their performances in these areas, but others showed little or no real improvement. There had been some criticism of using such a goal-based approach to difficult areas of development and human rights. However, the goals provided significant funding, resources and an important focus for states, UN agencies and various organisations to help them eradicate some of the most serious problems of our times with effects that will last well beyond 2015.

There was uneven progress in achieving the goals. China and India had made noticeable gains towards achieving them, in part due to the population size and economic development in these countries. Most problematically, geographic areas that would most benefit from the goals, such as sub-Saharan Africa, had not made the necessary improvements in meeting the MDGs by 2015. Meeting the MDGs did not depend entirely on economic growth, but rather on clever programs, such as measles reduction in Bangladesh. Also, the Global Financial Crisis reduced both the ability of some countries to take action towards the goals and the ability of developed countries to support programs in traditionally less economically stable countries.

In the years up to 2015, a post-2015 development agenda was finalised after extensive consultations in 70 countries. The result was the 'Sustainable Development Goals' or SDGs. This new development agenda, consisting of 17 goals, was agreed upon in 2015. The SDGs have been guiding all international efforts at sustainable development since 2015.

Legal Info

UN intervention and the Responsibility to Protect (R2P)

One of the most contentious arguments on the role of the UN relates to the ability of the UN Security Council to act in cases of the most serious human rights abuses within a state's own borders. State sovereignty traditionally restrains the international community from interfering in another state's territory. When situations of serious human rights abuses are exposed, usually involving crimes against humanity or genocide, the international community will often call for the UN to intervene to put a stop to atrocities that are about to occur or are occurring. Recent examples include serious human rights abuses in the Middle East and North Africa.

However, the UN's powers to intervene within any state are restricted by art 2(7) of the UN Charter: 'Nothing contained in the present Charter shall authorise the UN to intervene in matters which are essentially within the domestic jurisdiction of any state.'

Under Chapter VI of the charter, the Security Council can recommend measures for the peaceful settlement of disputes or situations that may lead to international friction. Although this has occasionally

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Legal Info

been used to send UN peacekeeping troops into troubled regions, it requires the consent of the state or states involved and will fail if the state refuses to allow intervention. Since 2002, the Security Council can also refer international criminal law matters to the ICC, as it did with Darfur, Sudan in 2005, but this may do little to stop a situation that is still occurring. In 2014, despite 65 UN member states wanting the ICC to prosecute Bashar Al-Assad for war crimes in Syria, Russia and China vetoed a UNSC resolution that proposed this course of action in Syria.

Article 2(7) of the charter does limit sovereignty in one instance: 'This principle shall not prejudice the application of enforcement measures under Chapter VII.' Chapter VII empowers the Security Council to take military or non-military action to 'restore international peace and security'. This makes it the most powerful organ of the UN, and indeed the world, giving it the power to intervene without a state's consent.

The Security Council has been heavily criticised for reluctance to use its intervention powers to prevent mass atrocities or intervene where serious abuses are occurring. At the World Summit 2005 on reform of the UN, the world community decided to embrace a new doctrine, a new international approach to human rights abuses, called the 'Responsibility to Protect', or R2P. The doctrine aims to make protection of human rights an integral part of the responsibility that goes with being a sovereign state – if a state fails to protect its own citizens, then the international community has the responsibility to step in under the Chapter VI or Chapter VII powers.

In 2006, the Security Council (by Resolution 1674) reaffirmed the World Summit Outcome Document 'regarding the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'. In 2009, the UN Secretary-General, later supported by a resolution of the General Assembly, expressed commitment to the doctrine under three 'Pillars' of responsibility:

- It is a responsibility of states to protect their populations from these crimes.
- The international community is responsible for helping states develop the protective ability before such crises or conflicts break out.
- When a state has manifestly failed to protect its citizens, and peaceful means are not sufficient, the international community must take action to prevent harm.

The R2P was first invoked in 2011, when Libya descended into civil war and a state of armed conflict following protests in Benghazi, during which armed state security forces fired into the crowd of protesters. The resulting backlash spread across the country, and there was disagreement internationally as to how the conflict should be stopped. The Security Council declared a 'no-fly zone' under Resolution 1973, which was designed to prevent dictator Muammar Gaddafi from inflicting further harm on Libyan people who had joined the uprising. The resolution authorised UN member states to use 'all necessary measures' to prevent attacks on civilians. The resolution passed with the abstentions of Russia and China. The resulting military action by NATO caused much controversy, with some arguing that the intervention infringed national sovereignty and the ability of Libyans to resolve the conflict for themselves. Others argued that according to the R2P doctrine, it was the duty of the international community to act. The NATO-imposed no-fly zone allowed the Libyan rebels to overthrow the regime of Muammar Gaddafi, but for years afterwards Libya imploded into anarchy and violence. This UN-sanctioned (with R2P reasons) and NATO-led limited intervention succeeded in ridding Libya of a dictator; but without helping Libya to establish a strong democratic nation state there was no hope of guaranteeing civil, political and economic rights. Intervention in a troubled nation state is never a simple matter. It is often the case that there is a choice between tyranny and anarchy. To create a strong democratic state where there is no previous history of this takes enormous political will and resources from the international community.

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Review 8.2

1. Identify the five active organs of the UN and briefly describe the role they play in promoting or protecting human rights.
2. Describe the role of the UNHRC and evaluate its effectiveness in responding to cases of human rights violations.
3. Define the doctrine of R2P and explain why its use in Libya in 2011 has not strengthened R2P as an international norm.
4. One concern about the R2P is that Security Council politics might influence its use, either in favour of or against certain states. Evaluate the effectiveness of the doctrine in light of this or any other issues you can identify.

Legal Links

Go to the following UN websites, which offer a wealth of information on human rights internationally, including current status, progress, goals and various complaints mechanisms:

- Office of the High Commissioner for Human Rights – http://cambridge.edu.au/redirect/?id=6259
- UN Human Rights Council – http://cambridge.edu.au/redirect/?id=6260
- Millennium Development Goals – http://cambridge.edu.au/redirect/?id=6261
- Post-2015 Development Goals – http://cambridge.edu.au/redirect/?id=6262.

8.5 The roles of other international groups

Intergovernmental organisations (IGOs)

An intergovernmental organisation (IGO) is an international institution made up of member states. IGOs are created by agreement between states, and each has an international treaty that acts as a charter outlining the organisation's purpose and operation. They are usually permanent, meet regularly and have international legal 'personality', which means they can enter into enforceable agreements and are subject to international law.

Some of the first worldwide IGOs were the International Telegraphic Union in 1865 and the Universal Postal Union in 1874. In 1909, there were 37 IGOs in the world, and by 1960 this figure had risen to 154. Today, the number stands at around 1000. The UN, created by the 1945 UN Charter, is the most important of all IGOs. Other powerful IGOs include the World Trade Organization (WTO), the International Monetary Fund (IMF), the North Atlantic Treaty Organization (NATO) and INTERPOL.

Apart from the UN, a number of IGOs have the promotion of human rights as part of their stated goals and can exert significant influence on the human rights situations of their member states, although the influence of every organisation differs. Examples are:

- Commonwealth of Nations – made up of 54 members, including the United Kingdom, Australia and almost all former colonies of the British Empire, it operates within a framework outlined in the *Singapore Declaration of Commonweath Principles*. The Commonwealth's stated aims include the promotion of democracy, the rule of law, human rights, individual liberty and good governance. Several members have been suspended due to serious or persistent violations and human rights abuses, including Zimbabwe in 2002 and Fiji on various occasions due to military coups.
- African Union (AU) – established in July 2002, the AU includes almost all African states; currently, 54 African countries are members, three are suspended members and Morocco is a former member. There are no all-African states other than Morocco that are not members

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of the African Union. The African Union's aims include bringing about security and peace in Africa and promoting good governance, democratic institutions and human rights. Its decisions are made by the Assembly of the African Union. The African Union includes the African Commission on Human and People's Rights, with responsibility for monitoring and promoting compliance with the African charter of the same name, and the African Court on Human and Peoples' Rights, currently being merged with the overarching African Court of Justice.

- Organization of American States – this includes all the states of North, Central and South America. Two of the organisation's bodies, the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights, are responsible for overseeing the regional human rights instrument – the *American Convention on Human Rights*.

Courts, tribunals and independent authorities

There are numerous international courts, tribunals and other independent authorities with power to hear matters involving human rights abuse.

International Court of Justice (ICJ)

The International Court of Justice (ICJ) is an organ of the UN. It started operation in 1946 at the Peace Palace in The Hague, The Netherlands. The ICJ has two roles: to hear and judge disputes between states, and to issue advisory opinions on matters of international law.

The ICJ has heard relatively few cases since its establishment, but has issued some important judgements and opinions. For instance, in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion), presented on 9 July 2004, the ICJ issued an important, though controversial, advisory opinion that the Israeli West Bank barrier – a 700-kilometre wall partitioning the Palestinian-occupied West Bank from Israeli territory – was contrary to international law and encroached on disputed territory. International NGOs such as the International Committee of the Red Cross (ICRC) and Amnesty International have claimed that the barrier causes serious humanitarian problems or violates Israel's obligations under international humanitarian law. Israel has disputed these claims, and the Security Council has yet to accept and enforce the ICJ's ruling.

The strongest criticism of the ICJ is that it requires the consent of state parties to hear matters and so has very little jurisdiction. States can consent to 'compulsory' jurisdiction of the court, but by

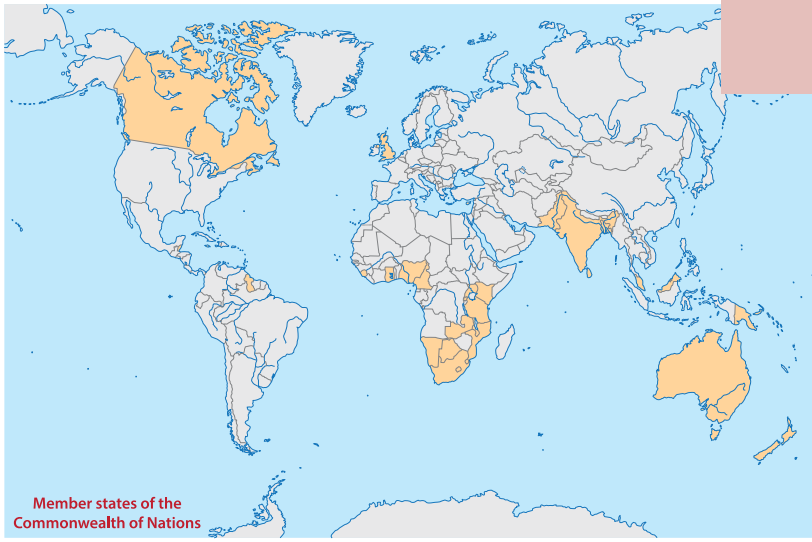

Figure 8.7 The Commonwealth of Nations consists of 54 nations that once belonged to the British Empire.

Figure 8.8 In 2014, the Marshall Islands filed a lawsuit against the nine nuclear weapons states for their failure to comply with art 6 of the *Nuclear Non-Proliferation Treaty*, which required them to eliminate their nuclear weapons in return for the rest of the countries of the world not acquiring them. The case is currently being heard in the ICJ (pictured).

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2010 only 66 states had done so, most – including Australia – with some form of reservation limiting the court's power. The court is unable to hear cases brought by individual people or private organisations, is restricted to states themselves, and has very little power of enforcement, with Security Council members being able to veto any enforcement action. Despite these limitations, the court has issued important judgements that carry the weight of international law and act as significant guides to future actions.

Other forums, including the Security Council (see earlier), the ICC, regional courts such as the European Court on Human Rights, and the UHRC, are arguably much more effective for hearing matters of serious human rights violations.

International Criminal Court (ICC) and ad hoc tribunals

The International Criminal Court (ICC) was established in 2002 to prosecute international crime. The ICC was preceded by various tribunals (known as 'ad hoc' tribunals) established by the UN Security Council or the UN to deal with specific events involving serious international crimes. The tribunals established by the Security Council, including the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), are in the process of finalising their operations. In contrast, the courts established by agreement between the UN and the governments in question, such as the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC), provide scope for more domestic governmental and legal input into the operations of the international court structure.

The ICC is not a court for human rights violations specifically, but it does prosecute and hear matters relating to the most serious international crimes, including those that fall under international humanitarian law, such as genocide, crimes against humanity and war crimes, although these acts would also constitute serious human rights abuse. It also has jurisdiction to hear crimes of aggression (illegal war), but the international community is still in the process of agreeing on a definition for this.

Importantly, the ICC has jurisdiction to prosecute individual people rather than states, which makes it a powerful institution for combating individuals who seek to use state sovereignty as a defence for their abuses. Australians work at the ICC in both the prosecution and defence areas.

European Court of Human Rights (ECtHR)

In her 2015 book, *A Magna Carta for All Humanity*, Francesca Klug reminded us that the UDHR (1948) and the *European Convention on Human Rights* (ECHR) (1950) both had a common heritage in the *Magna Carta*, but that the ECHR was also inspired by the UDHR, which was signed two years earlier. Both the UDHR and the ECHR were landmark human rights documents written in the wake of World War II and many of the statements in them are a rejection of the racism and persecution of Nazi-occupied Europe. The European Court of Human Rights (ECtHR) was set up in 1959 in Strasbourg, France to apply and protect the human rights of the citizens of Europe. It considers cases brought by individuals, as well as by organisations and states, against all countries bound by the ECHR. The ECHR has played an important role in promoting the awareness of human rights in Europe.

The ECtHR is an extremely influential human rights body, and compliance has been incorporated into the treaties of the European Union (EU). This means that the laws of all 27 member states of the EU must comply with the rulings of the ECtHR. This has had an enormous effect on member state laws – for

Figure 8.9 The European Court of Human Rights (ECtHR) was established in 1959 and is based in Strasbourg, France. It is seen as the most successful regional court in the world.

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example, numerous laws of the United Kingdom have had to be revised following ECtHR rulings. In 2015, the ECtHR was seen as the most successful regional court in the world.

The Australian situation

Unlike Europe, or Africa or the American states, Australia is not currently party to any regional human rights instrument or human rights court. The Association of Southeast Asian Nations (ASEAN) is in talks to develop a human rights charter and a human rights court.

The ASEAN charter contains some provisions on upholding law with respect to human rights and enabling the establishment of a human rights body and unresolved dispute mechanism, and there is a working group for a human rights mechanism, which would create:

- a regional declaration of human rights principles
- a regional human rights commission for monitoring and recommendation purposes (established in 2009)
- a court that would render binding decisions.

Other authorities established by treaties

The *International Bill of Rights*, as well as some other key human rights treaties, has established particular authorities to hear matters of compliance by member states with the treaties.

One of the most important of these is the Human Rights Committee, a quasi-judicial body which assesses member state compliance with the ICCPR and can hear petitions raised by the states about each other's compliance. Significantly, the First Optional Protocol to the ICCPR also gives the committee jurisdiction to hear personal complaints brought by individuals of member states about human rights violations in their own country. Currently, 114 countries have ratified this optional protocol, including Australia. Citizens can take complaints directly to the committee, providing they have first attempted to resolve the matter with human rights bodies in their own country – or region, if applicable – such as the ECHR.

At the committee, a group of human rights experts will hear a complaint brought against a state and make rulings on that state's compliance. Although its decisions are not enforceable, they are highly influential: they are embarrassing for the government of a state accused of violation, and they might influence local legal interpretation. These judgements will also be raised by the committee in its periodic reports to each member state, which may include recurring recommendations to address the issues until the committee is satisfied that the state is compliant. A number of cases have been raised against Australia, and the strong persuasive power of the Committee's rulings can be seen in the case of *Toonen v Australia* (see the 'In Court' box on page 190).

Legal Info

Human rights treaty bodies

A number of UN treaty bodies similar in function to the UNHRC have been established by various human rights treaties. Some of these are:

- Committee on Economic, Social and Cultural Rights
- Committee on the Elimination of Racial Discrimination
- Committee on the Elimination of Discrimination Against Women
- Committee Against Torture
- Committee on the Rights of the Child.

Research 8.1

1. Visit the website of UN High Commissioner for Human Rights (OHCHR) at http://cambridge.edu.au/redirect/?id=6263.
2. Research two of the committees listed in the 'Legal Info' box above and identify the international treaty the committee is responsible for, and the power the committee has to hear matters against member states.

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In Court

***Toonen v Australia*, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994; *Croome v Tasmania* (1997) 191 CLR 119**

Toonen was a landmark case on Australia's human rights. It was brought to the UN Human Rights Committee by Nicholas Toonen, a Tasmanian resident. The case illustrates the power of human rights laws to effect local change.

The case revolved around a complaint by Toonen that existing Tasmanian laws that criminalised consensual sex between adult males were in violation of his human right to privacy. This right is protected under art 12 of the UDHR and art 17 of the ICCPR. The complaint also claimed discrimination on the basis of sexual activity and orientation, and that homosexual men were unequal before Tasmanian law, in violation of arts 2 and 7 of the UDHR and art 26 of the ICCPR.

Australia historically inherited anti-homosexuality laws from Great Britain, which were then retained in the states' criminal laws. These were gradually repealed by states, commencing in South Australia in 1972. By 1991, Tasmania was the last remaining state to maintain these laws. Toonen also complained that people in authority in Tasmania would regularly make derogatory remarks about homosexual people, amounting to a campaign of official and unofficial hatred.

The UN committee found that adult consensual sexual activity in private was covered by the human right to privacy, and that Toonen's right was interfered with by Tasmania's laws, without any reasonable justification for that interference. The law violated art 17 of the ICCPR, and the committee ordered Australia to respond to the committee's finding and repeal the incompatible law. The committee's views were also widely publicised internationally and carried significant authority.

However, Tasmania refused to repeal the law. The federal government was forced to enact the *Human Rights (Sexual Conduct) Act 1994* (Cth), which legalised consenting sexual activity between adults throughout Australia. Tasmania still refused to repeal its law, and in 1997 Tasmanian rights campaigner Rodney Croome took the matter to the High Court of Australia (*Croome v Tasmania* (1997) 191 CLR 119), where the law was deemed illegal as it was now inconsistent with both the ICCPR and Australian law. Tasmania had no option but to abolish its law and decriminalise homosexuality.

Since being forced to overturn its laws, with the negative national and international publicity it received, Tasmania has become one of the most progressive states in Australia in combating discrimination based on sexuality, as well as other human rights. In 2003, Tasmania became the first jurisdiction in Australia, and one of the first in the world, to recognise and register same-sex domestic partnerships under the law.

Non-government organisations (NGOs)

Non-government organisations (NGOs) are organisations that are independent of and without representation of any government. They include private voluntary organisations, citizen associations and civil society organisations. The number of NGOs has grown exponentially in recent times. In 1914 there were an estimated 176, in 1970 there were an estimated 2000, and by the beginning of the 21st century there were over 100 000 NGOs. At the establishment of the UN in 1945, NGOs were already playing an important role in contributing to international discussion. Today, many NGOs collaborate on a daily basis on human rights and humanitarian work with various government and intergovernmental organisations and specialised UN agencies.

NGOs engaged in human rights play an indispensable role in informing the global community, governments and the UN of human rights violations and progress. They help ensure greater government compliance by investigating, researching, documenting and publicising cases

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of human rights violations. This process of 'naming and shaming' can have a profound effect on government behaviour. Some NGOs will also work directly with violators or victims, providing evidence to international courts, or encouraging other states or the UN to apply diplomatic pressure or take action against violating states.

One of the oldest and most important international NGOs is the International Committee of the Red Cross (ICRC). With origins tracing back to 1863, the ICRC's missions are strictly concerned with **international humanitarian law** – protecting the life and dignity of the victims of international and other armed conflicts; this work often overlaps with human rights abuses. The importance of the ICRC is recognised internationally, and since 1990 it has been allowed observer status at the UN General Assembly. The ICRC also works closely with the International Federation of Red Cross and Red Crescent Societies (IFRC), which is made up of 186 National Red Cross and Red Crescent Societies that lead and organise relief assistance missions in response to large-scale emergencies.

international humanitarian law
a body of international law developed from the Geneva and Hague conventions that deals with the conduct of states and individuals during armed conflict; also known as the law of armed conflict

Figure 8.10 Amnesty International is one of the most influential human rights NGOs. It was founded in 1961 and has over seven million supporters around the world.

Legal Links

These are some of the more well-known international NGOs working for human rights:

- Amnesty International – http://cambridge.edu.au/redirect/?id=6264
- Freedom House – http://cambridge.edu.au/redirect/?id=6265
- Human Rights Watch – http://cambridge.edu.au/redirect/?id=6266
- Carter Center – http://cambridge.edu.au/redirect/?id=6267
- International Committee of the Red Cross – http://cambridge.edu.au/redirect/?id=6268
- Reprieve – http://cambridge.edu.au/redirect/?id=6269.

Research 8.2

Visit two of the NGO websites mentioned in the 'Legal Links' box above and complete the following tasks.

1. Identify when the NGO was first established and who established it.
2. Describe the work that the NGO does in promoting human rights.
3. Consider the types of human rights that the NGO is attempting to protect.
4. Evaluate how the NGO might affect the human rights performance of governments.

The media

Like NGOs, the media plays a crucial role in the 'naming and shaming' of governments and human rights violators by investigating, reporting and then exposing instances of human rights abuse. This can have a significant influence on public opinion and government, and can help bring about change.

This is, however, largely the case only in the Western world, as many countries that inflict the greatest human rights abuses on their people do not allow freedom of the media – limiting internet access, for instance, severely restricts the information

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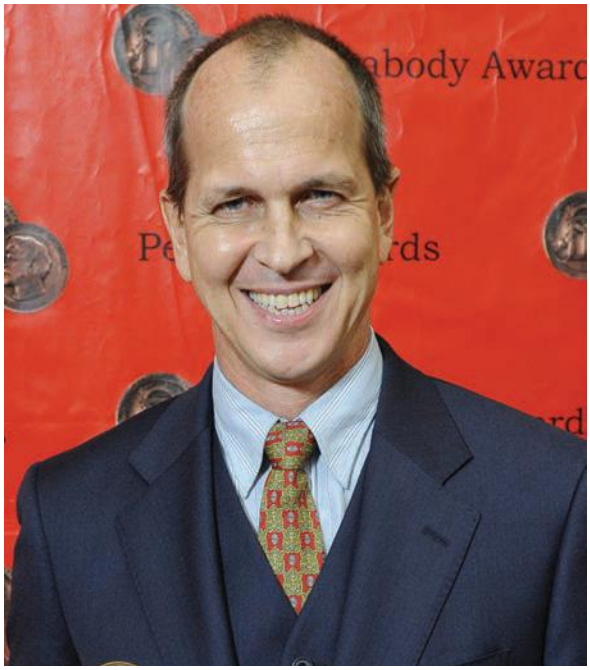

Figure 8.11 Australia journalist Peter Greste was jailed in Egypt in December 2014 and released in February 2015. He had been accused by the Egyptian Government of reporting news that was 'damaging to the government'.

people can access, and so affects the decisions they can make about their government.

The role of a free and impartial media and people's right to information is recognised as a human right: art 19 of the UDHR states 'everyone has the right to ... seek, receive and impart information and ideas through any media and regardless of frontiers'.

The influence of the media is also recognised by violators of human rights. Media freedom is severely restricted in many countries – it is often unsafe for reporters to undertake their work, as it could result in censorship, imprisonment, beatings or even death. According to one important NGO, the Committee to Protect Journalists, 61 journalists were killed in 2014. Almost 221 were jailed worldwide in 2014, with most in China, Iran or Cuba. Over half of those imprisoned were arrested in relation to internet reports.

The international NGO Reporters Without Borders (RWB) releases an annual index of media freedom of all states. In 2015, Australia ranked 25th in the world for degree of press freedom. At the other end of the scale were countries such as China (176th), Iran (173rd) and North Korea (179th). The Australian media still has a largely Western focus on its reporting of worldwide events.

Legal Links

Reporters Without Borders (RWB) aka Reporters Sans Frontieres (RSF)

RWB is a vital international NGO with correspondents and offices worldwide. RWB aims to promote press freedom in all countries by fighting censorship and laws undermining the press, defending journalists imprisoned or persecuted in their job, and working for the safety of journalists, especially in war zones.

In recognition of the organisation's importance, RWB holds consultant status at the UN. Detailed information on press freedom in every country around the world is available on RSF's website (http://cambridge.edu.au/redirect/?id=6270).

Review 8.3

1. Explain the difference between IGOs and NGOs and assess how either type of organisation can help promote human rights.
2. Compare the role of different courts, tribunals and other authorities in hearing matters of human rights. Identify what types of human rights matters can be heard by which body.
3. Identify the dangers faced by journalists in countries where there is little press freedom.

8.6 Human rights in Australian domestic law

In Australia, there is no one document where all human rights can be found – rights that correspond with internationally recognised human rights are drawn from different sources. These sources include international treaties, the *Australian Constitution*, the common law, and statute law of the Commonwealth, states and territories.

When an international treaty is negotiated and formed, states indicate their agreement to the principles of the treaty by signing it. Signing a treaty

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Figure 8.12 Treaties need to be incorporated into Australian law to make the rights and obligations enforceable, such as those concerning refugees.

means the country will have to act in the spirit of the treaty, but it is not directly binding. In most cases a treaty will need to be **ratified** by the state before it becomes binding and enforceable.

Some countries have **monist systems**, meaning that when the country's government ratifies a treaty, the treaty automatically becomes law in the country as if it were an Act of Parliament. Such countries can sign and ratify a treaty at the same time. France and The Netherlands have monist systems.

On the other hand, Australia, like the United Kingdom, is a **dualist system**. This means that simply signing a treaty does not make it enforceable in Australian law. The rights and obligations of the treaty will need to be **incorporated** into Australian law in some way. Parliament will usually pass legislation that echoes the words of the treaty or amends existing laws. For example, when Australia ratified the *Rome Statute of the International Criminal Court in 2002*, the Commonwealth Parliament simultaneously passed the *International Criminal Court Act 2002* (Cth) and the *International Criminal Court (Consequential Amendments) Act 2002* (Cth) to enact the provisions of the treaty into Australian law.

ratify (ratification)
the process of a state formally approving a treaty, making it legally binding

monist system
a legal system that deems treaties enforceable in domestic law as soon as they have been signed

dualist system
a legal system that does not deem treaties enforceable domestically until and unless they are incorporated into domestic law, usually by passing similar legislation

incorporation
the process by which a country incorporates a treaty into domestic law

8.7 The role of the *Australian Constitution*

The *Australian Constitution* plays two important roles in protecting human rights for Australians:

- It lays down the system of Australian government through which human rights are recognised, including the **separation of powers** and **division of powers**.
- It is the source of some specific human rights.

separation of powers
preventing one person or group from gaining total power by dividing power between the executive, the legislature and the judiciary

division of powers
how powers are divided between the federal and state governments

Separation of powers and division of powers

The doctrine of separation of powers, as previously studied, is important in protecting human rights. It involves the separation of the branches of state:

- the legislature – elected law-makers in parliament
- the executive – government, including ministers and agencies
- the judiciary – the courts that interpret and apply the law.

In Australia, separation of powers is protected under chapters I to III of the *Australian Constitution*, which describe the functions of each branch respectively. As a Westminster system of responsible government, Australia has no strict separation between the legislature and executive – the *Constitution* provides for ministers to sit in parliament and to be part of the executive, which can make **delegated legislation**.

delegated legislation
laws made by people or bodies to whom parliament has delegated law-making authority

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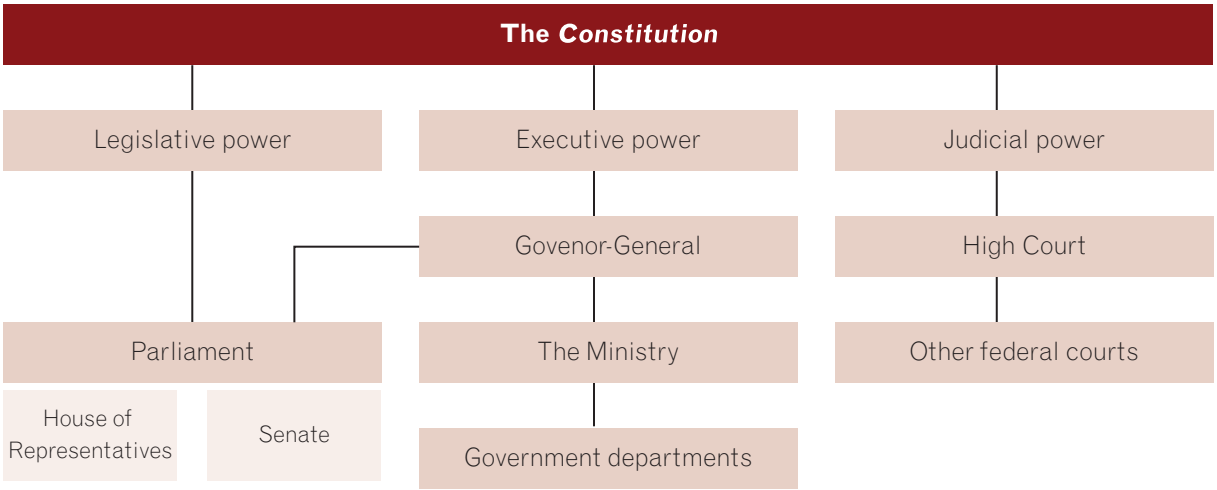

Figure 8.13 Separation of powers under the Australian Constitution – judicial power is strictly separated from political power.

However, the High Court has constantly ruled that strict separation of the judiciary from the other two 'political' branches is a fundamental principle in the *Constitution*. The independence of the judiciary is an essential mechanism for upholding the rule of law, ensuring that all people, including government, are equally subject to the same law. It also helps ensure that rights and liberties are protected from the risk of abuses of power that could come with a politicised judiciary. Finally, the separation of power enables the judiciary to strike down any legislation that it deems incompatible with the rights and limitations provided for in the *Australian Constitution*.

The *Constitution* also defines the division of powers between the Commonwealth and Australian states. This is the basis of the Australian federation: how legislative power is divided between Commonwealth and state parliaments. Most specific areas that the Commonwealth can make laws on are listed under s 51 of the *Constitution* – these areas are known as Commonwealth **heads of power** and include, for example, currency (s 51(xii)), marriage (s 51(xxi)) and copyright and patents (s 51(xviii)). Powers that are not listed in the *Constitution* are deemed **residual powers** – they are the powers the states can use. States can decide to refer such powers to the Commonwealth, as they did, for example, with air navigation and terrorism.

While the division of powers can act as a check on government by ensuring that power is not too centralised, the Commonwealth's power has grown significantly since Federation in 1901, especially, for example, in use of the corporations power (s 51(xx)).

heads of power
powers listed in ss 51 and 52 of the *Australian Constitution*: the areas that the Commonwealth can legislate on

residual power
a government power that is not listed in s 51 of the *Australian Constitution* as a legislative power of the Commonwealth Parliament, and thus belongs to the states

One area that has been crucial for the development of human rights in Australia has been the external affairs power (s 51(xxix)). This power gives the Commonwealth authority to legislate on external affairs, which includes Australia's treaty obligations. Since Federation, the growth in the number of international treaties has been enormous, and treaties have been developed to cover many of the areas of the law that would traditionally have been solely within the power of the Australian states. Human rights treaties have transformed the country by enabling the Commonwealth Parliament to bind states to those rights and if necessary legislate to protect rights universally across Australian jurisdictions.

Express and implied rights

Unlike the United States, Australia does not have a bill of rights to bind state and Commonwealth action relating to human rights. However, the writers of the *Constitution* did include some rights; these are known as **express rights**. Additionally, over

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Figure 8.14 Women displaying electoral identity cards. While most consider the right to vote a universal human right, in many countries certain groups are prevented from practising that right.

the last century the High Court has interpreted the *Constitution* as necessarily holding certain other rights. Even though they are not written in it, the High Court has found that certain rights must have been intended in order for the *Constitution* to function effectively – these are known as **implied rights**.

express rights
rights that are included (written) in a document

implied rights
rights that can be implied through the text, structure or purpose of a document

Express rights in the *Constitution* include freedom of religion (s 116), the right to vote in Commonwealth elections (s 41), the right to a trial by jury in federal indictable cases (s 80) and the right to 'just terms' where the Commonwealth compulsorily acquires property (s 51(xxxi)). These rights are clearly very limited, and over time the High Court has judged that certain other rights can be implied in the text and structure of the *Constitution*. For example, the High Court has on a number of occasions (most clearly in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520) held that the *Constitution* contains an implied right to freedom of political communication, a type of freedom of speech, in order for Australia's political system as established in the *Constitution* to function effectively.

Despite this, a finding of implied rights by the judiciary has often been controversial and the ability of the *Constitution* to act as a protector of human rights is very limited. Most Australian human rights are found in other sources of law.

Review 8.4

1. Explain how international treaties are incorporated into Australian law.
2. Define the doctrine of separation of powers and identify which power in Australia is kept strictly separate.
3. Describe how the external affairs power has transformed Australia's law.
4. Explain the difference between an express and an implied right.

8.8 Other human rights roles in Australia

Common law

The common law in Australia is the body of law made by judgements of the courts. It has evolved and been passed down over centuries, independently of government, and carries the power to protect many human rights. Many Australian statutes, particularly in criminal law, are silent on many aspects of the law; it is the common law that contains and defines these rights and obligations. Some examples of fundamental rights protected by the common law are the presumption of innocence and the right to a fair trial.

However, the common law does not offer absolute protection of human rights, because common law rights are not fixed – that is, rights in the common law, no matter how crucial they may be seen to be, can be removed by any Act of Parliament, because any legislation that conflicts with the common law position overrides that common law position. For example, strict anti-terrorism laws passed by the Commonwealth Government in the aftermath of the

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11 September 2001 attacks on the United States and the Bali bombings were widely criticised as removing long-standing criminal law rights for certain people.

The common law cannot be relied upon to develop new rights, as judgements will only define those rights on a case-by-case basis, if and when a relevant matter is brought before a court. However, it has still been instrumental in establishing some rights in recent times. For example, in 2001, in the case of *ABC v Lenah Game Meats Pty Ltd* [2001] HCA 63, the High Court suggested the possibility of a tort for invasion of privacy. In 2008, the Supreme Court of Victoria recognised a person's right to privacy in *Giller v Procopets* [2008] VSCA 236. In that case, privacy was breached by the defendant, who was the plaintiff's partner, after he unlawfully showed a private sexual videotape of her to her friends, family and employer. The High Court has yet to determine whether or not this right of privacy applies in the common law Australia-wide.

On the other hand, in a decision reached on 30 November 2011 in *Australian Crime Commission v Louise Stoddart and Anor* [2011] HCA 47, the High Court found that spouses had no right to silence. This overturned a presumption that has existed for hundreds of years and that protected the privacy of communication within a marriage. Some concern was expressed by civil libertarians about the broader consequences of this decision.

Statute law

Over the last half-century, a large body of Australian statute law, both Commonwealth and state, that protects human rights has been adopted. While many of the laws have been adopted in response to the establishment and ratification of international treaties protecting rights, some have also been established independently by state or federal parliaments. Statute law is a powerful tool in human rights protection and many laws have been wide-reaching, but like common law, rights laid out in statute are not fixed – they too can be removed by a later Act of Parliament.

Some of the most important pieces of human rights legislation in recent times are:

- *Racial Discrimination Act 1975* (Cth)
- *Anti-Discrimination Act 1977* (NSW).
- *Sex Discrimination Act 1984* (Cth)
- *Australian Human Rights Commission Act 1986* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Age Discrimination Act 2004* (Cth)

Courts and tribunals

In Australia, all courts and tribunals have some role in applying and enforcing human rights laws. Occasionally, courts also play a role in interpreting and developing human rights law. The most important Australian human rights bodies are discussed further.

Australian Human Rights Commission (AHRC)

The most significant human rights body in Australia is the Australian Human Rights Commission (AHRC). It was previously known as the Human Rights and Equal Opportunity Commission (HREOC). An independent national body, it was established under the *Australian Human Rights Commission Act 1986* (Cth) (formerly the *Human Rights and Equal Opportunity Commission Act 1986* (Cth)) to deal mainly with alleged violations of the *Racial Discrimination Act 1975* (Cth) and the *Sex Discrimination Act 1984* (Cth), but to also report and deal with human rights generally. States and territories also have equal opportunity or anti-discrimination bodies to oversee compliance with state human rights laws.

As Australia's human rights legislation has matured, the functions of the AHRC have expanded. It now has a responsibility to:

- receive and investigate complaints into discrimination and breaches of human rights
- promote public awareness about human rights and provide legal advice
- conduct public inquiries into human rights issues and produce recommendations
- give advice and make submissions to parliament and governments on the development of laws, policies and programs consistent with human rights.

The commission has had an important influence on Australia's laws. For example, in 1997 it conducted an inquiry into the separation of Indigenous children from their families (known as the Stolen Generations). The commission's report, *Bringing Them Home*, recommended that the Australian Government make

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an apology to the victims. This recommendation was ignored for over a decade by the Coalition government. However, in February 2008, a landmark apology to the Stolen Generations was made by the newly elected Labor Prime Minister, Kevin Rudd.

There have been other important inquiries, including inquiries into children in immigration detention, people with mental illness, racial violence and same-sex entitlements. In 2010, the commission played a key role in making recommendations about the possibility of having an Australian Charter of Human Rights. However, in 2015 when the commission released the *Forgotten Children* report about asylum seeker children, the President of the Commission, Gillian Triggs, was verbally attacked by then Prime Minister Tony Abbott for what he saw as a biased report. Some pressure was placed on Gillian Triggs to give up her position as president of the commission. However, Professor Triggs refused to budge, citing that she had a five-year term to serve out.

The Human Rights Commission has two complaints functions. First, it has the power to investigate many kinds of discrimination, including race or ethnic origin, age (young or old), disability or gender, and can also investigate workplace discrimination relating to sexual preference, trade union activity or political opinion. The commission will investigate and try to conciliate the complaint, but if it cannot be resolved the complainant can take the matter to the Federal Court of Australia, which has the power to make enforceable orders on recommendation of the commission.

Second, the commission can hear complaints on many other human rights breaches in Australian law and international human rights law. In these cases, the complainant is unable to take the matter to the Federal Court, but the commission can make a report to the Attorney-General, who is required to table the report in parliament. While this is an important function, these findings are not enforceable and the complainant will have no right to have the wrong rectified. There are calls for many of these matters to be made directly actionable in the courts as is the case with discrimination cases.

The Human Rights Commission also conducts a strong educational program on social media. The *Something in Common* project uses Facebook, Twitter and YouTube to encourage greater community engagement with human rights issues.

Legal Links

The website of the AHRC (see http://cambridge.edu.au/redirect/?id=6271) provides detailed information and educational resources on human rights in Australia. It describes the various complaints procedures available, and provides advice and guidelines on complying with human rights law. It also contains the results of its inquiries into human rights and reports on all findings of human rights breaches.

High Court of Australia

While matters involving human rights might appear before the state or federal courts and tribunals, it is in the High Court where they often become most important. This is because the High Court has the power to set precedents that are binding on other courts and to overturn state or Commonwealth legislation where it conflicts with the *Constitution*.

High Court cases involving human rights include the decriminalisation of homosexuality (*Croome v Tasmania*), a constitutional right to freedom of political communication (*Lange v Australian Broadcasting Corporation*) and a possible common law right to privacy (*ABC v Lenah Game Meats*). In another case, the High Court upheld the constitutional right of all people to vote, including prisoners (*Roach v Electoral Commissioner* [2007] HCA 43).

The High Court's methods of interpretation in cases involving human rights have been particularly influential, and occasionally controversial. For example, the case of *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 is one of the most important cases in Australian law and involved recognition for the first time of Australia's Indigenous peoples' right to title in their traditional land. This principle became known as 'native title'.

In the decision in that case, international law was influential for the judges in reaching their conclusion. Justice Brennan stated that international law was 'a legitimate and important influence on the common law, especially when international law declares the existence of universal human rights [and that] a common law doctrine founded on unjust

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discrimination in the enjoyment of civil and political rights demands reconsideration'. This represents an important step in human rights recognition, opening up the numerous international human rights documents to domestic consideration. Some, however, have criticised the court for exceeding its powers, under the doctrine of separation of powers, and argue that expanding such rights is a matter for parliament only.

The power of the judiciary, particularly the High Court, to protect human rights is critical, especially where judges can be influenced by agreed international standards, and have the potential to apply those standards in the absence of conforming legislation passed by parliaments. Combined with the court's power to declare legislation inconsistent or invalid, to uphold the rights provided for in the *Constitution* and to continue to develop the common law, the High Court is arguably the most important protector of human rights in Australia.

Review 8.5

1. Explain why statute law may be a stronger mechanism for enforcing human rights than common law.
2. Identify three important human rights statutes and describe some of the rights they protect.
3. Explain some of the functions of the AHRC.
4. Critically evaluate the role of the High Court in protecting human rights in Australia.

Research 8.3

Visit the website of the New South Wales Council for Civil Liberties (http://cambridge.edu.au/redirect/?id=6272) and complete the following tasks.

1. Identify when the organisation was founded.
2. Describe some of the functions of the organisation.
3. Find and discuss some of the cases the organisation has conducted defending human rights.

Non-government organisations

As in the international arena, there are numerous NGOs in Australia that work in the area of human rights. Like international NGOs, these organisations play a vital role in researching and reporting on human rights issues, making submissions to state and Commonwealth parliaments or law reform bodies on human rights, and working in the field of human rights with victims of rights violations. Australian NGOs are important in protecting individuals' rights, shaping public and political opinion and exposing violations of human rights by governments and individuals.

Legal Links

Some of the more well-known NGOs in Australia in the field of human rights include:

- New South Wales Council for Civil Liberties (NSWCCL) – http://cambridge.edu.au/redirect/?id=6273
- Civil Liberties Australia – http://cambridge.edu.au/redirect/?id=6274
- Australian Council of Social Service (ACOSS) – http://cambridge.edu.au/redirect/?id=6275
- Asylum Seeker Resource Centre – http://cambridge.edu.au/redirect/?id=6276.

The media

The rights of Australian reporters to disseminate information and the right of the public to receive information are not enshrined in law. The freedom of political communication is protected by the *Constitution*, but in Australia there is not yet any general right to freedom of speech. Nevertheless, Australian reporters, particularly those from the ABC and SBS, play an important role in investigating and reporting on human rights on both a regional and worldwide basis.

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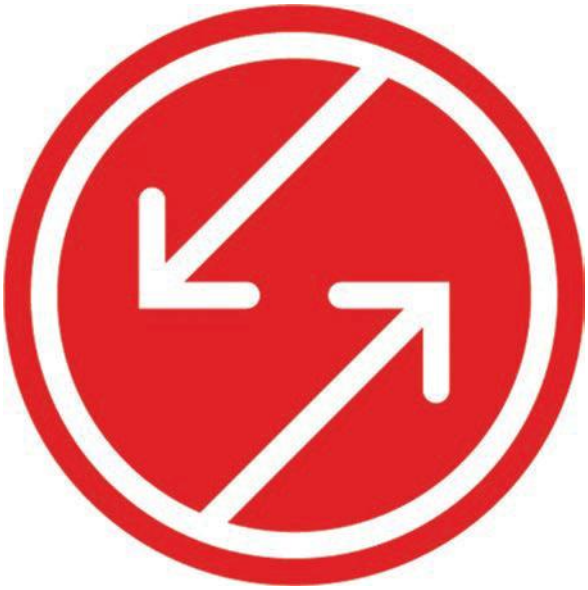

Figure 8.15 EngageMedia is a non-profit media, technology and culture organisation that uses the power of video, the internet and open technologies to create social and environmental change.

8.9 A charter of rights for Australia

This chapter has shown how human rights are protected internationally by various documents, treaties and organisations. Similarly, Australia protects certain human rights by statute, common law, courts and local organisations. However, the protection of rights in Australia is scattered, and in many cases fragile. Arguably, most rights could be overturned by the simple passing of an Act of Parliament. While Australia currently lives under a peaceful and vibrant democracy, where rights for most people are respected and protected, history shows that this may not always be the case. Minorities and non-Australian citizens lack the benefits that a human rights charter, for example, would give.

Many states have opted to protect their citizens' rights through adoption of a bill or charter of rights, which aims to restrict the power of future parliaments to reduce or infringe certain rights. For example, in 1791 the United States introduced a series of constitutional amendments known as the US *Bill of Rights*. This followed some precedents, notably the English *Bill of Rights* of 1689. The US *Bill of Rights* includes numerous rights, such as trial by jury, a prohibition on cruel or unusual punishment, a right to due process, protection against self-incrimination and protection from unreasonable search and seizure. The important thing about the US *Bill of Rights* is that the rights were given constitutional force as provisions of the US Constitution, ensuring their fundamental status in US law and their future survival.

Other countries have enacted similar bills of rights by statute; these are highly influential, but they lack the full force of constitutional provisions. This form has been preferred by some jurisdictions as it allows for some future flexibility, while still declaring protection of the wide range of rights and giving the judiciary the power to declare any inconsistent legislation incompatible. For example, Canada introduced the Canadian *Bill of Rights* in 1960, New Zealand introduced a Bill of Rights in 1993 and the United Kingdom enacted the *Human Rights Act 1998* (UK). In Australia, both the Australian Capital Territory (in 2004) and Victoria (in 2006) have enacted human rights charters – in line with many of the rights protected under the UDHR, the ICCPR and the ICESCR – to protect human rights in relation to their legislation and decisions.

In Commonwealth law, various attempts have been made to introduce greater human rights protection, but they have failed. The most notable attempts were in 1944, when the Labor government tried to introduce constitutional amendments to guarantee freedom of expression and freedom from want and fear, and the 1983 Australian Human Rights Bill. In 1997, the issue of a human rights bill was again raised, but it too failed during the Constitutional Convention on making Australia a republic.

Legal Links

The full *National Human Rights Consultation Report* is available at http://cambridge.edu.au/redirect/?id=6277. Chapters 12 and 13 of the report are relatively short but explain in detail each of the arguments for and against a charter, respectively. The arguments in Table 8.1 on page 200 reflect each of the arguments examined in the report.

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Figure 8.16 Former High Court Justice Michael Kirby is an outspoken proponent of a Charter of Rights for Australia.

In 2008, on the 60th anniversary of the UDHR, the then Federal Attorney-General, Robert McClelland, announced an inquiry, called the National Human Rights Consultation, into whether Australia should adopt some form of a charter of rights. The inquiry sparked a nationwide debate about the status of rights protection, the merits of adopting a charter and the future of rights in Australia. The consultation

Table 8.1 A summary of all the main arguments put forward by supporters and opponents of a charter of rights

Arguments for a charter of rights	Arguments against a charter of rights
Extremely high community support	The adequacy of current human rights protections in Australia
Remedying the shortcomings of existing human rights protections	Undermining a tradition of parliamentary sovereignty, including transferring legislative power to unelected judges
Reflecting basic Australian values	No better human rights protection is guaranteed
Protecting the marginalised and disadvantaged	Potentially negative outcomes for human rights
Improving the quality and accountability of government	Excessive and costly litigation
Supporting a culture of regard for human rights	Democratic processes and institutions offer better protection of rights
Improving how the international community views Australia with regard to human rights	A major economic cost
Bringing Australia into line with other democracies	Unnecessarily legalised human rights
Generating economic benefits	

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Figure 8.17 Participants at the Eritrea vigil in London on 17 May, 2015 protesting against the Eritrean government's religious policies.

was widely successful. After receiving over 35 000 submissions, conducting 66 community roundtables and three days of public hearings, and conducting extensive research into the issue, the consultation released its report at the end of 2009.

Of all the submissions entered to the consultation, 95% discussed enacting a charter of rights or a human rights Act, similar to that of the United Kingdom or New Zealand. Of all those, 87.4% were in favour of such a charter and only 12.6% were opposed. In April 2010, the Australian Government rejected the key recommendation of the National Human Rights Consultation Committee report: to implement a legislative charter of human rights. Instead, the government announced that it would adopt a human rights framework including various measures, such as education initiatives and enhanced parliamentary processes. It remains to be seen whether a future government will decide to act on the recommendation and implement a comprehensive charter of human rights and whether its implementation would have any benefit to minorities and those most at risk of rights infringement in this country.

Research 8.4

Read all the arguments for and against adopting a charter of rights, then review the more detailed arguments contained in chapters 12 and 13 of the *National Human Rights Consultation Report* (see http://cambridge.edu.au/redirect/?id=6277) and complete the following tasks.

1. Research at least three arguments for and three arguments against introducing a charter in the report.
2. Explain in detail what the argument consists of and any arguments against it.
3. The Rudd government in 2010 failed to attempt to introduce a charter of human rights. Should a future government try again?

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Chapter summary

- Protection of human rights differs internationally and domestically.
- State sovereignty can be used to promote or to hinder human rights.
- The various UN bodies and international courts have differing roles to play in the protection of human rights.
- The Responsibility to Protect is a UN doctrine that attempts to make the prevention of human rights abuses the collective responsibility of the international community.
- Many IGOs and NGOs play an important role in promoting human rights internationally.
- The UNHRC can hear complaints submitted directly by citizens of states.
- The ICC was the first permanent international court to deal with violations of human rights and crimes against humanity.
- Australia incorporates international treaties into domestic law by legislation.
- The *Australian Constitution* enshrines some minimal human rights.
- Most Australian human rights are found in statute or in common law.
- The High Court has a crucial role in upholding human rights in the *Constitution* and common law.
- Freedom of speech and freedom of information are essential for a healthy democracy and the maintenance of the rule of law.
- A charter of rights for Australia was considered in 2010 but the government at the time decided against going ahead despite strong public support. There are many arguments for and against a charter.

Questions

Multiple-choice questions

1 Which of the following is *not* an organ of the UN?

A Security Council
B International Committee of the Red Cross
C Secretariat
D Economic and Social Council

2 Which of the following best describes the Responsibility to Protect?

A States have the sole responsibility to protect their populations from human rights abuses.
B The international community has the responsibility to intervene whenever there are human rights abuses.
C The responsibility to protect people's human rights is shared between the state and the collective international community.
D The responsibility to protect people's human rights is shared between the UN Security Council and the collective international community.

3 Which of the following is *not* protected by the *Australian Constitution*?

A The right to vote
B The right to religious freedom
C The right to privacy
D The right to federal trial by jury

4 The separation of powers in Australia is best described by which of the following?

A The separation of parliament, the army and the judiciary
B The separation of legislative power between the Commonwealth and the states
C The separation of parliament, the executive and the judiciary
D The separation of parliament, the judiciary and the Senate

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5 Which of the following contains only arguments *for* a charter of rights?

A Reflecting basic Australian values; high community support; excessive and costly litigation

B High community support; adequacy of current human rights protections; generating economic benefits

C Improving Australia's international standing; reflecting basic Australian values; transferring legislative power to unelected judges

D High community support; improving the quality and accountability of government; redressing the inadequacy of existing protections

Chapter summary questions

1 Assess how state sovereignty can either be used to uphold human rights or to shield a government from international action resulting from human rights violations.

2 Describe the role of the various organs of the UN in protecting human rights.

3 Describe the role of the various international courts in enforcing human rights.

4 Assess the High Court's ability to protect human rights.

5 Is an Australian charter of human rights still worth pursuing?

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Chapter 9
Contemporary human rights issues

Chapter objectives

In this chapter, students will:

- identify and apply legal terminology to contemporary human rights issues
- describe how international and domestic law are used in the promotion of human rights
- discuss ways in which the law is used to deal with human rights issues
- explain the role of the law in educating the public about human rights and encouraging cooperation as a means of progress on human rights issues
- evaluate the effectiveness of legal measures to promote human rights
- communicate legal information about contemporary human rights issues using logical and well-structured arguments
- analyse the operation of international law and domestic legal systems in promoting human rights.

Issue 1 Human trafficking and slavery

Issue 2 Child soldiers

Issue 3 Exploitation of workers – digital versions only

Note that to meet the requirements of the NSW Legal Studies syllabus, only one of these three issues must be studied.

Legal oddity

Researchers at Georgia State University tracked Islamic State (IS) propaganda and eulogies over 13 months.

The data, published by the US military's Combating Terrorism Center at West Point, claimed 89 boys aged eight to 18 had been killed fighting in a number of various warfare roles. Between January 2015 and January 2016, 39% of the boys were killed in suicide car bombings and 33% in battle.

The number of children who have died fighting for IS in the last year is nearly twice the previous estimate. The researchers also found that three times as many children were involved in operations than during 2014.

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Issue 1:
Human trafficking and slavery

Key terms/vocabulary

child soldier
contemporary slavery
debt bondage
forced labour
forced marriage
human trafficking
people smuggling
sexual slavery

Relevant law

IMPORTANT LEGISLATION AND TREATIES

Slavery Convention (1926)
Universal Declaration of Human Rights (1948)
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery (1956)
Criminal Code Act 1995 (Cth)
Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999 (Cth)
Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (2000)
Trafficking Victims Protection Act of 2000 (US)
Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth)

SIGNIFICANT CASES

R v Tang (2008) 237 CLR 1
R v Wei Tang (2009) 233 FLR 399

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9.1 Contemporary slavery

The history of slavery and the advancement of the abolitionist movement were discussed in Chapter 7. As discussed in that chapter, the worldwide movement to abolish slavery began in the 18th century. It culminated in the development of numerous anti-slavery treaties in the 20th century, leading eventually to the abolition of slavery. Article 4 of the 1948 *Universal Declaration of Human Rights* (UDHR) states: 'No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.'

Today, almost every country has enacted laws officially abolishing slavery, and by doing so has undertaken to end the practice within its own borders. Minimum working conditions have been established, as have complex laws on the migration and movement of individuals across international borders. Yet despite this, slavery is still far from being an issue of the past. Illegal slavery and the trade and trafficking of human beings continue to this day, including in developed countries such as Australia. It is difficult sometimes to look at a situation today and be able to label it slavery, because as a society we tend to think of slavery as something from the past that no longer exists.

As **contemporary slavery** involves illicit activity, accurate statistics describing the extent of the problem are difficult to obtain; and it can be difficult to recognise some activities as slavery. The International Labour Organization (ILO) estimates that at least 21 million adults and children are in forced or bonded labour or commercial sexual servitude at any given time. According to some researchers and non-government organisations (NGOs), up to 31 million people may currently be enslaved around the world; this is more people than at any other time in history.

Refer, for example, to the websites for Anti-Slavery International (http://cambridge.edu.au/redirect/?id=6278) and iAbolish (http://cambridge.edu.au/redirect/?id=6279).

contemporary slavery
a form of forced or bonded labour, with or without pay, under threat of violence

Contemporary slavery can take a number of forms. The main categories include:

- **forced labour** – the ILO estimates that at least 18.7 million people in the world are subjected to forced labour. Forced labour is work performed under the threat of a penalty or harm (such as threat of hardship, detention, violence or even death to the person or to another person); it is work that the person has not voluntarily submitted to. Victims might include domestic workers and workers in factories or sweatshops, mining and agriculture or construction. A person may, for example, be lured by the promise of a legitimate job opportunity and instead be forced to work without pay or while enduring physical abuse. It can often be difficult for authorities to find such individuals or groups.
- **debt bondage** – the United Nations (UN) defines debt bondage as 'modern-day slavery', often a form of forced labour. Debt bondage is where a person is forced to repay a loan with labour instead of money. Debt bondage also involves the proper value of the labour not being applied towards repayment of the debt, and/or the type or duration of services not being properly limited. In many cases, the person may be deceived into paying extremely high rates of interest, making it impossible to repay the debt. They might be tricked or trapped into working for no or very little money, or have unreasonable expenses deducted from any pay or added to the debt. In some cases, children of the borrower may be forced to repay the debt across generations.
- **sexual slavery** – this involves repeated violation or sexual abuse or forcing the victim to provide sexual services. It can take many forms, including forced prostitution, single-owner sexual slavery, slavery associated with religious practices or other types of slavery, such as forced labour where sexual abuse is also common. Sexual slaves are usually women and children. The victims might be captured, coerced, deceived or even sold by their own families or acquaintances into sexual slavery. The *Vienna Declaration and Programme of Action* calls for an international response to this. Sexual slavery's most problematic aspect is commercial sexual exploitation of children in the form of child prostitution, child pornography and sex tourism.

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Figure 9.1 In some countries, girls as young as 15 are forced into marriages with much older men.

forced labour
work performed under the threat of a penalty or harm and which the person has not voluntarily submitted to

debt bondage
a situation where a person is forced to repay a loan with labour instead of money, where the proper value of the labour is not applied towards repayment, and/or the type or duration of services is not properly limited

sexual slavery
repeated violation or sexual abuse or forcing of a victim to provide sexual services; it often takes the form of forced prostitution or forced labour where sexual abuse is also common

There are other more specific situations that may result in conditions of slavery, which might arguably fall into one or more of the categories above. They include domestic workers kept in captivity, the adoption of children who are in effect forced to work as slaves, **child soldiers** and those pushed into a **forced marriage**.

child soldier
a person under the age of 18 who participates, directly or indirectly, in armed conflict as part of an armed force or group, including both armed and support roles

forced marriage
marriage in which one or both parties is married against their will, often on promise of payment of money or goods to the family of the other person involved

9.2 Human trafficking and slavery

Today, many victims of slavery are forced into slavery by way of **human trafficking**, which is the commercial trade or trafficking in human beings for the purpose of some form of slavery. It includes recruiting or transporting a person for forced labour or debt bondage, or providing or obtaining a person for forced labour or debt bondage by use of force, fraud or coercion, or trafficking people for sexual slavery. The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children was adopted by the UN in 2000; it has since been ratified by 166 countries, and entered into force in 2003. It is a protocol to the *UN Convention against Transnational Organised Crime* (2000).

human trafficking
the commercial trade or trafficking in human beings for the purpose of some form of slavery, usually involving recruiting, transporting or obtaining a person by force, coercion or deceptive means

Human trafficking is a complex crime involving some of the most serious violations of human rights. It should be distinguished from **people smuggling**, which is where people voluntarily pay a fee for the smuggler's service, not necessarily involving any deception. With people smuggling, the people are usually free to continue on their own after arrival, often in the hope of starting a new life in the new country. With human trafficking, however, the victim will usually be exploited or forced into performing some sort of labour or service on arrival.

people smuggling
illegal transportation of people across borders, where people voluntarily pay a fee to the smuggler, and then are usually free to continue on their own after arrival in the hope of starting a new life in the destination country

Human trafficking can involve a whole line of criminal activity, from recruitment and harbouring of victims, to transport and sale, to obtaining or buying and finally exploiting that person in slavery or forced labour. Victims of human trafficking can be recruited in a number of ways (for example, they may be lured by a false job offer or offer of migration or a marriage proposal). In other cases, victims may be sold by family members, recruited by former slaves, deceived, intimidated or even physically abducted.

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Figure 9.2 Many victims of human trafficking are children.

The victims might be falsely imprisoned or threatened, or bonded with debt; or it might be practically impossible for the victim to survive outside. Victims might be exploited in a commercial industry, such as the commercial sex industry or agriculture or mining, or in a private residence (for example, in a forced marriage or as domestic workers). Thailand and Brazil are considered to have the worst child trafficking statistics.

9.3 Extent of human trafficking

Estimates of the number of people trafficked across international borders vary dramatically. The UN Office on Drugs and Crime estimates that there are over 2.5 million victims of human trafficking across state borders. However, this does not include the millions of people trafficked within their own countries, which is especially difficult to detect. According to the UN's *Global Report on Trafficking in Persons*, sexual exploitation is the most documented type of trafficking because it is more frequently reported by countries; instances of forced labour and debt slavery, as well as forced marriage and domestic servitude, may be less well documented. The ILO estimates that at least 56% of all forced labour victims are women and girls. This is part of a much wider problem – the place and value of women in society – in developing countries.

It is a global problem involving people of many nationalities trafficked in many countries, including Australia, the United States and European Union states. While many victims come from developing countries, poverty is not the sole source of the problem, which is driven by fraudulent recruiters, exploitative employers and corrupt officials, all seeking to reap profits from the victims' exploitation.

Siddharth Kara, an expert of human trafficking and slavery, has suggested that profits from human trafficking worldwide are well over US$150 billion, which, according to the ILO in 2015, makes it second only to drug trafficking. Regardless of the numbers, human trafficking is an important issue and affects almost every country in the world – whether as a source, transit or destination country. The following section explores some of the measures adopted worldwide to combat the problem.

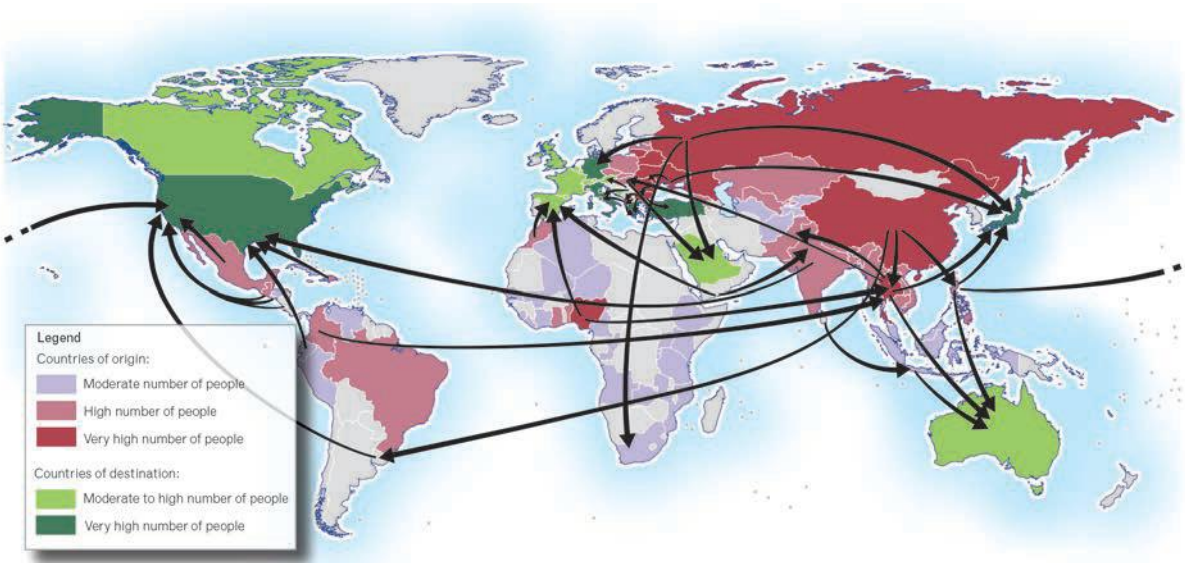

Figure 9.3 Human trafficking – countries of origin and destination

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Case Study

Human trafficking – victims' stories

The following stories are extracted from the US Department of State's *Trafficking in Persons Report* for 2015. They illustrate some of the suffering of victims of human trafficking and the different places and circumstances in which it can occur.

- With the help of a labor broker, 16-year-old Lok left Nepal for a job in Qatar. He was too young to legally migrate for work, but the broker who recruited him obtained a fake passport so Lok would appear to be 20 years old. The broker charged Lok an illegally high recruitment fee, so he left with a large debt that he had agreed to pay back at a 36 percent interest rate. Two months later, Lok died of cardiac arrest while working in harsh conditions. Migrant workers in parts of the Gulf, including Qatar, have complained of excessive work hours with little to no pay in scorching heat. Many workers also allege their housing complexes are overcrowded and have poor sanitation. Lok's parents received no money for his two months' work.
- Thema paid approximately $1480 to Sierra Leonean recruiters who promised her a nursing job or hotel work in Kuwait. Upon her arrival in Kuwait, however, Thema was instead forced to work as a domestic worker for a private Kuwaiti family. Thema worked all day, every day without compensation. Her employers forbade her from leaving the house or from using a cell phone. The family eventually returned Thema to her recruiter, taking advantage of a guarantee allowing them to obtain a refund for domestic workers they are not happy with. She ran away from the recruiter to the Sierra Leonean Embassy and was placed in a Kuwaiti government-run shelter with approximately 300 other former domestic workers. Thema likely faces the same fate as other trafficking victims in Kuwait who run away from private homes – the cancellation of her residence permit and deportation.
- When she was 14 years old, Cara met Max while on vacation in Greece with her mother. She fell in love with him and, after only a few weeks, Max persuaded her to move in with him, rather than return to England. He soon broke his promise to take care of her and forced Cara to have sex with strangers. Max first convinced her that the money she made was helping to keep them together; he later threatened to kill her mother if she tried to stop. In time, Max gave Cara to another trafficker who forced her to send postcards to her mother depicting a happy life in Athens. Cara eventually suffered an emotional breakdown and, once hospitalized, was able to ask for help. Hospital staff contacted her mother, who had no knowledge of Cara's abuse. They returned to England, where Cara is rebuilding her life and aspires to help other trafficking victims.
- Tanya was only 11 years old when her mother traded her to a drug dealer for sex, in exchange for heroin. Both Tanya's mother and the drug dealer have been indicted on multiple charges, including sex trafficking. In addition, the drug dealer was accused of rape as well as videotaping his sex crimes. At the end of the school year, after four months of such abuse and being forced to take heroin, Tanya went to live with her father and stepmother and confided in them about what had happened. Both her mother and the drug dealer face the possibility of life in prison if convicted on all counts.

Review 9.1

1. Identify the form or forms of slavery applicable to each story featured above.
2. Explain how each of these individuals was trafficked – describe the methods used and the purpose for which they were trafficked.
3. Describe the person or people likely to benefit from the victim's exploitation in each of these instances. Identify where any profit was likely to be involved.

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Legal Links

The US Department of State releases an important annual report on human trafficking titled the *Trafficking in Persons Report*. The report contains detailed information on measures against human trafficking worldwide, including the status of current national legislation, and on prosecution and prevention of human trafficking and protection of victims.

The report also lists each country according to its development or success in combating human trafficking, and places them in different levels or 'tiers'. The most recent report is available on the Department of State's website (see http://cambridge.edu.au/redirect/?id=6280).

Research 9.1

Looking at the latest edition of the US *Trafficking in Persons Report*, make a brief list of some of the highest (tier 1) and lowest (tier 3) ranked countries, then complete the following tasks.

1. Identify any patterns you can find in the highest and lowest country rankings.
2. Choose one country featured in the report. Find more detailed information on that country and summarise its progress.

9.4 Responses to human trafficking and slavery

Legal responses

International responses

Legal responses to human trafficking began with the worldwide abolition of slavery, largely in the early 20th century through the *Slavery Convention* of 1926. This treaty was expanded in 1956 by the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery*, which clarified and expanded the definition of slavery, including, for example, debt bondage, forced marriage and child slavery.

Although these treaties provided for the official abolition of slavery worldwide, they did not address issues of illicit slavery and human trafficking. Greater awareness of human trafficking and international pressure to deal with it grew, particularly at the end of the 20th century, culminating in 2000 with the UN General Assembly's adoption of the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, as part of a larger treaty tackling transnational crimes.

The protocol entered into force in 2003 and was the first legally binding instrument with an agreed definition of human trafficking. It aimed to provide an umbrella of overall protection, outlining an appropriate regime of protection, prosecution and prevention in order to effectively and more uniformly combat human trafficking. It was designed for member states to enact into the most appropriate domestic laws. The protocol has created greater global awareness of the issue, greater conformity in national laws that tackle the various issues of human trafficking, and better cross-border cooperation in investigating and prosecuting violations.

As of 2015, there were 166 state parties to the protocol. In the past few years the number of states seriously implementing the protocol has more than doubled. However, there are still many countries that do not have the required legal instruments

Figure 9.4 Human trafficking campaign sign outside the UN building in New York

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or political will. Although the protocol has been reasonably successful, there is still a lot of progress to be made that will require considerable resources, focus and cooperation.

Research 9.2

A link to the full text of the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children is available at http://cambridge.edu.au/redirect/?id=6281.

Look at the text of the protocol and complete the following tasks.

1. Looking at both the Preamble and art 2 of the protocol, summarise the main reasons for the treaty being created.
2. Identify the article containing the definition of human trafficking and explain how this might apply to the various types of and participants in human trafficking.
3. Describe the purpose of Parts II and III to the protocol and evaluate how these might improve the effectiveness of the treaty.

Domestic responses

Although opportunities for trafficking into Australia may be fewer than for some other countries, due to geographic isolation and strong migration controls, Australia is still a destination country for victims of trafficking, particularly those from Asia, Southeast Asia and Eastern Europe.

The Australian Government established a human trafficking strategy in 2003 and since then has dedicated almost $60 million to tackling the problem. This strategy covers the full trafficking cycle, from recruitment to reintegration, and the key areas of prevention, detection and investigation, prosecution and victim support are all given the same weight. Australia ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children with effect from 14 October 2005.

Australia first introduced sexual slavery laws with the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999* (Cth). It refined these and added more specific human trafficking offences

Figure 9.5 The Australian Federal Police (AFP) plays an important role in detecting and investigating cases of human trafficking.

to the federal *Criminal Code* in the *Criminal Code Amendment (Trafficking in Persons Offences) Act 2005* (Cth). The current provisions are found under Divisions 270 and 271 of the *Criminal Code Act 1995* (Cth); they include penalties of up to 25 years' imprisonment for some offences. Similar offences also included under state and territory legislation include:

- Division 270 – Slavery, sexual servitude and deceptive recruiting. This division contains offences including possession of a slave, engaging in slave trading and entering into any commercial transaction involving a slave. It also contains prohibitions on the deceptive recruiting of a person for sexual servitude.
- Division 271 – Trafficking in persons and debt bondage. This division makes it an offence to traffic in adults or children, internationally or domestically. It also contains offences relating to debt bondage, forced labour and the trade in human organs.

Additional measures have been introduced by the Australian Government since 2003, in particular under the 2004 *Commonwealth Action Plan to Eradicate Trafficking in Persons*. In 2008, the federal government introduced new measures under the *Commonwealth Government Anti-Trafficking Strategy*.

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In Court

***R v Tang (2008) 237 CLR 1; R v Wei Tang* (2009) 233 FLR 399**

This involved Australia's first jury conviction under the slavery provisions of Division 270 of the Commonwealth *Criminal Code*. It involved a brothel owner, Wei Tang, who was accused of bringing five women from Thailand to work in a licensed brothel in Fitzroy, Melbourne, under unlawful conditions of debt bondage and slavery.

The women arrived in Australia on validly obtained tourist visas, although in their visa applications they had not stated that the true purpose was to work. The women had worked in the sex industry in Thailand, and voluntarily entered into agreements with a broker. Wei Tang then purchased them from a Thai recruiter for $20 000 each.

Each woman was required to repay a debt of $45 000, and the repayments formed the basis of the slave trading charges. When the women arrived, Wei Tang withheld the women's passports as well as their return plane tickets, and the women were told the debt was to be repaid by working six-day weeks over seven to eight months. Each client serviced by the women counted towards $50 off the payment, amounting to a total of 900 clients required to repay the debt. If the women worked on the seventh day as well, they were permitted to keep $50 per client for themselves.

The women were not normally kept locked in, but they had little money and limited English, and their passports were retained. Because their visas had been illegally obtained, they were afraid of immigration authorities, and they were required to work extremely long hours. However, there was no evidence that Wei Tang had physically abused the accused, and after six months two women had paid off their debts, and were able to choose their working hours and be paid for their work.

In 2006, Wei Tang was convicted of five counts of intentionally possessing a slave and five counts of intentionally exercising a power of ownership over a slave, contrary to section 270.3(1)(a) of the Commonwealth *Criminal Code*, and sentenced to 10 years' imprisonment. However, the conviction was overturned and ordered for retrial in the Victorian Court of Appeal in 2007 on the basis that the judge had misdirected the jury on the meaning of the term 'slavery', and should have instructed them that the prosecution needed to prove that Wei Tang knew or believed the powers she was exercising were powers attaching to ownership.

The prosecution then appealed to the High Court of Australia, where the original conviction was upheld in 2008 by a six-to-one majority. The High Court found that the prosecution needed only to prove Wei Tang's intent to exercise powers attaching to ownership, and that Wei Tang had had 'the power to make each woman an object of purchase, the capacity to use the women in a substantially unrestricted manner for the duration of their contracts, the power to control and restrict their movements, and the power to use their services without [adequate] compensation'.

Figure 9.6 Wei Tang

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Some of the measures introduced include:

- increased specialist training and funding for the Australian Federal Police to detect and investigate human trafficking operations
- additional funding and training for the prosecution of human trafficking through the Commonwealth Director of Public Prosecutions
- a National Policy Strategy to combat trafficking in women for sexual servitude
- victim support measures and special visa arrangements to support victims of trafficking
- a targeted Communication Awareness Strategy that gives information about trafficking and the help available
- cooperation with regional and international agencies in tackling the sources of human trafficking and prosecuting offenders.

The Australian Government has made a number of prosecutions under the criminal provisions, in particular the case of Wei Tang, which is described in the 'In Court' box on page 213. One of the serious problems in Australia's enforcement campaign has been the issue of protection visas and threat of deportation of victims on discovery by authorities. This can effectively deprive the system of necessary witnesses and can have the effect of punishing the victims of the crimes. A number of government proposals in recent years have attempted to address these deficiencies; their effectiveness remains to be seen in future prosecutions.

Review 9.2

Read the media article on page 213 and answer the following questions.

1. Identify the section and division of the Commonwealth *Criminal Code* under which Wei Tang was prosecuted.
2. Describe where the women came from and how they came to be working in Australia.
3. Outline the conditions of the 'contract' that Wei Tang had made with the women.
4. Describe some of the conditions that led to a finding of the women being kept as slaves, and outline the powers that Wei Tang was found to have exercised.

Non-legal responses

There are many programs and organisations, both international and domestic, that aim to combat the causes, organisation, execution and effects of human trafficking worldwide.

International responses

At the international level the UN, the ILO and various NGOs are involved in combating slavery and human trafficking. The UN has established a *Global Initiative to Fight Human Trafficking* (UN.GIFT), which aims to:

- increase awareness about human trafficking
- assist non-state actors (such as NGOs) in their anti-trafficking campaigns by encouraging cooperation and joint action between NGOs and the efficient prosecution of criminals
- reduce the demand for the exploitation of people and the vulnerability of potential victims, and ensure support for victims who have escaped.

The ILO also plays a crucial role in implementing and reporting on workers' rights worldwide. The ILO has campaigned ceaselessly against forced labour. In 2001, the ILO established a *Special Action Programme on Forced Labour* (SAP-FL) to attempt to raise global awareness of forced labour in its different forms. It has undertaken several worldwide and country-specific studies and surveys on a range of aspects of forced labour, including human trafficking, bonded labour, rural servitude, forced domestic work and forced prison labour.

Figure 9.7 An anti-human-trafficking poster

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As discussed in Chapter 8, NGOs play an extremely important role in combating human rights abuses (for example, by reporting on and exposing abuses, by researching and informing the public and governments on incidents and patterns of abuse, and by working to combat causes, incidents of or effects of abuse). NGOs involved in combating human trafficking and slavery include:

- Anti-Slavery International (see http://cambridge.edu.au/redirect/?id=6278), an international NGO founded in 1839 and based in the United Kingdom; it aims to draw attention to the continuing problem of slavery worldwide and campaign for recognition and action in the countries most affected today.
- American Anti-Slavery Group, iAbolish (see http://cambridge.edu.au/redirect/?id=6279), an anti-slavery NGO that works on awareness, advocacy and aid, and focuses primarily on slavery in Sudan and Mauritania.

Legal Links

- UN.GIFT – for more information on the UN.GIFT initiative, see the website http://cambridge.edu.au/redirect/?id=6283.
- ILO – information on the ILO's forced labour program, SAP-FL, is available at http://cambridge.edu.au/redirect/?id=6284.

Domestic responses

Actions by states are also crucial in combating slavery. As mentioned earlier, the United States plays a significant role in combating human trafficking worldwide. The United States first began monitoring human trafficking in 1994 and has broadened its reporting over the years to cover all main forms of contemporary slavery. In 2000, the United States passed the *Trafficking Victims Protection Act*. This established the Office to Monitor and Combat Trafficking, which has initiated programs and provided millions in grants to organisations around the world. It has assisted many countries with training, investigating and prosecuting offenders, and with protection of victims from abuse. In 2004, the United States established a centre to coordinate the activities of federal agencies, police, intelligence, and diplomatic representatives to stop trafficking. One of the United States' most important efforts has been the US Department of State's detailed annual *Trafficking in Persons Report* (TIP Report).

In Australia, there are also a number of NGOs that make an indispensable contribution to fighting all forms of modern slavery. The media also plays a role informing the public about the existence and nature of modern slavery in this country. Films, books and documentaries have also played an important role. For example, in July 2006 SBS aired *Trafficked*, a documentary about sex slavery in Australia which was watched by over 500 000 viewers. *Trafficked* shocked the country and acted as a catalyst for some victims of trafficking to lodge compensation claims. As the director, Luigi Acquisto, said, 'the film made legal history and set precedents for future victims'.

Australian universities are also crucial in researching and reporting on trends in human trafficking in Australia. For example, University of Technology Sydney's Anti-Slavery Project began in 2004; it is dedicated to the elimination of modern slavery in all its forms through collaboration with government agencies and community groups. The University of Queensland established a Human Trafficking Working Group in 2008; it researches and analyses cases and statistics on human trafficking and slavery in Australia.

Effectiveness of responses

At the international level, the problem of modern slavery is showing no signs of going away. The main contributors to the risk of people trafficking and slavery and the difficulty in preventing it have been identified as:

- Developing states do not have the resources to fight these forms of exploitation and transnational crime.
- There are socio-political and economic factors driving the movement of people from one place to another.

In a globalised economic system there is an increased demand for all types of labour, legal and illegal. This demand is exploited by criminal organisations, and vulnerable people are trafficked as victims to meet this demand. Poverty in source countries, combined with a lack of both education and the rule of law, can contribute to the vulnerability

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of victims and the success of recruiters' coercive or deceitful techniques.

The implementation and enforcement of international treaties, especially the 2000 protocol, is left up to national governments. While some states vigorously pursue offenders, others may be unwilling or unable to effectively tackle the problem. The UN, the ILO and NGOs all play a crucial role in encouraging such countries to continue their efforts, and reporting mechanisms such as the US TIP Report help expose the continuing deficiencies of these countries' efforts.

The 2012 TIP Report lists Australia as a tier 1 best practice country, but identifies a number of areas where improvements can be made. The report noted that crime was becoming increasingly recognised in the Asia–Pacific region, with a 30% increase in prosecutions in one year in Indonesia, and legislation now in place in over half of the Pacific Island nations. Regional reform has been key: many technical assistance programs and policy frameworks have been produced or managed by regional bodies, and Australia has played a particularly important role.

We cannot expect much change in the short term to the economic drivers of migration and people movement, but improved awareness and monitoring of vulnerabilities, including locations, sectors and businesses where trafficking occurs, will help prevent and reduce trafficking in people in Australia and the wider region.

Legal Links

- Anti-Slavery Australia – information on the Anti-Slavery Project is available at http://cambridge.edu.au/redirect/?id=6278.
- Human Trafficking Working Group – research, case reports and statistics on human trafficking in Australia are available at http://cambridge.edu.au/redirect/?id=6285.
- *Trafficked* – further information on the SBS documentary *Trafficked* is available at http://cambridge.edu.au/redirect/?id=6286.

Review 9.3

1. Describe some of the efforts of the UN and the ILO in tackling human trafficking.
2. Explain the role of the media, NGOs and other non-legal responses in combating human trafficking. Evaluate how these groups can complement the legal measures in place.
3. Critically evaluate the effectiveness of legal and non-legal responses to human trafficking based on consideration of the causes of and drivers behind the problem.

Figure 9.8 On the International Day for the Abolition of Slavery, 2 December, IOM Ukraine opened a public art installation titled *Invisible in Plain Sight*. The installation was to raise awareness about trafficking in human beings and tell the real stories of its victims who live among us, but often remain unseen.

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Issue 2:
Child soldiers

Key terms/vocabulary

child soldier
human shield
press-ganging
war crime

Relevant law

IMPORTANT LEGISLATION AND TREATIES

Defence Act 1903 (Cth)
Universal Declaration of Human Rights (1948)
Declaration of the Rights of the Child (1959)
United Nations Convention on the Rights of the Child (1989)
Rome Statute of the International Criminal Court (1998)
ILO Worst Forms of Child Labor Convention (1999)
Optional Protocol to the Rights of the Child on the Involvement of Children in Armed Conflict (2000)

SIGNIFICANT CASES

Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06

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9.5 Defining the issue of child soldiers

Children, like adults, are entitled to the protection of human rights. The *Universal Declaration of Human Rights* (UDHR) is intended to be universally applied, and the rights it declares apply to children and young people just as they do to adults. However, children have less power in society and thus may be more susceptible to victimisation and human rights violations than the average adult citizen. The special vulnerability of children is recognised in art 25 of the UDHR, which provides that children are 'entitled to special care and assistance'. In 1959, the UN expanded on this with the adoption of the *Declaration of the Rights of the Child*. The declaration restates several provisions of the UDHR as applicable to children, adding that children need 'special safeguards and care, including appropriate legal protection, before as well as after birth'.

Although significant progress has been made in children's rights in the last century, many children across the world today are still denied basic human rights or have those rights violated; for example, children in some countries are denied the right to education or to a fair trial, and suffer violence, or punishment by cruel and inhumane methods, including, in some countries, the death penalty.

Figure 9.9 The UDHR (1948) and the *Declaration of the Rights of the Child* (1959) started the process of giving global recognition to the rights of children. These rights are not enforced equally around the world.

In some countries, children are also recruited into armed forces as **child soldiers**.

child soldier
a person under the age of 18 who participates, directly or indirectly, in armed conflict as part of an armed force or group, including both armed or support roles

Children have been involved in military campaigns in many cultures throughout history, even when their use was widely condemned by society. For example, child soldiers have been documented as having participated as aides, scouts, support personnel or in historical events such as the Children's Crusade of medieval Europe in 1212, as drummer-boys under Napoleon in the Battle of Waterloo, as young militia in the Spanish Civil War, and in the Hitler Youth in Nazi Germany during World War II.

In the 20th century, many international campaigns were undertaken to stop the participation of children in armed conflict and to bring about greater awareness of their exploitation. However, the use of children is still widespread in some areas of the world, particularly areas where instability is rife. The use of children in armed conflict will usually be highly exploitative, and is often considered a form of contemporary slavery or human trafficking. Children are often unlawfully recruited though the use of force, intimidation or deception, and are used for labour in conflict areas, or sexually exploited.

Figure 9.10 The Islamic State or ISIS openly recruited children to be soldiers and encouraged them to commit atrocities.

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Children in armed conflict are likely to be exposed to high levels of danger or abuse and significant psychological trauma. They may also be injured or killed, or suffer other kinds of serious harm. Groups may target children for use in armed conflict because they are seen as free and expendable labour, or as easier to abduct or manipulate. Children may also be more willing than adults to take risks, while the other side may also be less inclined to suspect children, or may hesitate to attack where children are present. Children are particularly vulnerable to military recruitment – they may be more easily manipulated, their youth makes it harder for them to resist, and they do not fully understand the conflicts they are being recruited for.

The parties recruiting children can be government forces, paramilitary organisations or rebel groups. Children might be recruited at home, on the street or even at school, or they might be physically abducted by recruiters. They might even be forcibly conscripted by governments. In many cases, children 'voluntarily' join armed groups: there are social or economic pressures on them, and they believe that joining the group will get them food or security. In other cases, children may be abducted or **press-ganged** by armed groups.

press-ganging
the act of forced conscription used in England during the 1800s; groups of men known as press gangs were employed by the government to recruit people forcibly into lifetime service with the armed forces

Children are usually unable to escape or are subjected to severe punishment for attempting to escape. Sometimes children may be forced or indoctrinated into committing atrocities against neighbours or even their own families, and may become stigmatised in their communities because of this, making it impossible for them to return home.

The use of child soldiers takes three main forms:

- direct involvement in armed conflict, where the child may be expected to take part in the fighting and armed with a weapon
- indirect involvement through support roles, such as messenger, scout, cook, porter, servant, to lay or clear landmines or even as a sexual slave
- use for particular political advantage, such as propaganda or as a **human shield**.

human shield
the placement of civilians in or around military targets to deter the other party from attacking that target

9.6 Extent of the issue

It is impossible to calculate how many children around the world are involved in armed conflict as child soldiers, but the issue has come to the public's attention due to conflicts in Sierra Leone, Liberia, Uganda and Iraq that involve heavy use of child soldiers. Child soldiers may serve in government armies, but they also serve also in government-linked militias and opposition or rebel forces, where reliable data are unavailable. Some countries may have inadequate procedures to verify the ages of new recruits. In other countries, low levels of birth registration mean that children may be inadvertently or even deliberately recruited; in Paraguay, for example, this assisted forced conscription of children as young as 12.

The NGO Peace Direct estimates that the number of child soldiers in the world is about 250 000, while Human Rights Watch says that it could be as much as 300 000. In that year, the UN reported 57 armed groups worldwide using child soldiers.

For example, recent conflicts in Sri Lanka, Uganda, Colombia, Myanmar (Burma), Iraq, Israel and the Occupied Palestinian Territories and Sudan have involved some use of child soldiers. In one of the worst cases, in Uganda, the rebel group Lord's Resistance Army (LRA) kidnapped over 30 000 children and used them as soldiers and slaves. According to a 2009 US TIP Report, boys in the rebel group are forced to loot and burn villages and torture and kill their neighbours.

Girls who are abducted are usually raped or become sex slaves. In the Sierra Leone conflict they became 'bush wives'. In countries such as Uganda, Sri Lanka or Nepal, it is claimed that a third or more of the children recruited are girls. In April 2014, in the Chibok area of Nigeria, nearly 300 girls were kidnapped from their school by the notorious Nigerian terrorist group, Boko Haram. These were among thousands of girls, boys and young men who have been kidnapped in 2014. These young people have been used as soldiers, sex slaves and suicide bombers in Boko Haram's rebel army.

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Figure 9.11 In April 2014, nearly 300 hundred girls were kidnapped by Boko Haram from Chibok in Nigeria.

Figure 9.12 Arms manufacturers have made their weapons lighter and simpler, making it easier for child soldiers to use.

The majority of child soldiers are aged between 15 and 18 years, and in some cases their use may be considered legal under national laws. However, in some countries children under 15 years old, and in some cases as young as seven years old, may be recruited, especially by rebel or guerrilla movements. Recruiting children under the age of 15 years is considered a **war crime** under international law.

war crime
action carried out during a time of war that violates accepted international rules of war

While the use of child soldiers is universally condemned, the NGOs report that hundreds of thousands of children have fought and died worldwide as a result of use in conflict over the last decade. They are frequently forced to conduct hazardous tasks such as laying landmines or explosives, or even sent on suicide missions, and are usually forced to live in harsh conditions, often with no health care and/or without enough food. Almost always they will be subject to cruel and brutal treatment, including beatings and humiliation, or severe punishment for mistakes or attempts to escape.

Technological advances in weaponry have also contributed to an increase in the use of child soldiers; small arms and lightweight automatic weapons are simpler and lighter, and thus easier for children to operate. Recently, some armed groups have given

Research 9.3

Explore the United Nations website, 'Children and Armed Conflict' at http://cambridge.edu.au/redirect/?id=6287.

1. Identify and make a list of the conflict situations around the world where the use of child soldiers is currently an issue (there should be about 23 conflict situations). Identify the regions where the use of child soldiers is particularly widespread.
2. What are the '6 Grave Violations'?
3. In what ways are children affected by armed conflict?
4. From the 'Library' tab download the most recent UN document on one of the conflict situations which is close to Australia. What is the nature of this document? What information does this document give about this conflict situation?
5. From the 'Library' tab find the latest Secretary General's report on children in conflict situations.
6. Describe the latest campaign about children in conflict situations. How effective do you think this campaign is in raising awareness about this issue?

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Case Study

Child soldiers – victims' stories

The following stories illustrate some of the suffering endured by children forced to serve in armed conflicts, as well as the different circumstances and places around the world where the practice occurs.

- In the Democratic Republic of Congo (DRC), a militia group abducted 11-year-old Lucien and 11 of his classmates from their school. Lucien submitted to military training after he was tied up and stabbed in the stomach. Sixty other children submitted to the severe training and those who resisted were beaten. Lucien saw people die from starvation and illness, with the children given only one plate of maize per day to share with 12 others. Lucien managed to escape after several years in captivity and now lives with a host family.
- In Burma (Myanmar), 11-year-old Aung was travelling home when army recruiters picked him up. Aung tried to refuse, but the soldiers told him that if he did not join them, he would be imprisoned for six years. Aung believed he had no choice, so he agreed to join. He was frequently beaten during training. At only 12 he was sent into combat, and at 13 he witnessed members of his unit murder 15 women and children. At 14, Aung managed to escape across the border into Thailand, where he found an illegal job. He knew that, if discovered, he would be returned to Burmese authorities, where he would be arrested – and also risk his family's safety.
- In Uganda, rebel soldiers from the Lord's Resistance Army (LRA) abducted 14-year-old Charlotte and 139 other girls from their dormitories at a Catholic boarding school. They were marched to a military camp in Sudan. Charlotte was put in military training for 35 days before being sent to fight the government army. She was also given to an older male soldier as a 'wife' and gave birth to two children while in the bush, nearly losing her own life during the delivery of her first child. Charlotte and her children escaped after eight years in captivity, and have been reunited with Charlotte's family. Charlotte has also returned to school.
- In Colombia, 16-year-old Estelle 'voluntarily' joined the guerrilla movement, FARC, when she was 11, in order to escape the physical and sexual abuse she suffered at home. Estelle believed that FARC would offer her protection and a support network. Once she joined, however, she was told that if she attempted to escape she would be sentenced to death. Before managing to escape, Estelle was forced to kill, and lived in constant fear of being killed.

See http://cambridge.edu.au/redirect/?id=6288 for source information.

Figure 9.13 Areas in Uganda affected by the Lord's Resistance Army

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children drugs to make them more dangerous or less fearful during conflict. For example, during conflict in Sierra Leone children were reportedly given a mixture of gunpowder and cocaine before battle. Sexually transmitted diseases and other health problems have also become more prevalent among these children, and there are high rates of unwanted pregnancies in girls. Where children do manage to escape, the physical and psychological scarring, as well as stigmatisation in their former communities, makes reintegration into normal life very difficult.

As a final point, many countries around the world also continue to officially recruit under-18s into government armed forces. Over 60 countries, including developed countries such as Australia and the United States, still allow voluntary recruitment of 17-year-olds into the army, and calls to raise the minimum age to 18 have been countered by arguments around manpower requirements. For example, the US Army has acknowledged that in 2003 and 2004 it sent nearly 60 17-year-old US citizens to Afghanistan and Iraq. In recent years, the US Army has lowered educational requirements, and increased bonuses for recruitment: this has led to a striking increase in the number of under-18s joining the military.

On 26 April 2012, the Special Court for Sierra Leone convicted Charles Taylor, the former President of Liberia, for his role in the civil war in that country which included the extensive use of child soldiers. On 30 May 2012 Taylor was given a 50-year prison sentence. The sentence was later upheld by the Appeals Chamber.

Review 9.4

1. Identify the place, age and gender of the children involved in the Case Study on page 221.
2. Explain whether the children in these stories were recruited by official or non-government forces and describe the way in which they were recruited.
3. Describe the tasks the children were forced to do and the way in which they were treated, including any abuse or hazards they were exposed to.

9.7 Responses to the issue of child soldiers

Legal responses

Although the use of child soldiers has throughout history been condemned as morally or ethically wrong, it is only relatively recently that a proper international framework has been put in place to try to bring the practice to an end.

International responses

The recognition of children's special vulnerability and need for a higher level of human rights protection was mentioned in the introduction to this section. However, it was not until 1977 that the specific issue of child soldiers was first addressed. The Geneva Conventions, known as the 'laws of war', are a series of four treaties adopted between 1864 and 1949 to regulate the conduct of armed conflict and attempt to limit its effects. In 1977, a number of additional protocols to the Geneva Conventions were adopted, in which the problem of child soldiers was recognised. The minimum age for recruitment or use in armed conflict was set at 15 years, for both government and non-government parties. International law now has this as the standard custom.

Later treaties also aimed to address the issue in different ways:

- The *United Nations Convention on the Rights of the Child* (1989), one of the most important international human rights treaties, and now all but universally adopted, includes art 38, which relates to children in armed conflict. Article 38 restates the minimum age of recruitment as 15, and discourages recruitment of children under 18 years old. It also creates obligations to minimise harm to all children during armed conflicts.
- The *Rome Statute of the International Criminal Court* (1998), discussed in Chapter 6, set up a permanent court for trials concerning charges of war crimes, crimes against humanity, and genocide. Recruiting children under 15 years old into armed forces or using them to participate in hostilities was specifically added as a war crime that can be tried and punished by the International Criminal Court (ICC). The Rome Statute came into force on 1 July 2002.

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- The *ILO Worst Forms of Child Labor Convention* (1999) prohibits children under the age of 18 from being forced to take direct part in armed conflict. It defines this as one of the worst forms of child labour, along with other forms of slavery and sexual exploitation. The treaty has now been ratified by over 170 countries.

The UN, NGOs and countries around the world became particularly focused on eradicating the use of child soldiers towards the end of the 20th century. In the year 2000, the UN adopted the most important and comprehensive treaty on child soldiers – the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict.

The optional protocol, which entered into force in 2002, says 18 years of age is the minimum for compulsory recruitment or direct participation in hostilities. It also raises the absolute minimum voluntary recruitment age to 16. It requires certain safeguards for recruitment and calls on governments to cooperate to put an end to the use of child soldiers and to provide for support and rehabilitation of former child soldiers. The optional protocol has received wide support and has now been ratified by over 130 countries.

Many countries, however, including Australia and the United States, have signed up with reservations on lowering the recruitment age to 17. For example, the Australian Defence Force (ADF) currently permits voluntary recruitment at 17, with a birth certificate and written informed consent of a parent or guardian, and the ADF must fully inform the child of the nature of the duties and be satisfied that the child is signing up on a 'genuinely voluntary basis'.

The various treaties have been some of the most rapidly and widely ratified treaties worldwide and have created a much stronger international framework for ending the recruitment and use of child soldiers. However, violations do continue by both government and non-government parties. The UN Security Council has adopted a number of resolutions recently, particularly in 2004 and 2005, condemning the use of child soldiers and calling for a rigorous monitoring and reporting system for abuses. Research, monitoring and reporting on compliance by all countries around the world now occurs and abuses are more regularly exposed.

Research 9.4

The full text of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict is available at http://cambridge.edu.au/redirect/?id=6289.

Look at the text of the protocol and complete the following tasks.

1. Looking at the Preamble to the protocol, summarise the main reasons for the treaty being created.
2. Identify the article(s) containing the prohibition on recruiting and using child soldiers and explain the obligations they impose.
3. Critically evaluate how Australia's reservation to the protocol and current recruitment practice corresponds with the purpose and obligations of the treaty.

The framework is relatively new and will take time to take full effect. However, in one of the most significant developments, the ICC, under the Rome Statute, has begun to charge a number of individuals with war crimes relating to child soldiers in armed conflicts, particularly in conflicts in Uganda, Sudan and the DRC. This is particularly important because the international prosecution of individuals where countries themselves are unable or unwilling to prosecute is a critical way of putting an end to local practices, seeking justice for victims involved and acting as a deterrent for would-be offenders. The case of Thomas Lubanga Dyilo is discussed in the 'In Court' box on page 224.

Legal Links

Further information on the ICC trial of Thomas Lubanga Dyilo is available on the ICC's website (http://cambridge.edu.au/redirect/?id=6290) and at a website devoted to the Lubanga trial (http://cambridge.edu.au/redirect/?id=6291), which is put together by the Open Society Justice Initiative.

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In Court

Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06

The year 2006 marked the first time a person was arrested under a warrant issued by the International Criminal Court (ICC): Thomas Lubanga Dyilo of the Democratic Republic of the Congo (DRC). In 2009, his trial became the first ever by the ICC. A rebel militia leader, he was accused of conscripting child soldiers to fight in armed conflicts in the DRC during 2002 and 2003.

Figure 9.14 Thomas Lubanga Dyilo

Context

Conflict between groups had been occurring in the north eastern region of DRC for many years. It related mainly to competition for land, but later became entangled in larger conflicts over mineral and diamond deposits, and involved ethnic groups from neighbouring Rwanda and Uganda. There were many fighting groups and factions forming complicated rivalries. Many children were recruited into armed groups on all sides. Widespread killing and appalling levels of sexual violence were among the atrocities committed, without accountability, against civilians. By 2004, this conflict had lead to the deaths of around four million people, either directly through killings or from disease and starvation.

Lubanga was alleged to have served from 2002 as commander-in-chief of one armed group, the Patriotic Forces for the Liberation of Congo. In March 2004, the DRC Government authorised the ICC to investigate and prosecute international crimes in the DRC relating to the conflict.

Arrest

Lubanga was strongly suspected of having committed war crimes during the conflict. Rebel soldiers under his command were accused of massive human rights violations. These included ethnic massacres, mutilation, torture, rape, murder and the forcible conscription of child soldiers. He was arrested in March 2005 and transferred from the DRC to the ICC in The Hague, The Netherlands, in March 2006, where he was held in an ICC prison cell. He was accused of the following war crimes:

- September 2002 to June 2003 – enlisting and conscripting children under the age of 15 for active participation in hostilities in the context of an international armed conflict (art 8(2)(b)(xxvi) of the Rome Statute)
- June to August 2003 – enlisting and conscripting children under the age of 15 for active participation in hostilities in the context of an armed conflict not of an international character (art 8(2)(e)(vii)).

Human rights organisations claimed that at one point Lubanga maintained around 3000 child soldiers between the ages of eight and 15. It was also reported that he had ordered every family in the territory under his control to donate something that would assist the war effort – money, a cow, or a child to join his militia.

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In Court

Trial

The ICC held multiple hearings in preparation for the Lubanga trial to determine evidence, victim and witness testimony, and the process and form of the trial. In total, eight legal representatives of victims, representing a total of 93 victims, were to take part. After many delays, the trial commenced on 26 January 2009.

A verdict was reached on 14 March 2012. Lubanga was found guilty of the war crimes of enlisting and conscripting children under the age of 15 to participate actively in hostilities between 2002 and 2003. This was the first verdict issued by an ICC chamber and is important for demonstrating the court's effectiveness in dealing with crimes of this nature. On 10 July 2012, Lubanga was given a sentence of 14 years. This sentence was confirmed by the Appeals Chamber on 1 December 2014. On 3 March the Appeals Chamber instructed the Trust Fund for to implement a plan for collective reparations for victims.

The Lubanga judgement was a milestone in international law and in the criminalisation of the use of child soldiers. The ICC used the precedent of the Special Court for Sierra Leone to hold that the crime of conscription of child soldiers is committed as soon as the child joins the armed group, whether this is with or without compulsion. This is a very high threshold. The judgement also established a high threshold for the protection of children who have an indirect role in conflict by being involved in domestic duties or general support: the chamber found that children were said to be involved in hostilities even if they were not involved in direct fighting.

Review 9.5

1. Identify the articles of the Rome Statute under which Lubanga was charged and describe the crimes he was charged with.
2. Briefly summarise the context of the charges and the allegations against Lubanga.
3. Describe the process by which Lubanga was arrested and finally brought to trial.
4. Critically evaluate the effectiveness of the ICC in achieving justice for the victims. Consider issues of national resources, delay, exposure and deterrence.

Domestic responses

Although numerous treaties have now been established to try to combat the various issues around child soldiers, these treaties rely on the will of states to implement them and pursue their objectives.

There are few known cases of domestic prosecutions for the recruitment or use of children in armed conflicts, with the exception of some cases in the DRC and recent truth commissions – established following serious conflicts in Sierra Leone, Timor-Leste and Liberia – that are known to have addressed child soldier issues.

As mentioned previously, the international treaties have been well accepted and widely ratified, and domestic legal systems have had to be brought into line with their requirements. For example, in 2008 the United States enacted the *Child Soldiers Accountability Act*, which allowed the United States to prosecute domestically individuals who have knowingly recruited or served as child soldiers in or outside the United States or to deny such people entry into the country. Similar laws have been enacted in other countries. These not only send an important message to military commanders but also prevent travel or fleeing by offenders to international safe havens.

In Australia, the minimum compulsory conscription age under s 59 of the *Defence Act 1903* (Cth) is 18 years, but voluntary recruitment is different. After ratification of the Rome Statute in

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Figure 9.15 Canadian protesters against the conviction of Omar Khadr, a child soldier convicted of war crimes while fighting with the Taliban in Afghanistan in 2002

2002 and the child soldiers optional protocol in 2006, the *Criminal Code Act 1995* (Cth) was amended to meet Australia's ICC and treaty obligations. Sections 268.68 and 268.88 were added to the *Criminal Code* to criminalise the use, conscription or enlistment of children as part of an international or national armed conflict. These sections make it a crime to use, conscript or enlist children under the age of 18 for armed groups or forces other than national armed forces. However, for national armed forces it is only a crime if the child is under 15 years old.

In 2007, in Australia there were almost 500 young people under 18, boys and girls, serving in the ADF, but the ADF had no record of under-18s being deployed into operations areas. As mentioned earlier, the minimum voluntary recruitment age is 17 years, according to the ADF's Defence Instructions, and the ADF has put procedures in place to ensure that child recruitments are on a 'genuinely voluntary basis'. Young applicants can first apply to join at 16 years and 6 months, and children as young as 10 can register their interest online with Defence Force Recruiting.

In 2005, the ADF Ombudsman released a report on the management and administration of under-age personnel. It included a recommendation for review of the costs and benefits of accepting children for enlistment, with a view to raising the age to 18 years. The Defence Department disagreed, arguing that raising the minimum age would 'severely restrict the quality and quantity of recruits'.

Child soldiers have more recently become a domestic concern in Australia due to 'foreign fighters' going to Syria and Iraq to fight with ISIS or Islamic State. The case of 15-year-old Canadian Omar Ahmed Khadr, who was caught by the US military fighting with the Taliban in Afghanistan in 2002 and held at Guantanamo Bay for 10 years, may be relevant for Australia as it deals with its returning foreign fighters. Though Khadr was a minor at the time, he was prosecuted in a US military commission. The UN condemned his prosecution and while being held in Guantanamo Bay detention camp his case was taken up by many protestors. From 2015, Australia has been faced with young foreign fighters or their families wishing to return to Australia. In cases where these people are minors, then under international law they should be treated as child soldiers, and that means that though they were perpetrators they were also victims. The controversy over how to deal with such cases continues in Australia.

Non-legal responses

There are many programs and organisations, international and domestic, which aim to combat

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the causes and effects of the recruitment and use of child soldiers worldwide.

International responses

At the international level, the UN plays an important role in monitoring the use of child soldiers around the world. The ILO and the UN Children's Fund (UNICEF) in particular play a role in research into and studies of the problem, providing recommendations to the UN and to member states where necessary, and promoting the spirit and obligations of the treaties on children in armed conflict. For example, in 2010 UNICEF and the government of Chad held a conference that sought to end the use of child soldiers by armed forces and groups across Central Africa.

There is also a host of international NGOs that conduct important work in monitoring and reporting on the issue, educating the public and lobbying government and international organisations to take action.

Legal Links

Further information from the following intergovernmental organisations (IGOs) and NGOs on the issue of child soldiers is available from their websites:

- the Roméo Dallaire Child Soldiers Initiative – http://cambridge.edu.au/redirect/?id=6292
- Amnesty International – http://cambridge.edu.au/redirect/?id=6293
- International Labour Organization – http://cambridge.edu.au/redirect/?id=6295.

Domestic responses

As on the international level, there are many domestic NGOs that work in the area of children's rights. These may include focusing on issues relating to child soldiers, particularly in countries where recruitment of child soldiers is a significant problem. Recently, one strong movement that enables local interest groups, individuals, schools and other institutions to take part in a global effort to raise awareness about children in armed conflict has developed internationally. 'Red Hand Day', as it is known, is a campaign that takes place on 12 February every year to commemorate and draw attention to the issue of child soldiers. It has proved hugely successful and participants all over the world, particularly in schools, take part every year in raising funds, showing support, educating others and lobbying governments.

Other forms of domestic responses include groups or individuals who assist with rehabilitating former child soldiers by helping to relocate their families, getting them back into school or vocational training, and helping them re-enter life. The media also plays a role in informing the public about the existence and problems of child soldiers. Films, books and documentaries have also played an important role. The 2006 movie *Blood Diamond*, for example, dramatised some of the horrific aspects of the diamond trade in parts of Africa, including the recruitment and use of child soldiers in diamond-related conflict areas. Films like this, which have wide audience appeal, are an effective non-legal means of focusing global attention on the issue, as are books by the victims themselves.

Effectiveness of responses

Progress has been made on child soldiers, but there is still a long way to go, and any further advances will require commitment and political will.

Despite the significant efforts of the international community, particularly in the last decade, with the adoption and ratification of ground-breaking human rights treaties, the pace of progress has been slow and the tens of thousands of children currently involved in armed conflict have yet to feel its impact. More must be done to make it less attractive to recruit children for use in armed forces by strengthening the enforcement mechanisms.

While the establishment of the ICC – and the first trial of charges relating to child soldiers – is encouraging, this is only the tip of the iceberg. Political will is needed at all levels to strengthen the enforcement mechanisms, but it will be an uphill battle if the root causes of conflicts that draw children into the battlefield are not addressed. This involves the wider issues of tackling poverty, ending conflicts and establishing the rule of law and respect for human rights in all countries.

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Figure 9.16 In March 2012 the issue of child soldiers was catapulted into the world spotlight with a social media campaign called 'StopKony', which was designed to focus attention on the notorious Lord's Resistance Army leader Joseph Kony.

Figure 9.17 A rare image of Joseph Kony, leader of the rebel group, Lord's Resistance Army

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One radical method of tackling this difficult issue was the 'StopKony' campaign. In March 2012, the issue of child soldiers was catapulted into the world spotlight with a social media campaign called 'StopKony', which was designed to focus attention on the notorious Lord's Resistance Army leader Joseph Kony. The campaign featured a YouTube clip that went viral on the internet, particularly in social media. Despite being indicted by the International Criminal Court in 2005, charged on 33 counts, Kony still remained at large in 2015. There was controversy at the time about the effectiveness of this campaign in pressuring political leaders to have the political will to get results, and about the extent to which the organisation used money on the campaign that had been donated for use with the actual children in these situations.

Review 9.6

1. Describe some of the efforts of NGOs and governments in tackling the issue of child soldiers.
2. Explain the role of the media, NGOs and other non-legal groups in combating the use of child soldiers. Evaluate how these groups can complement the legal measures in place.
3. Critically evaluate the effectiveness of legal and non-legal responses to child soldiers based on consideration of the causes and drivers behind the problem.

Figure 9.18 David Ojok was abducted at the age of 13, and forced to become a child soldier. Now he is working as a bricklayer, thanks to training he received at the Northern Uganda Youth Development Centre, which is supported by UK aid.

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Issue 3:
Exploitation of workers

Issue 3 is covered in the digital versions of the textbook.

GO

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Issue 1 summary

- Although slavery has officially been abolished internationally, it continues as a form of criminal activity today.
- Slavery can take the form of forced labour, debt bondage or sexual slavery.
- Human trafficking is an illicit activity involving the trade in slaves.
- International treaties have provided a framework to help countries implement measures to deal with human trafficking.
- There are many IGOs and NGOs doing important work all over the world to end contemporary slavery.
- The Australian Government has recently improved its approach to combating human trafficking and a number of prosecutions have been made.

Issue 1 questions

Multiple-choice questions

1 Human trafficking differs from people smuggling in that:

A human trafficking is a criminal activity while people smuggling is not
B human trafficking involves deception of the person involved
C people smugglers allow a person to go free after transport is complete
D all of the above

2 The Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children achieves which of the following?

A It makes trafficking an international crime punishable by the ICC.
B It makes all UN states enact domestic laws on human trafficking.
C It lays out agreed definitions and a framework of approach.
D It gives signatories the resources to tackle the underlying problems.

3 Australia's approach to combating human trafficking has included which of the following?

A Amendment of the Criminal Code, funding of around $60 million and specialist training for the AFP
B Funding of around $60 million, training for Commonwealth prosecutors and more detention centres
C Developing a new treaty, cooperation with regional and international agencies and specialist training for the AFP
D Training for Commonwealth prosecutors, mandatory detention and improved victim protection scheme

4 The annual *Trafficking in Persons Report* has been invaluable in monitoring the progress of anti-trafficking efforts worldwide. It represents which type of the responses below?

A A domestic response of the Australian Government
B A domestic response of the US Government
C An international response of the UN
D An international response of a coalition of NGOs

5 Which of the following is one of the main contributors to the risk of people trafficking?

A A lack of political will
B A lack of international consensus
C Inadequate interception and detention facilities
D Socio-political and economic factors

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Chapter summary questions

1 Identify when slavery was officially abolished and explain why it still remains a problem today.
2 Identify the forms of contemporary slavery and the ways in which slaves are recruited and trafficked.
3 Outline the international responses to human trafficking, including reference to the purpose of the main treaties.
4 Describe some of the non-legal responses to the issue of human trafficking.
5 Critically evaluate the effectiveness of legal and non-legal responses to the issues of human trafficking and contemporary slavery.

Issue 2 summary

- The use and recruitment of child soldiers in armed conflict can involve serious abuses of human rights and can amount to a war crime.
- The extent of the problem is hard to gauge, but child soldiers are still used in conflicts all over the world.
- International responses to child soldiers are relatively recent but have accelerated in the last decade, and the first international trial before the ICC has now occurred.
- IGOs and NGOs play an important role in monitoring and reporting on the issue of child soldiers.
- More needs to be done to combat the issue of child soldiers: poverty, conflict and the lack of the rule of law and respect for human rights remain as root causes of the problem.

Issue 2 questions

Multiple-choice questions

1 Which of the following statements about the issue of child soldiers is not true?
   A The UN has estimated there could be as many as 300 000 child soldiers worldwide.
   B The use of children under 18 in armed conflict is generally confined to developing countries.
   C The advent of modern weaponry has worsened the problem of child soldiers.
   D The recruitment of children under 15 years into armed conflict is an international war crime.

2 Which of the following treaties was used to prosecute Thomas Lubanga Dyilo?
   A Kyoto Protocol
   B Optional Protocol to the Rights of the Child on the Involvement of Children in Armed Conflict
   C Rome Statute
   D Additional protocols to the Geneva Conventions

3 Which of the following best describes the Australian position on recruiting child soldiers?
   A It is a crime to recruit children under 18 years into national armed forces for participation in armed conflict, and to recruit children under 15 years for other armed forces or groups.
   B It is a crime to recruit children under 18 years into armed forces or groups other than national armed forces, but national forces can recruit at 17 years.
   C It is a crime to recruit children under 18 years for direct involvement in armed conflict in either national or other armed forces, but recruitment for indirect involvement is possible at 17 years.
   D It is a crime to recruit children under 18 years into armed forces other than national armed forces, but national armed forces can recruit at 15 years.

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4 The Office of the Special Representative of the Secretary General for Children and Armed Conflict is:
   - **A** the leading UN advocate for the protection of children in war
   - **B** an IGO that researches and releases annual reports on child soldiers
   - **C** a humanitarian NGO that works with former child soldiers
   - **D** a body of the UN that campaigns against child soldiers

5 Which of the following is most needed to address the issue of child soldiers?
   - **A** tackling poverty and ending conflicts
   - **B** encouraging respect for human rights and the rule of law
   - **C** prosecutions by governments and the ICC
   - **D** all of the above

Chapter summary questions

1 Describe how child soldiers are recruited and some of the conditions they may have to endure.
2 Explain the roles that child soldiers might be expected to play in a conflict.
3 Outline the international responses to child soldiers, including reference to the purpose of the main treaties.
4 Describe some of the non-legal responses to the issue of child soldiers.
5 Critically evaluate the effectiveness of legal and non-legal responses to the issue of child soldiers and contemporary slavery.

Themes and challenges for Part II Human rights

The changing understanding of the relationship between state sovereignty and human rights

This area of the syllabus requires examination of the reasons why state sovereignty can be used both to promote human rights and undermine human rights.

- Sovereignty – this assumes that the government of a nation has the sovereign right to make any laws they like within their borders and that no other nations have the right to intervene.
- Human rights law – this has gradually undermined the idea that sovereignty is a barrier to external intervention. The international community is able to exert pressure in a number of ways on states that blatantly allow violations of human rights.
- Responsibility to Protect – this UN doctrine makes it every government's responsibility to protect the human rights of their citizens. If a government is unable to do this then it is the international community's responsibility to assist them.

Issues of compliance and non-compliance in relation to human rights

- In this area of the syllabus it is necessary to examine why nation states comply with the law as opposed to reasons why they put themselves outside the law.
- Monitoring and enforcement mechanisms – there are now mechanisms, such as international courts and tribunals, that aim to hold people accountable for violations of human rights, such as the Human Rights Committee or the ICC.
- Mutual benefit – nations realise that they have much to gain from following the vast majority of international law regarding human rights.

The development of human rights as a reflection of changing values and ethical standards

- Moral values and ethical standards – the bitter experience of two world wars and genocide on a massive scale in the first half of the 20th century had led to a change in values and a determination to do everything to build a new

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world order where human rights are respected and upheld.

- The UN Charter, *Genocide Convention*, UDHR and Geneva Conventions – these historic events, which occurred within a few years of the end of World War II, promoted a dramatic shift in the international community by placing human rights centre stage in international law as they never had been before.
- Human rights law – now a major branch of international law, it connects in some way with all other areas of international law.

The role of law reform in protecting human rights

- Human rights treaties – never before in history have human rights been given so much protection. However, enforcement of human rights is not guaranteed in many countries of the world.
- Rule of law – countries that are governed by the rule of law have the best chance of protecting human rights.
- Responsibility to Protect – this promotes reform in which the international community has the responsibility to help struggling nations build their capacity in their economic development, their government administration and institutions.

The effectiveness of legal and non-legal responses in protecting human rights

- Political will – the effectiveness of responses often depends on the political will of the leaders of major world powers to take action to strengthen the enforcement mechanisms to protect human rights.
- Public opinion – a public that is informed and made aware of human rights issues can pressure their leaders to promote human rights. NGOs, IGOs and the media play a critical role in the areas of research, documentation, education and lobbying. In many cases, little would be achieved without these groups playing these roles.

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Part III
Options

50% of course time

Principal focus

Each option has its own principal focus, listed at the start of the chapter.

Themes and challenges

Each option has its own set of themes and challenges, listed at the start of the chapter.

HSC external examination information

The HSC examination will be a written paper worth a total of 100 marks. The paper will consist of three sections.

Questions relating to Part III of the syllabus – 'Options' – will appear in Section III of the examination. There will be seven extended response questions, one for each option offered in the syllabus. Students will be required to answer two of these questions, each relating to a different option they have studied.

Section III: Options 50 marks total (25 marks per option)

The question relating to each option will have two alternatives.

The expected length of response is around 1000 words (approximately eight examination writing booklet pages).

Chapters in this Part

Each option is in a separate chapter. Students must study two options (each option amounts to 25% of course time).

Chapter 10 **Option 1: Consumers**

Chapter 11 **Option 2: Global environmental protection**

Chapter 12 **Option 3: Family**

Chapter 13 **Option 4: Indigenous peoples (digital only)**

Chapter 14 **Option 5: Shelter (digital only)**

Chapter 15 **Option 6: Workplace**

Chapter 16 **Option 7: World order**

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Chapter 10
Option 1: Consumers

25% of course time

Principal focus

Students will be investigating consumers' legal rights and how the law attempts to achieve justice for consumers by referring to a variety of current issues and examples.

Themes and challenges

Themes and challenges to be incorporated throughout this option include:

- how the law works in encouraging cooperation as well as resolving conflicts of consumers
- dealing with compliance and non-compliance
- how changing values and ethical standards are being reflected in consumer laws
- recognising the rights of consumers in the legal system
- achieving justice for consumers through legal and non-legal responses.

At the end of this chapter, you will find a summary of the themes and challenges relating to consumers. The summary draws on key points from the text and links them to each of the themes and challenges. This summary is designed to help you revise for the external examination.

Chapter objectives

In this chapter, students will:

- outline the developing need for consumer protection
- outline the objectives of consumer law
- examine the nature, function and regulation of contracts
- evaluate the effectiveness of the regulation of marketing, advertising and product certification in achieving consumer protection
- examine the role of occupational licensing in achieving consumer protection
- recognise the importance of awareness and self-help
- examine the range of remedies available to consumers
- evaluate the effectiveness of non-legal and legal measures in achieving justice for consumers
- identify and investigate contemporary issues involving the protection of consumers and evaluate the effectiveness of legal and non-legal responses to these issues.

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Key terms/vocabulary

acceptable quality
acceptance
advertising
alternative dispute resolution (ADR)
auction
Australian Consumer Law (ACL)
bait advertising
cartel
caveat emptor
conciliation
condition
consideration
consumer contract
contract
cooling-off period
damages
duress
express term
fiduciary duty
fit for purpose
implied term
injunction
invitation to treat
laissez-faire economy
licensee
litigation
mediation
monopoly
negligence
offer
offeree
offeror
price-fixing
procedural fairness
product warranty
pyramid selling
rescind
remedy
unconscionable conduct
warranty
weights and measures laws

Relevant law

IMPORTANT LEGISLATION

Sale of Goods Act 1923 (NSW)
Minors (Property and Contracts) Act 1970 (NSW)
Contracts Review Act 1980 (NSW)
Fair Trading Act 1987 (NSW)
Telecommunications Act 1997 (Cth)
Australian Securities and Investment Commission Act 2001 (Cth)
Corporations Act 2001 (Cth)
Spam Act 2003 (Cth)
National Consumer Credit Protection Act 2009 (Cth)
Competition and Consumer Act 2010 (Cth)
Civil and Administrative Tribunal Act 2013 (NSW)
Motor Dealers and Repairers Act 2013 (NSW)

SIGNIFICANT CASES

Australian Knitting Mills Ltd v Grant (1933) 50 CLR 387
G.H. Myers & Co. v Brent Cross Service Co. (1934) 1 KB 46
Grant v Australian Knitting Mills [1936] A.C. 562
Johnson v Buttress (1936) 56 CLR 113
Beale v Taylor (1967) 1 WLR 1193
Reardon v Morley Ford Pty Ltd (1980) 49 FLR 401
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447
Blackpool & Fylde Aero Club v Blackpool Borough Council, Court of Appeal [1990] 3 All ER 25
Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd (1991) 22 NSWLR 298
Qanstruct Pty Ltd v Bongiorno Ltd (1993) 113 ALR 667
Astley v Austrust (1999) 197 CLR 1
Director of Consumer Affairs of Victoria v AAPT Ltd (Civil Claims) [2006] VCAT 1493
eBay International AG v Creative Festival Entertainment Pty Ltd (2006) 170 FCR 450

Legal oddity

A class action was brought against energy drink provider Red Bull for false advertising. The claim was that the tagline of the company, and associated advertising, said that the drink would improve performance and focus. However, articles about nutrition said that the 'boost' from energy drinks comes entirely from the caffeine, rather than other ingredients such as guarana, and so the performance benefits from the energy drink were no greater than those from a (less expensive) cup of coffee. Although Red Bull argued that their product was a better source of 'energy', there was no scientific data to back this up. While not accepting any wrongdoing, Red Bull agreed to settle on the lawsuit. As a result, anyone living in the United States who purchased at least one can of Red Bull between 1 January 2002 and 3 October 2014 was entitled to a $10 cash reimbursement, or else free Red Bull products to the value of $15.

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10.1 The nature of consumer law

The developing need for consumer protection

The need for consumer protection has grown over time. Prior to the Industrial Revolution, the vast majority of people throughout Europe lived simple lives based on subsistence agriculture. The typical marketplace of the time offered a small range of products. The consumer therefore did not need sophisticated knowledge of the quality and value of most goods in order to make a purchase. Furthermore, because there was no product packaging, goods could be inspected closely.

The situation for contemporary consumers could not be more different. Today, we often need to rely upon the expertise of others (shop assistants or financial advisers) when purchasing products such as superannuation plans or electrical equipment (for example, computers and mobile phones). A highly specialised level of product knowledge is required in the marketplace of the 21st century. Therefore, it is essential that legislators put safeguards in place to resolve conflict and protect consumers from exploitation. A peasant consumer often had the advantage of knowing the producer of the goods. If any problems arose with the item that had been bought or bartered for, the buyer could easily confront the seller to resolve the problem. Modern consumers, on the other hand, usually deal with salespeople (who rarely have a role in the production of the goods they sell) or multinational corporations that may be remote or inflexibly bureaucratic.

Early markets were also characterised by the common law notion of ***caveat emptor***. Purchases in pre-industrial markets were at the buyer's own risk. If a product was faulty, it was the buyer's problem. *Caveat emptor* is based on the assumption that the buyer and seller meet on equal terms. Modern Australian consumer protection laws recognise that this is not the case.

In a ***laissez-faire* economy**, the interaction between buyers and sellers of goods is considered to be a private realm, and intervention by the state is minimal. In the late 18th century, manufacturers and sellers of goods were generally wealthy, well-educated industrialists, while the buyers were often poor, uneducated workers. The power imbalance was evident, and the notion of *caveat emptor* came into question. Governments began to create laws that would, in time, address the need for consumer protection.

caveat emptor
a Latin term meaning 'let the buyer beware'; it implies that consumers should use their own care and knowledge to protect themselves against exploitation

***laissez-faire* economy**
an economic system in which the state refrains from interfering with markets by regulation or other means

The definition of a consumer

Part I s 4B of the *Competition and Consumer Act 2010* (Cth) defines a consumer as: 'a person who acquires goods or services that are priced at less than $40 000'. Further, an individual or a company is also considered to be a 'consumer' if they purchase goods or services that cost more than $40 000 provided that they are 'of a kind ordinarily acquired for personal, domestic or household use or consumption' and not, for example, for resale.

In most cases consumers can decide whether or not to purchase an item – whether it's a can of soft drink, a computer or an insurance policy – but we are often influenced by marketing and advertisements.

When making purchases, consumers have a range of expectations about the products and/or

Figure 10.1 It is important that tourists shopping at the Grand Bazaar in Istanbul, Turkey understand the concept of *caveat emptor*.

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services they are buying. Primarily, consumers expect that the products they buy will work properly for a period of time as indicated by the manufacturer, and that the services they receive will be of a standard promised by the supplier. Although these types of expectations have existed since the trade in goods and services began, laws to protect consumers and their rights are relatively new.

As far as the law is concerned, an individual is generally considered to be a 'consumer' when the goods or services purchased are essentially for private use or consumption. Every time we purchase a commodity or service, we enter into a special legal relationship with the seller. In other words, there is a legal expectation that parties will behave in a manner that ensures that both buyer and seller are treated fairly. Without this legal arrangement, purchases would be characterised by mistrust and uncertainty, with greatly increased vulnerability for the party in the weaker bargaining or enforcement position.

Objectives of consumer laws

Consumer law relates to the interaction between three legal entities:

- manufacturers or suppliers of goods and services that are intended for personal, domestic or household consumption
- the state (parliament and judiciary)
- consumers, as defined by the legislation.

All three groups pursue particular interests, and can be considered to be interdependent in the contemporary marketplace. The common law of contract, equity and a variety of federal and state statutes govern much of our day-to-day dealings with manufacturers or suppliers.

The primary objective of consumer law is to protect the legal rights of consumers when purchasing goods or services, while supporting an effective marketplace. The law achieves this by:

- educating the public to make them aware of their rights – educated consumers can protect themselves from exploitation

Review 10.1

1. Why has the need for consumer protection grown over time?
2. Explain the necessity for legislative consumer protection in the 21st-century marketplace.
3. Upon what is the idea of *caveat emptor* based?
4. What do you understand by the notion of a *laissez-faire* economy? Why is it problematic for contemporary consumers?
5. According to the *Australian Consumer Law* legislation, what is a consumer?

Research 10.1

Access the *Australian Consumer Law* home page at http://cambridge.edu.au/redirect/?id=6302 and click on 'The Australian Consumer Law' at the top of the menu on the left of the screen. Complete the following tasks.

1. When did the *Australian Consumer Law* (ACL) come into force?
2. In point form, outline the main features of the ACL.
3. The ACL applies nationally and in all states and territories, and to all Australian businesses. Is this a good thing? Why?
4. How does the ACL deal with transactions that occurred prior to its enactment?

Figure 10.2 The primary objective of consumer law is to protect consumers.

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- articulating and mandating standards for the quality of goods and services – this promotes transparency and accountability in the manufacturing and service sectors
- providing **remedies** for consumers

remedy
a means by which redress or reparation is provided for the breach of a legal right

- implementing **weights and measures laws** that provide consumers with reliable benchmarks of quality
- ensuring that various occupations are licensed
- protecting consumers in a time of global **advertising**, mass marketing and e-commerce where there has been a marked reduction in personal interaction between buyers and sellers

weights and measures laws
laws that govern weights and measures stated on the packaging of products (such as food and beverages) or as indicated on the trading premises (for example, at a petrol station) in order to protect consumers from being cheated or deceived

advertising
any action designed to draw the attention of consumers to the availability of goods or services in the marketplace

- regulating contractual relationships between buyers and sellers – especially 'unfair' contract terms
- guarding against unsafe and defective products
- helping vulnerable and disadvantaged consumers.

10.2 Contracts

Types of contracts

A **contract** is an agreement made between two or more people that is recognised by the courts as being legally binding on the parties.

contract
an agreement made between two or more people that is recognised by the courts as being legally binding on the parties

The basis of a contract is agreement, which in most cases consists of an offer made by one party to another person, and an acceptance of the offer by that person. The person making the offer is referred to as the **offeror** and the person to whom the offer is made is known as the **offeree**.

offeror
the person making an offer of an agreement

offeree
the person to whom the offer of an agreement is made

Consumer contracts can be executed:

- in written form, by signing a document
- orally, by agreeing in person or over the phone
- by a mixture of the above two
- by clicking an 'I agree' button on a web page.

Written contracts

Many consumer contracts are in writing. Those for the sale or lease of real property (land) should be. They are usually characterised by:

- a clear identification of the parties to the contract
- contractual terms that are in writing for all to see
- precise language which describes the terms of the contract in such a manner as to avoid the need to rely upon memories of the original agreement
- the parties' signatures
- the assumption that all the terms have been read and agreed to.

Normally, parties to contracts opt for written contracts in order to avoid having to prove:

- that the contract existed
- what the terms of the agreement actually were, and/or
- to try to limit the obligations to what is on the paper rather than what was said or understood in the negotiations.

Since the contract will often be a standard form contract developed by a large commercial service or goods provider, it may be long and difficult to read. The consumer is likely to have relied on representations made to them at the point of sale by the retailer or dealer. The written contract in these circumstances will not necessarily reflect the consumer's understanding of the agreement.

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Figure 10.3 Contracts do not have to be in writing to be legally binding.

Review 10.2

1. What is the primary objective of consumer law? In point form, how is this achieved?
2. Define the notion of a 'contract'.
3. Do contracts have to be in writing? Provide four examples of the ways in which contracts can be executed.
4. Many contracts exist in an oral format. How does the court deal with breaches of oral contracts?

Oral contracts

Many contracts are oral. Every time we buy a hamburger or a carton of milk we enter into a contract for the sale of goods. The only writing we may have may be a receipt. Oral agreements may be difficult to prove and/or remember precisely, so they are open to misinterpretation. In resolving a contractual dispute, the court will closely examine statements made and the conduct of each party leading up to the negotiation of the contract.

Oral agreements can be supported in court by information about the other party's:

- behaviour both before and after the agreement
- specific actions
- past dealings.

Written–oral contracts

Contracts may be a mixture of written and oral agreements. If a written contract contains few terms, and appears to be 'incomplete', oral undertakings and conduct will be scrutinised very closely by the court, and may be accepted as part of the contract. Where the parties have put down their agreement in writing, the 'parol evidence rule' will apply. If a written agreement appears to be a complete record of the agreement, it will be accepted against a contradictory term made orally.

Elements of a contract

The law of contract is one of the areas of civil law and is essential to the successful operation of modern capitalist economies. It attempts to define the circumstances under which parties who make promises to each other are legally bound by them. For a contract to exist, the following elements must be present:

- the intention of both parties to create legal relations
- an offer by one party (the offeror)
- the acceptance of that offer by the other party (the offeree)
- consideration from the offeree
- legal capacity of both parties.

Intention to create legal relations

If an agreement is to be treated as a contract, it is essential that the parties to it intended to enter into a legally binding relationship.

Social and domestic agreements are presumed not to give rise to a legal relationship. For example, a promise to meet someone for dinner or to give a colleague a lift home from work would not be legally enforceable should one of the parties fail to arrive. If your parents offered to pay you a sum of money for doing the housework or the gardening and then changed their minds after you did the work, the law presumes that this arrangement did not involve an intention to create legal relations and would not entitle you to sue them for breach of contract. However, where an agreement is made in the course of business, there is a presumption that the parties intend to create a legal relationship.

Offer

The second element required for the formation of a contract is an offer. Without an **offer** there can be

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no acceptance, and hence no agreement between the parties.

An offer is a firm proposal, made with a willingness to be bound by the terms. A preliminary proposal, enquiry or price quotation during the process of negotiation does not constitute an offer. While this may appear to be an offer, it is viewed as merely an encouragement to others to make offers. This is known as an **invitation to treat**.

offer
a firm proposal to form a binding contract, made with a willingness to be bound by its terms

invitation to treat
an initial invitation to others to make an offer

An invitation to treat is not an offer, and therefore its **acceptance** cannot give rise to a contract. At an **auction** sale, the call for bids by an auctioneer is an invitation to treat (that is, an invitation to buyers to make an offer) and the bid by the intending buyer is the offer. The acceptance is indicated and completed by the fall of the auctioneer's hammer. Thus a bid may be withdrawn by a buyer at any time before it is accepted by the auctioneer. Similarly, an auctioneer may refuse to accept an offer if the bid does not reach the minimum (or reserve) price set by the seller. Prices on marked articles in shop windows are just invitations to treat – they are not offers to sell at the marked price. Therefore, a shopkeeper is not required to sell an item on display, nor are they obliged to sell it at the marked price. Catalogues and advertisements that offer goods or services for sale, and timetables that offer transport at a particular place and time, are typically invitations to treat.

acceptance
the unconditional consent to all the terms of an offer

auction
a public sale in which people bid for goods or property, and the sale is to the highest bidder

Acceptance of the offer

An acceptance of an offer is the unconditional agreement to all the terms of the offer. For a binding contract to exist between the parties, the acceptance must be communicated to the offeror. It is open to the offeror to state how the offer shall be accepted. Quite often, an offeror makes it clear that the offer must be accepted in writing by mail. The postal acceptance rule states that acceptance is completed when the contract is posted, not when it is received.

Figure 10.4 An acceptance of a contract is an agreement with the terms within it.

The offeree must make an unqualified acceptance of all the terms of the offer. If they attempt to impose a conditional acceptance, this becomes a counter offer and so is a rejection of the offer. An offer can only be accepted by those people to whom it was made. An offer may be revoked at any time before it is accepted. Any acceptance must be within the time period stipulated in the offer. If an offer, for example, states that acceptance must be within three days, then any attempt to accept after five days will be invalid. If no time period is specified, the offer may be accepted within a reasonable time.

Consideration

The element of **consideration** is essential to any valid contract. This is what turns a mere promise into a contract that the law will enforce. Every contract contains at least one promise, and the enforceability of a promise depends on the promisee's response. The promisee must have given, done or suffered something in exchange for the promise, and that 'price paid for the promise' is called consideration. Consideration needs to be of some value, and cannot be illegal or unlawful. It must move from the promisee to the other party to the contract. In most cases, consideration is in the form of money given in return for goods or services. Consideration may also take the form of someone's reliance on a promise, to their disadvantage or detriment (for example, doing something, refraining from doing something, giving up something, or taking on some responsibility in order to obtain the benefit promised by the promisor).

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In Court

***Blackpool & Fylde Aero Club v Blackpool Borough Council, Court of Appeal* [1990] 3 All ER 25**

This is a leading case in English contract law and focuses upon the legal duties of parties in a tendering process.

Since 1975, Blackpool & Fylde Aero Club had held a series of licences from the local council operate pleasure flights out of Blackpool Airport. However, when their licence was approaching its expiry date in 1983, the council decided to invite seven organisations, including the Blackpool & Fylde Aero Club, to submit tenders for the new licence.

In order for the new tender to be considered by council, all tender applications were required to be submitted at the Town Hall 'not later than 12 o'clock noon on Thursday 17 March 1983'. The Blackpool & Fylde Aero Club placed their offer in the letter box at the Town Hall one hour before the cut-off time: 11 am on the 17th. They expected the letter box to be cleared at noon, but the Town Clerk's staff failed to do this. Consequently, the letter was not considered 'delivered' until after the deadline thus resulting in a new licence being awarded to one of the other bidders – Red Rose Helicopters.

Discussions between the Aero Club and the council made it clear that the letter had in fact been delivered on time. As a result, the council declared the previous round of tenders invalid, and invited the submission of new tenders. When this happened, Red Rose Helicopters advised the council that it was contractually bound to grant the licence to them. The council therefore withdrew its offer of a second round of tenders in order to pursue the contract with Red Rose Helicopters. The Aero Club immediately sued for 'breach of contract', arguing that the council had not lived up to its promise to consider all applications that were submitted by the deadline.

The High Court of Justice found in favour of the Blackpool & Fylde Aero Club, and held that the council was liable in damages to the Aero Club for breach of contract and negligence. Blackpool Council resolved to appeal to the Court of Appeals, where it was decided that, while an invitation to tender could in certain circumstances give rise to binding contractual obligations, the council in this instance had a 'legal duty' to consider all applications equally. The Blackpool & Fylde Aero Club was therefore entitled as a matter of contractual right to have its tender opened and considered along with the others because it was submitted in accordance with the council's guidelines. Hence the appeal by Blackpool Council was dismissed.

Figure 10.5 Breach of contract – Blackpool Council was found liable in damages to the Aero Club for not considering its tender application fairly.

consideration
something given, done or suffered by the promisee in return for a promise in a contract

Other requirements

Other conditions for an enforceable contract include the following:

- Parties must have the capacity to enter into a contract – that is, they must be capable at law of entering a voluntary agreement. Hence, contracts entered into by people who lack contractual capacity (for example, children, people who have relevant mental incapacity, and people under the influence of alcohol or

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drugs) may not be enforceable by the other party.

- Certain types of contracts have requirements set out in legislation. For example, in New South Wales, contracts for the sale of land must be in writing or there must be a written note or memorandum of the contract signed (*Conveyancing Act 1919* (NSW) s 54A).
- The obligations in a contract will be negated if either or both of the parties have not given their free and voluntary consent, due to mistake (one or both parties misunderstand each other or agree on the basis of an incorrect understanding of the facts), misrepresentation (one party induces the other to enter the contract by making a false statement), **duress** (a party's consent was obtained by violence or threats) or undue influence (one party's use of power or status to obtain the consent of the other).
- Contracts for illegal acts (such as a contract to kill someone) or that otherwise contravene public policy (for example, that endanger public safety) are void and unenforceable.

duress
coercion or pressure used by one party to influence another party

Terms of contracts

The terms of a contract relate to the basis of the agreement; for example, Amy agrees to sell certain goods to Liam, and Liam agrees to pay the sum of $500 to Amy. These promises are known as the terms of the contract, and can be express or implied.

Terms may appear in the form of a written document, usually signed by both parties, or may consist of oral statements. If a document is not signed, written terms may be incorporated into a contract that would otherwise be an oral contract (for example, terms on the back of a ticket, or on a sign at the entrance to a place where the customer has paid for entry).

Conditions and warranties

A term within a contract can be either a **condition** or a **warranty**. If one party to a contract breaches a condition (for instance, using the earlier example, if Liam refuses to pay Amy), the aggrieved party can terminate the contract and sue for **damages**. Warranties, on the other hand, are terms that are less important or peripheral aspects of a contract (for example, a manufacturer's promise to repair or replace faulty goods). If a party fails to honour its warranty, the aggrieved party can sue for damages but is not entitled to end the contract.

Research 10.2

Visit the website of the Law Society of NSW at http://cambridge.edu.au/redirect/?id=6303 and answer the following questions.

1. What happens when someone breaks a contract?
2. Outline the features that make a contract?
3. When can you get out of a contract?

condition
(of a contract) a term of fundamental and essential importance; if a condition is breached by a party the other party is entitled to terminate the contract and can sue for damages

warranty
a minor term of a contract whose breach entitles the aggrieved party to sue for damages, but not to end the contract

damages
(contractual) money ordered by a court to be paid to a plaintiff where a contract is breached, for the purpose of placing the plaintiff in the same situation as if the contract had been performed

Once a contract is made, legal obligations and rights flow from it. Consequently, if one party to a contract fails to perform their side of the bargain (that is, if they breach the contract), contract law provides a remedy.

Express and implied terms

The terms of a contract may be express or implied. **Express terms** are contractual terms that are either spoken or written into a contract and are agreed to by both parties. They clearly set out the legal rights of both parties. **Implied terms** can arise under general law or statute. Terms may be implied in contracts of a certain type, such as contracts for the sale of goods. They may also be implied in a particular contract based on the parties' presumed

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intentions as interpreted by the court, or on the basis of ordinary custom or usage in a particular market or situation. An implied term should be reasonable and consistent with the express terms of the contract. In other words, it needs to allow the parties to perform their tasks efficiently and fairly.

express term
a contractual term that has been specifically stated and agreed to by both parties at the time the contract is made, either in writing or orally

implied term
a contractual term that has not been included in the formal agreement; terms can be implied by custom or law, or because of the presumed intentions of the parties

Australian legislatures operate on the principle that certain standards must be upheld when people enter contractual agreements, even where these standards are not stated expressly. An example of an implied term for the protection of consumers is a guarantee of **acceptable quality** for the sale of goods under Australian Consumer Law (ACL). In simple terms, this means that when a consumer makes a purchase, there is an implied term that the goods will be **fit for purpose**.

Implied terms add another layer of consumer protection because they ensure that individuals who are sold inadequate goods, for instance, can seek a remedy.

acceptable quality
an implied guarantee in ACL that goods sold are fit for purpose, acceptable in appearance, free from defects, safe and durable

fit for purpose
an implied term in ACL, guaranteeing that the goods sold will do what they were designed to do

Exclusion clauses

Exclusion clauses are incorporated into contracts to attempt to limit a party's liability for conduct that would otherwise breach the contract. These clauses limit or take away the other party's right to claim damages. Such clauses are almost always contained in a written document; it may or may not be signed. For example, when a motorist parks in a car park, a contract is entered into the moment a ticket is accepted from an automatic dispensing machine. On the back of the ticket or on a sign near the ticket machine there will be a notice drawing the motorist's attention to the fact that the owners of the parking station will take no responsibility for any damage

Figure 10.6 In a car park, a contract is entered into the moment a ticket is accepted from an automatic dispensing machine. On the back of the ticket or on a sign near the ticket machine there will be a notice drawing the motorist's attention to any exemption clauses.

to the car while it is parked on their premises. In these circumstances, the party wishing to rely on the exemption clause will have to show that they took reasonable steps to give notice of the clause to the other party before or at the time the contract is made. Where a reasonable person would not expect the ticket or document to contain contractual terms, then the exclusion clauses cannot be relied on. Acts done outside the terms of the contract will not normally be covered by exemption clauses.

Other examples include an airline ticket that guarantees a flight, but not necessarily on the stipulated date, and housing insurance that will not cover acts of God or terrorism.

Unconscionable contracts

The general rule is that the court will not grant relief to a party just because the contract operates against them. However, where a contract is entered into as a result of one party's **unconscionable conduct**, the other party may seek a remedy. A contract can be set aside (**rescinded**) where one party, if at a special disadvantage against another party, has this disadvantage exploited by the other party using their superior bargaining power or position in an unfair way.

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In Court

***Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447**

An elderly Italian couple who were not fluent in English and had little formal education signed a mortgage with the bank, as security for the debts of one of their sons' building companies. The mortgage included a guarantee that the parents would be liable for the debts of the company. Their son's explanation to them of the guarantee was inaccurate, and the bank made no attempt to explain it to them. When the son's business went into liquidation, the bank claimed nearly $240 000 under the guarantee. The contract was set aside on the basis of unconscionable dealing by the bank.

The High Court held that a contract can be rescinded where one party has knowledge of, or is aware of the possibility, or a reasonable person would be aware of the possibility of another party's 'special disadvantage', and takes unfair advantage of this through their superior position in entering into a transaction. In this case the parents were considered to have a 'special disadvantage' because of their age, background and reliance on their son's misleading information about the extent of their liability under the guarantee.

unconscionable conduct
one party's exploitation of the vulnerability of another party to a contract; the victim may have been impaired by some external factor (such as age, disability or lack of education) or may have been deceived or threatened by the stronger party

rescind
to revoke, retract or cancel

There are also remedies under the law of equity for parties who have entered into a contract based on the unconscionable conduct of another party.

Research 10.3

Access *A Guide to the Unfair Contracts Terms Law* at http://cambridge.edu.au/redirect/?id=6304 and complete the following tasks.

1. In broad terms, what is a standard form contract? Give some examples of such contracts.
2. In deciding whether a contract is a standard form consumer contract, what factors must a court take into account?
3. Read Schedule 2, s 24(1) of the ACL and s 12BG of the *Australian Securities and Investment Commission Act 2001* (Cth), and briefly outline the test to determine unfairness in a consumer contract.

Review 10.3

1. What elements must exist before a contract can come into existence?
2. Differentiate between an 'offer' and an 'invitation to treat'.
3. Explain what you understand by the 'postal acceptance rule'. Why is it important?
4. Parties to a contract must have the 'capacity' to enter into contractual negotiations. Explain what this means and provide examples of those individuals who are deemed at law to be lacking in that capacity.
5. Explain the notion of an unconscionable contract? What remedy is available to individuals who enter such contracts?

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The legal notion of unconscionability is best understood by considering whether, if one party suffers from a special disadvantage, the other party has used their superior position to exploit that person.

Available relief in equity

As noted previously, a party who is a victim of duress, undue influence or unconscionable dealing may be entitled to obtain relief in equity by having the contract rescinded.

Equitable remedies and legislative provisions protect consumers in transactions involving the sale of goods. Legislation provides guarantees that are implied in all sale of goods transactions.

The following cases illustrate some of the ways that the law protects consumers:

- A party may seek relief because of *undue influence*. This is where a party exploits a relationship of influence (where one party depends on another) to induce the other party into entering the contract. For example, a person who is materially or emotionally dependent upon another can be easily influenced: see *Johnson v Buttress* (1936) 56 CLR 113, in which a will was successfully challenged on the ground that an illiterate widower had been influenced by a relative, whom he relied on for advice, into leaving this relative his only asset.
- A contract for professional services must be performed with *reasonable care*. For example, in *Astley v Austrust Ltd* (1999) 197 CLR 1, a company sued a law firm for poor legal advice, which had left the company with onerous debts. The court considered the question of whether the company could succeed in an action for breach of the implied term in the contract that the solicitors would act with reasonable care.
- A party may seek relief because of *duress* or coercion. For example, in *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298, the contract was for paintwork on a helicopter. When the charter company arrived to pick up the helicopter, which had been sent back to have defects in the paintwork corrected, the document presented by Hawker Pacific, and then signed by the charter company, showed a lower price, but included a term excluding any further liability (such as for unsatisfactory work). The company urgently needed the helicopter, which the painting company knew. The court accepted the argument that the document ought to be voidable on the grounds of duress, as the charter company believed the helicopter would be kept if the document had not been signed.
- The product purchased must be of *merchantable quality*. For example, in *Australian Knitting Mills Ltd v Grant* (1933) 50 CLR 387, underwear purchased caused a severe skin reaction. Grant initially lost this case, but was successful on appeal in *Grant v Australian Knitting Mills* [1936] A.C. 562. The Privy Council (highest court of appeal at the time) found that the manufacturer and the retail shop had been negligent and in breach of the implied term of the contract of sale – that the goods would be satisfactory for the buyer's use.
- The product must be *fit for the purpose* for which it is required. In an early English case, *G.H. Myers & Co. v Brent Cross Service Co.* (1934) 1 KB 46, the court held that a repair company that installed faulty connecting rods in a car was liable for the breach of this implied term. This case established that this term should be implied both in contracts for the supply of goods only, and in contracts for the supply of goods along with work to be done.
- A product must *match its advertised description*, where the buyer relies on that description, whether or not they have seen the product or has bought it on the basis of the description alone. For example, in *Beale v Taylor* (1967) 1 WLR 1193, a car for sale was advertised as a '1961 Herald 1200 convertible'. Although the buyer examined the car and saw that there was a metal disc on the rear of the car showing '1200', in fact a 1961 model and an earlier one had been welded together. The buyer was entitled to damages for breach of the English statute applying to the sale of goods.
- Manufacturers/suppliers cannot engage in *deceptive or misleading marketing* and advertising. In *Qanstruct Pty Ltd v Bongiorno Ltd* (1993) 113 ALR 667, the members of a company were induced to purchase four life insurance policies, and also to finance their purchase by

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borrowing from a company associated with Bongiorno. They were told that payments on the policies would be tax deductible. They suffered financial loss as a result of going into debt without gaining the promised tax benefits. The statements of the defendant company, Bongiorno, were held to have been misleading.

Review 10.4

1. Explain what you understand at law by the concept of an equitable remedy.
2. Why is *Johnson v Buttress* (1936) 56 CLR 113 a good example of equitable relief?
3. How does *Hawker Pacific Pty Ltd v Helicopter Charter Pty Ltd* (1991) 22 NSWLR 298 demonstrate consumer protection?
4. What does the phrase 'fit for purpose' mean? Give an example of classic case law that underlies this ideal.

Statutory protection

The ACL, which established uniform consumer laws in all states and territories in Australia, commenced on 1 January 2011. As noted above, the ACL provisions are contained in the *Competition and Consumer Act 2010* (Cth), renamed from the *Trade Practices Act 1974* (Cth). We now have one national legislative instrument that governs all fair trading and consumer protection.

The provisions of the ACL broadly reflect those in the *Trade Practices Act,* but some additional protections have been added. It also picks up most of the consumer protection provisions in the fair trading legislation of each state and territory. So now a number of state and federal statutes ensure that all consumer contracts contain implied terms providing broad protection against unconscionable conduct, defective products, and deceptive or misleading advertising. The most significant of these are:

- *Competition and Consumer Act 2010* (Cth)
- *Sale of Goods Act 1923* (NSW)
- *Fair Trading Act 1987* (NSW)
- *National Consumer Credit Protection Act 2009* (Cth).

The *Contracts Review Act 1980* (NSW) also allows the court to grant relief for unjust contracts. The court may refuse to enforce any or all provisions of the contract, make an order declaring the contract void, or make an order varying (changing) any provision in the contract. When deciding whether or not a contract or a term is unjust, the court must consider the public interest, all the circumstances of the case, whether the aggrieved party had the opportunity to negotiate the terms before signing, whether the terms were reasonable or difficult to comply with, and whether the parties had equal bargaining power. Section 9(2) sets out the ways in which a party may have been at a disadvantage, such as undue influence or pressure, as well as conditions of age, mental capacity and literacy, and lack of legal or other expert advice.

The *Australian Securities and Investment Commission Act 2001* (Cth) sets out the powers of the Australian Securities and Investment Commission (ASIC) and governs consumer protection in relation to financial services, including enforcement and court-ordered remedies.

The ACL also introduced a new protection for consumers in dealing with standard form contracts. A **consumer contract**, which is a standard form contract, is prepared by one party – generally the party with all or most of the bargaining power – and then presented to the other party (the consumer), who is required to accept or reject the terms. A term of a standard form contract is considered unfair if it would 'cause a significant imbalance in the parties' rights and obligations, is not reasonably necessary in

Figure 10.7 A court can overturn an unfair contract.

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order to protect the legitimate interests of the party who would be advantaged by the term, and would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on' (s 12BG).

consumer contract
a contract for the supply of goods or services, or for a sale or grant of interest in land, to an individual purchasing the goods, services or land for personal, domestic or household use

In determining whether a term in a consumer contract is unfair, a court must take into account:

- the contract as a whole, and
- the extent to which the term is clear and readily understood by both contracting parties.

The court may also take into account any other matters it considers relevant.

A good example can be seen in *Director of Consumer Affairs of Victoria v AAPT Ltd (Civil Claims)* [2006] VCAT 1493. This case concerned state legislation that had objectives and terms similar to the amendments to the ACL. In 2003, Part 2B had been inserted into the *Fair Trading Act 1999* (Vic), making a consumer contract with an unfair term in it void. Consumer Affairs Victoria brought an application before the Victorian Civil and Administrative Tribunal against the telephone company AAPT, alleging that certain terms in its mobile telephone contracts were unfair. Some of these terms concerned variations to the contract that could be made by AAPT but not by the customer, and AAPT's ability to terminate service and to charge a reconnection fee for an overly broad range of reasons. The tribunal held that these terms were indeed unfair.

Research 10.4

Go to the NSW Fair Trading home page at http://cambridge.edu.au/redirect/?id=6305 and then use the 'Consumer Guarantees, warranties & refunds' option in the 'Consumers' tab at the top of the page to complete the following tasks.

1. Outline the automatic guarantees to which you as a consumer are entitled at law, regardless of any other warranties that merchants might provide.
2. What products and services are guaranteed under the ACL?
3. Under what conditions do consumer guarantees not apply to you?

10.3 Consumer protection

Negligence and consumer protection law

Where goods manufactured without proper care cause injury, loss, damage or death, the consumer is entitled to bring an action under the relevant federal or state legislation. Alternatively, they may have a cause of action for breach of contract, if the supplier or manufacturer has expressly or impliedly promised that the goods are free of defect. A third type of claim is an action in **negligence** (breach of a duty of a person to take reasonable care not to cause harm to other people), as demonstrated in *Grant v Australian Knitting Mills* [1936] A.C. 562, a case in which sulphite was left in woollen underpants, causing the plaintiff to contract dermatitis.

negligence
a breach of the duty of reasonable care owed by one party to another, and damage to the plaintiff resulting from this breach

In Australia, governments seek to keep unsafe products from the market and inform consumers about product safety by ensuring that:

- safety warning notices for goods or services are published regularly (ACL ss 129–130)
- consumer goods or product-related services may only be provided if they comply with a compulsory safety standard (ACL ss 104–108)
- suppliers notify the Commonwealth minister within 48 hours of becoming aware that a person has suffered serious injury, illness or death associated with a consumer good or product-related service they supplied – either in Australia or overseas (ACL ss 131–132A)
- unsafe products that reach the market are readily detected and reported
- there is effective and timely removal of unsafe products from the market (ACL ss 109–119)
- compulsory product recall occurs if required (ACL ss 128 and 201 for supplier-initiated recall; ss 122–127 for minister-ordered recall)

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Figure 10.8 Product recalls occur in order to protect the safety of consumers.

- compensation is available to consumers who suffer injury because of a safety defect (ACL Parts 3–5).

Suppliers have a duty to warn consumers of products that are considered to have dangerous characteristics that are discovered after they are already on the market. They may also be required to recall the product, under the *Competition and Consumer Act 2010* (Cth) (see previously for ACL sections) or the *Fair Trading Act 1987* (NSW) (s 45). Where a product has been recalled and a supplier does not comply with this recall notice, a consumer may still be able to sue for damages if they suffer loss or damage as a result of this failure (*Fair Trading Act 1987* (NSW) s 46).

Some recent examples of product recalls include:

- Hewlett Packard (HP) and Compaq Notebook Computer Lithium Ion Battery Packs – these were overheating and exploding (2009)
- Cadbury Old Gold Dark Chocolate, 70% Cocoa, 200-gram block – the milk solids weren't declared on the labelling and this caused allergic reactions for lactose-intolerant consumers (2009).

Legislative provisions regarding consumer product safety standards, which include requirements for testing of goods and the inclusion of warnings or instructions with products, are intended to prevent or reduce the risk of injury to any person. See, for example, Part 3-3 of the ACL. Children's prams, smoke detectors and kitchen ovens are examples in which the importance of these safety standards is particularly evident.

In addition to these provisions, there are state and federal laws governing the provision of information about products and services.

Legal Links

Go to http://cambridge.edu.au/redirect/?id=6306 to view the ACCC product safety recall list.

Regulation of marketing and advertising

Statutory protection

Although common law provides some protection for consumers with regard to the deceptive practices of manufacturers and suppliers, it was not until it was codified into statute that consumer law truly emerged as a force for social and economic justice. Provisions protecting consumers from deceptive advertising and marketing practices are contained in both federal and state consumer legislation. They are found in the ***Australian Consumer Law* (ACL)**, which is Schedule 2 of the *Competition and Consumer Act 2010* (Cth).

***Australian Consumer Law* (ACL)**
federal legislative provisions contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) – formerly the *Trade Practices Act 1974* (Cth)

Deceptive or misleading conduct

Section 18 of the ACL, formerly s 52 of the *Trade Practices Act 1974* (Cth), contains provisions providing protection against deceptive or misleading conduct.

At law, 'conduct' means 'doing or refusing to do any act'. Conduct is considered misleading if it has the capacity to lead into or cause error. Making a statement that is literally true may nonetheless constitute misleading or deceptive conduct. Misleading or deceptive conduct includes exaggerated statements about a product, failure to disclose all relevant information, and in some circumstances silence. It also includes promises that are not kept and incorrect predictions. The court will determine objectively whether conduct is likely to mislead the public. In determining this, the court will look at what a reasonable person's reaction would be to the representation.

It makes no difference whether the company intended to mislead or deceive consumers; even omitting to say something can amount to misleading

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or deceptive conduct if this involves a deliberate decision to withhold information. If an advertisement creates a misleading perception about an item (for example, if a manufacturer of small toys with many detachable parts failed to disclose the risks to infants and toddlers), then the company may be in breach of the ACL. Recent case law has suggested that a clear causal link will need to be shown for a court to find that silence contributed to an erroneous impression.

Under the ACL, a consumer can recover damages for the loss or damage suffered by the conduct of another which contravenes provisions in the ACL.

Under the *Australian Constitution*, a federal Act applies to all trading, financial and foreign corporations within Australia, as well as to people who are engaged in trading, financial and foreign trade across state borders. The *Fair Trading Act 1987* (NSW) regulates people who have a link to New South Wales and who are not covered by the federal Act.

In Court

***eBay International AG v Creative Festival Entertainment Pty Ltd* (2006) 170 FCR 450**

A concert promoter sold tickets that stated that all tickets resold for profit would result in the holder of the newly bought ticket being refused entry to the concert. The court held that the promoter had engaged in misleading and deceptive conduct and that the new condition of sale conveyed a false representation that all tickets resold for profit would be cancelled.

False or misleading representations

In addition to the provisions concerning misleading and deceptive conduct, the ACL contains specific provisions regarding representations (s 29). A representation is a statement or assertion. A person contravenes (breaches) this provision by making false or misleading representations to consumers about their goods or services, such as:

- a false claim about the quality or value of a product
- a claim that goods are new when in fact they are second-hand
- a claim that a product is sponsored by or used by a celebrity when in fact it is not
- a false or misleading claim about a potential consumer's need for any goods or services
- a false or misleading claim about the existence, exclusion or effect of any condition, warranty or guarantee
- a false claim about the place of origin of a product.

Unconscionable conduct

The ACL (in ss 20, 21 and 22) provides protection for consumers against unconscionable conduct.

Offering gifts and prizes

Suppliers who entice consumers to buy their goods or services by offering gifts, prizes or other free items with the intention of not providing the advertised gift contravene s 32 of the ACL. Suppliers participating in such marketing schemes are considered to have been engaging in deceptive practice.

Bait advertising

Bait advertising is the practice of advertising something at a specified price, with the knowledge that it will not be possible to offer it at that price for a reasonable time and in reasonable quantities. Often referred to as 'bait and switch', this tactic has the objective of getting the consumer into shops, where sales staff inform customers that they have 'run out of' a particular line and attempt to convince them to buy a more expensive product or model. Such behaviour contravenes s 35 of the ACL.

bait advertising
advertising goods or services for sale at a specified price with the knowledge that the company will not be able to offer them at that price for a reasonable period

For example, in *Reardon v Morley Ford Pty Ltd* (1980) 49 FLR 401, the Federal Court found that a car dealership breached what is now s 35 of the ACL (it was then s 56(1) and (2) of the *Trade Practices Act*). It advertised a car at a price, but when a prospective buyer came to inspect it, he was told the model advertised had already been sold – in fact, that model at that price had never been for sale by that dealer.

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News

Reebok EasyTone claims false: ACCC

Lucille Keen

The Australian Financial Review, 24 October 2014

Reebok has been fined $350 000 for misleading consumers about a pair of shoes that it claimed would tone the buttocks up to 28 per cent more than regular sneakers.

The Federal Court in Perth said it was misleading for Reebok to claim that its EasyTone shoes will increase the strength and muscle tone of the wearer's calves, thighs and buttocks more than if they were wearing traditional walking shoes.

The court found these claims contravened the ACL and the company had no reasonable grounds for making the representations.

Figure 10.9 Reebok EasyTone

Reebok is required to refund $35 to every customer who bought the shoes – the trainer version retails for up to $179 – between September 2011 to February 2013, and who believe they suffered loss or damage as a result of the company's representations.

The advertisements promised that the shoes would strengthen hamstrings and calves by up to 11 per cent and tone the buttocks up to 28 per cent more than regular sneakers, just by walking.

Reebok claims the 'balance ball inspired' shoes use pockets of air to 'absorb energy', create 'micro instability' and 'tone and strengthen key leg muscles while you walk'.

'It's as easy as that,' one of the slogans on the box said.

'This shoe can help tone some of your hard-earned leg muscles', 'Better butt and legs with every step', 'Take the gym with you' were other claims made.

Only doing the hard yards works

Fitness expert Jacqui Ambrus-Bonazzi said instability devices don't really tone muscles.

'You've got to do resistance training and eat a clean, balanced diet,' the owner of Canberra-based business PT2U said. 'To say a shoe will do this is far-fetched and a marketing ploy. If people think it has helped it is probably more of a placebo effect.' …

The shoes had been imported and sold by Reebok in Australia to stores such as Myer, Rebel Sport, Foot Locker, Jim Kidd Sports and The Athlete's Foot, since December 2009, but the proceedings related to promotional material from September 2011 to February 2013.

Reebok was ordered to pay $25 million by the Federal Trade Commission to settle a similar claim in the United States. After the US case in November 2011 and until May 3, 2012 Reebok Australia supplied 16 448 pairs of EasyTone shoes to retailers that may have contained the promotional material, court documents claim …

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News

Australia Competition and Consumer Commission deputy chairman Delia Rickard said when companies claim their products have certain performance characteristics and benefits, they have a responsibility to ensure that those claims are accurate and supported by credible evidence.

'This is particularly important in cases such as this where it is difficult for consumers to independently verify the claims,' Ms Rickard said. 'The fact that these claims made about the alleged benefits of EasyTone shoes had come to the attention of regulators in other jurisdictions, but still continued to be made in Australia by Reebok was of particular concern to the ACCC'.

Reebok is required to establish a hotline for consumers to call, and to publish corrective notices with details of how consumers can seek redress.

Review 10.5

Read the media article about Reebok EasyTone and complete the following tasks.

1. Why was Reebok fined by the ACCC?
2. List the false claims in the Reebok advertisement.
3. Besides paying the actual fine, what else did the ACCC require Reebok to do?

Referral selling

Section 49 of the ACL states that a supplier cannot offer discounts, rebates or other benefits to consumers in return for their providing information about other prospective customers.

Pyramid selling

Under ss 44 and 46 of the ACL, it is illegal for a person to participate in a **pyramid selling** scheme. This is a scheme in which prospective participants are promised payment or other benefits for introducing others to the scheme. The practice is fraudulent because what is really being sold is the right to distribute, not the actual product or service being marketed.

pyramid selling
an illegal type of selling in which an individual pays to become a distributor of goods in return for a reward for recruiting new distributors

Unsolicited and unordered goods

Sections 69–95 of the ACL deal with unsolicited consumer agreements. An unsolicited consumer agreement is where a 'dealer' enters into an agreement for the supply of goods or services with a consumer as a result of negotiations, and these negotiations were not invited by the consumer.

Under s 39 of the ACL, a person must not send unsolicited credit cards through the mail; there is an exception for credit card companies that are providing a replacement for an expired card. Section 40 of the ACL prohibits a person from claiming they have a right to be paid for unsolicited goods or services unless the person reasonably believes they have a right to the payment.

Coercion

Under s 50 of the ACL, a person must not use coercion, physical force or unwarranted harassment in connection with the supply, possible supply or payment for goods or services.

Cooling-off period

Legislative provisions permit **cooling-off periods** in relation to certain contracts because the law acknowledges the existence of high-pressure sales tactics that can influence consumers to make

cooling-off period
a period of time that gives buyers an opportunity to rethink their decision to enter into a contract of sale

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purchases they otherwise would not. These tactics may not constitute unconscionable conduct, but may result in purchases that put the buyer at a disadvantage. Legislation that provides for a cooling off period includes:

- ACL – allows for a 10-day cooling-off period and the right to terminate a contract after the cooling-off period where the contract is an unsolicited (direct marketing) consumer contract (s 82)
- *Motor Dealers Act and Repairers Act 2013* (NSW) – provides a one-day cooling-off period where the vehicle is purchased by a consumer on credit arranged through the dealer (ss 80–81)
- *Conveyancing Act 1919* (NSW) – specifies a five-day cooling-off period for sales of residential property (s 66S)
- *Student Assistance Act 1973* (Cth) – provides for a 14-day cooling-off period for a loan contract between a student and a financial company (s 12KA).

Review 10.6

1. When is a consumer entitled to bring an action in negligence?
2. Explain the significance of *Grant v Australian Knitting Mills* [1936] A.C. 562.
3. List and explain the relevant sections of the ACL that relate to the protection of consumers from unsafe products.
4. Why is s 18 of ACL so important?
5. What do you understand by the notion of a 'false and misleading representation'? Provide some examples of this behaviour.
6. Differentiate between 'referral' and 'pyramid' selling. Why are they deemed to be illegal?

Non-statutory controls on advertising

Non-statutory bodies provide protection when it comes to deceptive and/or misleading marketing and advertising. Australia has a highly accessible self-regulatory framework which complements its statutory regime.

That system is administered by the Advertising Standards Bureau (ASB) through the Advertising Standards Board and the Advertising Claims Board. These boards operate on the principle that advertisers have a shared interest in promoting consumer respect for, and confidence in, general advertising standards.

The ASB provides a free complaint resolution service to the public. It also makes decisions on complaints about most forms of advertising and marketing. Issues from which complaints arise include the use of language; discriminatory presentation of people; concerns about children; depictions of violence, sexuality and nudity; and health and safety. There is an appeal mechanism by which the community and advertisers can challenge decisions made by the ASB.

The Advertising Claims Board provides a complaint resolution service regarding issues of truth, accuracy and legality of advertising. The complainant bears the cost of the resolution process. Its primary purpose is to resolve disputes between competitors through **alternative dispute resolution** (ADR), rather than through expensive and time-consuming litigation.

alternative dispute resolution (ADR)
methods other than formal court proceedings for settling disputes, including arbitration, negotiation, mediation and conciliation

Both boards use professional codes of ethics as the basis for their determinations. These codes include the Australian Association of National Advertisers (AANA) *Code of Ethics*, the AANA *Food & Beverages Code* and the AANA *Code for Advertising and Marketing Communications to Children*.

Research 10.5

Read the ACL sales practices guide (see http://cambridge.edu.au/redirect/?id=6307) and complete the following tasks.

1. Can a business or person issue an invoice that states an amount to be paid for unsolicited goods or services?
2. What is the maximum penalty for requesting payment for unsolicited goods and/or failing to include a warning notice on an invoice?

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Review 10.7

1 How does statute law combat high-pressure sales tactics?
2 List and explain the statutes that have inbuilt cooling-off periods.
3 Briefly outline the non-statutory controls that exist to address deceptive and/or misleading marketing and advertising in Australia.

Legal Links

The AANA codes can be viewed at http://cambridge.edu.au/redirect/?id=6308.

Occupational licensing

Regulation of professions and occupations may include:

- registration – listing practitioners on an official register to identify them and to ensure that they comply with legal requirements
- certification – a way of recognising those who have obtained qualifications that are necessary and/or desirable for practising the profession; it also provides information to the public that will help them choose between competing professionals
- licensing – a means of identifying those who have fulfilled criteria related to education, experience and compliance with professional codes of ethics, and authorising them to practise; it generally involves a regulatory body to administer the licence.

If all individuals in the workforce could be trusted to maintain high standards of ethical practice, there would be no real need for licensing. The imposition of licensing and registration is an attempt to guarantee that people employed in various occupations have the requisite skills and perform their roles honestly. Licensing controls govern most professions, trades and businesses, including those in Table 10.1.

Self-regulation

One way that industries may set practising standards and regulate the entry of individuals into their field is self-regulation through professional bodies. Two notable examples of this are the Australian Medical Association (AMA) and the NSW Law Society. The former is a national body that regulates the ethics, work standards and academic qualifications of doctors, and the latter has co-regulatory duties, with the Office of the Legal Services Commission, to enforce professional standards, provide licences for practising, investigate complaints and provide disciplinary action.

In some professions, self-regulation works closely in tandem with legal requirements. However, in others, the absence of compulsory standards can lead to a lack of uniformity in matters such as complaints and disciplinary processes; difficulty for employers in assessing a breach of professional ethics; and a burden on consumers to inform themselves about the quality of a professional's practice. Individuals in occupations as diverse as social workers, accountants, migration agents and opticians – as well as their professional organisations – have

Table 10.1 Examples of regulated professions, trades and businesses

Professionals	Trades	Businesses
Doctors	Plumbers	Travel agents
Lawyers	Electricians	Car dealers
Engineers	Builders	Credit providers
Dentists	Motor mechanics	Hotels
Architects	Carpenters	Motels
Veterinarians	Fitters and turners	Restaurants

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Figure 10.10 Licensing is designed to protect consumers from unqualified professionals, tradespeople and businesses.

addressed the need for legislation to ensure that all practitioners meet standards of competence and ethical behaviour.

State regulation

As a consequence of the problems with self-regulation, Australian states have been forced to intercede via rules. In recent times, state parliaments have enacted rules that provide guidelines regarding the **fiduciary duties** and licensing requirements of real estate agents and solicitors. The objective is to compel businesses and professionals to act honestly and in accordance with their duties to consumers. An example of a statutory licensing regime in New South Wales, that for automobile dealers and repairers, is discussed below.

fiduciary duty
where one person (the fiduciary) undertakes to act in the interests of a second person (the beneficiary) and has the power to effect the interests of the beneficiary

Licensing of motor car dealers and repairers

The activities of car dealers and repairers in New South Wales are governed by the *Motor Dealers and Repairers Act 2013* (NSW). The Act ensures that someone wishing to buy or sell cars is licensed to do so. This legislation stipulates that dealers must not make false or misleading statements regarding the quality of the vehicles they are selling. The Act also makes it illegal to trade as a vehicle repairer without a licence. This statute also governs the activities of all licensed auto-electricians, panel beaters, spray painters, and brake and transmission mechanics to ensure that only licensed repairers complete such work. Any **licensee** whose work is below the industry minimum standard may have their licence revoked and will not be able to undertake any repair work which could potentially harm a vehicle owner or cause further damage to the car.

licensee
licence holder

Review of licensing decisions

The regulatory body for a particular profession or occupation may grant or revoke a licence. When it

Figure 10.11 The activities of car dealers and repairers in New South Wales are governed by the *Motor Dealers and Repairers Act 2013* (NSW).

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Review 10.8

1 Outline the three ways in which professions and occupations are regulated in our country. Why is this regulation necessary?
2 Self-regulation is undertaken by a number of professions. Give two examples of professions that are self-regulated and explain what is monitored in each case.
3 Why is self-regulation potentially problematic? How is this addressed by law-makers?

Table 10.2 Reasons for a licence to be refused or revoked

Possible reasons for the refusal of a licence	Possible reasons for revoking a licence
Inadequate training or education of the applicant	Malpractice by the licence holder
Inability of the licence holder to meet minimum industry or professional standards	Fraudulent, misleading or deceptive behaviour by the licence holder
Concern regarding the character of the applicant, such as their honesty	A breach of the licence holder's fiduciary duty with regard to trust funds

makes an administrative decision to deny access to, or revoke a licence, it must do so in accordance with the rules of **procedural fairness**. In simple terms, this means that individuals must be given an opportunity to hear the reasons why their licence has been denied or revoked and to present arguments as to why the licence should be granted or reinstated. If an individual is unsuccessful in obtaining or retaining a licence, they can apply to the Office of Fair Trading for an internal review. If dissatisfied with the result, the person can apply to the Administrative Decisions Tribunal for further review.

procedural fairness
the body of rules that ensure that decision-makers act fairly, in good faith and without bias when resolving disputes

10.4 Consumer redress and remedies

Awareness and self-help

Self-help avenues are open to consumers who feel they have been treated unfairly by suppliers or manufacturers. Redress can be obtained by complaining to the supplier or manufacturer. Self-help is a useful mechanism for consumer redress because it is resource-efficient and easily carried out. Further, it can provide just outcomes for consumers without their having to undertake costly litigation.

Complaints to suppliers

Under the law, consumers can seek redress in the form of repair, replacement or refund. If the product or service supplied does not do the job that the customer was led to believe it would, or there is some serious fault in the product, the customer is entitled to seek a legal remedy. In most cases, this is initially achieved by the consumer complaining in person to the supplier. Usually, the supplier of a faulty product will repair or replace the product or provide a refund. This is because most suppliers are aware of the statutory protections in place for consumers, but also because it is an opportunity to foster goodwill and customer loyalty. A dissatisfied customer whose complaint is taken seriously and promptly addressed can become an ambassador for that supplier through word of mouth.

Complaints to manufacturers

Consumers do not always have direct access to manufacturers. Once the location of the manufacturer has been determined, it is prudent for the aggrieved consumer to contact them via telephone and in writing.

Under the *Competition and Consumer Act 2010* (Cth), manufacturers have an obligation to fulfil their express warranties and implied guarantees and to ensure that a supply of spare parts and repair facilities is reasonably available for a reasonable period after goods are supplied to consumers.

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Figure 10.12 Many companies handle their customer service through call centres.

Manufacturers must also meet the requirements for acceptable quality and fitness for purpose.

Government organisations

State government organisations

There are various bodies within or authorised by the New South Wales Government that deal with consumer complaints. The roles of these agencies include:

- educating the public about their rights in the area of consumer law
- providing advice to consumers about negotiating with providers of goods and services, and assisting them in their negotiations
- advising the government about consumer issues
- investigating serious complaints
- in the event of a breach, applying to the relevant tribunal or court to bring an action.

Some of the relevant agencies are discussed below.

NSW Fair Trading

This government body is a division of the New South Wales Department of Finance, Services and Innovation, whose role is to manage consumer laws, safeguard the rights of consumers and advise businesses and traders regarding fair and ethical practice. The legislative framework that this body oversees sets the rules for fairness in the daily transactions between consumers and traders. It investigates unfair practices and administers the licensing of operators in a range of industries, including home building, the automotive trades, real estate, business and retail, and retirement villages.

Consumers can contact NSW Fair Trading for information on their rights and responsibilities and for the resolution of disputes. It covers a range of services, including a statutory public register with information to help buyers of second-hand cars, bicycles and boats; help selecting qualified builders and tradespeople for those thinking of building or renovating a house; and information for tenants, landlords and real estate agents about their rights and responsibilities.

NSW Fair Trading is also the agency where business owners can register their business names, and obtain the licences and certificates needed to operate in New South Wales.

Research 10.6

Visit NSW Fair Trading at http://cambridge.edu.au/redirect/?id=6309.

1. Use the links in the menu to research and make brief notes on each component of consumer rights – myths and facts.
2. Use the links in the menu to select consumer guarantees, warranties and refunds. Make notes under the following headings:
   - consumer guarantees
   - warranties
   - repairs, refunds and replacements
   - compensation for damage and loss
   - cancelling a service
   - proof of transaction.

NSW Ombudsman

The NSW Ombudsman is a statutory 'watchdog' body dealing with complaints against the New South Wales Government. This includes complaints about organisations delivering community services in New South Wales. Those organisations include the New South Wales Department of Family and Community Services, and non-government services that get

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funding from these departments. It also conducts reviews of people in care and monitors community service issues. The NSW Ombudsman can assist anyone who receives or is eligible to receive community services in New South Wales, including:

- children and young people in care
- people with disabilities
- the families and the advocates of children and young people in care or people with disabilities
- people who use supported accommodation services
- people who use childcare services
- people who use local neighbourhood centre services
- people who use home and community care services.

Legal Aid NSW

Legal Aid NSW is an independent statutory body that was set up under the *Legal Aid Commission Act 1979* (NSW). It provides legal advice and assistance to socially and economically disadvantaged people, including court representation if there has been a successful application for a grant of legal aid. Legal Aid NSW also gives talks in schools, community centres and libraries to educate the public about the law, people's legal rights and responsibilities, and services; has information stalls at community events; and publishes booklets, CDs and DVDs for purchase. Legal Aid NSW can help with consumer law issues such as matters relating to the purchase of goods and services and matters relating to unconscionable contracts and unfair contract terms. All Australian states and territories have legal aid, but not all provide as much assistance in civil matters.

Other legal and advocacy organisations in NSW

Other legal and advocacy organisations that are funded by government and that assist people on low incomes are:

- Community Legal Centres NSW (http://cambridge.edu.au/redirect/?id=6310) – free legal advice services
- Financial Counsellors' Association of NSW Inc (http://cambridge.edu.au/redirect/?id=6311) – free services for people with debts and problems with money
- Tenants NSW (http://cambridge.edu.au/redirect/?id=6312) – free tenancy advice funded by government.

Federal government organisations

Several Commonwealth agencies deal with the regulation of industries and protect consumer rights.

Competition and Consumer Policy Division of the Commonwealth Department of the Treasury

This division of the Treasury provides advice to the Commonwealth Government on the consumer policy framework contained in federal legislation and on how to promote competitive and informed markets. This includes advice on the policy and regulatory frameworks for promoting competition, and for consumer protection.

Commonwealth Consumer Affairs Advisory Council (CCAAC)

CCAAC provides independent advice to the Minister for Competition Policy and Consumer Affairs on consumer policy issues. Its specific tasks are to:

- receive reports, papers and issues from the minister and advise on the implications for consumer policy
- investigate and report on consumer issues referred to it by the minister
- advise the minister of any emerging issues that could affect Australian markets and consumers.

The Australian Securities and Investments Commission (ASIC)

ASIC is an independent Commonwealth body that regulates Australia's corporate and financial services sectors and ensures that Australia's financial markets are fair and efficient. Among its responsibilities is the enforcement of consumer protection laws covering investments, superannuation, credit activities, insurance and financial advice. These laws are primarily found in the *Australian Securities and Investments Commission Act 2001* (Cth) and the *Corporations Act 2001* (Cth). ASIC licenses financial services businesses, conducts public education initiatives for consumers, provides information to businesses to help them fulfil their obligations, and monitors compliance through surveillance. ASIC's

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enforcement powers are set out in the *Australian Securities and Investment Commission Act 2001* (Cth), the *Corporations Act 2001* (Cth) and other legislation, and include:

- commencing prosecutions, usually conducted by the Commonwealth Director of Public Prosecutions
- seeking civil penalties from the courts.

Australian Competition and Consumer Commission (ACCC)

The ACCC is the independent statutory authority that administers the ACL. Its role is to promote competition and fair trade in the marketplace. Market competition, or rivalry among producers and suppliers of goods and services, uses the economic principles of supply and demand to discover the kinds of goods and services that consumers want.

Market competition, by contrast with a market where there is a **monopoly**, is believed to benefit consumers, businesses and the community in general. An unregulated competitive market, however, has a greater likelihood of leading to unscrupulous or unfair conduct on the part of some suppliers, and thus risks harm or disadvantage not only to the people providing labour to businesses, but also to consumers.

monopoly
exclusive control of a market by one company, which generally results in increased prices because there are no alternative suppliers

The ACCC thus has an important responsibility: ensuring that businesses and individuals comply with laws on fair trading and consumer protection. The ACCC complements state consumer affairs agencies, provides education to consumers and businesses about the relevant laws, and regulates national infrastructure industries, which include communications, energy, water, post and transport.

An example of a high-profile prosecution initiated by the ACCC involved the packaging and recycling group Visy Industries Pty Ltd. The company received a $36 million fine in November 2008 for **price-fixing** in the market for cardboard cartons. The penalty handed down in the Federal Court followed an ACCC investigation that found Visy breached the then *Trade Practices Act* by engaging in illegal **cartel** behaviour with rival packaging company Amcor Ltd. Billionaire Visy chairman Richard Pratt was also to face criminal charges for lying to the ACCC, but these were dropped when he became terminally ill (he died in April 2009).

price-fixing
suppliers keeping prices in the market at a certain level by agreeing among themselves not to lower or raise their prices

cartel
a group of companies that work together to control prices and markets; their behaviour is unlawful if it is found to be anti-competitive

Consumer Affairs Forum (CAF)

The CAF (formerly the Ministerial Council on Consumer Affairs) consists of the Commonwealth, state and territory ministers responsible for fair trading, consumer protection and credit laws, along with the New Zealand ministers with those portfolios. Its role is to assess consumer policy issues of national significance and develop a consistent approach to those issues, and it facilitates communication and cooperation between Australia and New Zealand in those areas.

Review 10.9

1. Briefly explain the role of the NSW Ombudsman regarding the delivery of government services to consumers.
2. Outline the assistance that Legal Aid NSW can provide to consumers.
3. What is the role and significance of the ACCC in the Australian context?

Industry organisations

A number of industry organisations deal with consumer complaints and assist with remedies. They may be classified as follows.

Industry-based dispute resolution

Some industry groups have developed complaint handling and dispute resolution schemes designed to provide consumer remedies, enhance business reputation, and support claims that these industries are self-regulating. For example, Master Builders Australia is an employers' group that represents and protects businesses in the building and construction

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industry. It has a national code of practice setting out acceptable standards for commercial behaviour and ethics, by which its members are bound. Consumers can make a complaint to the master builders' association in their state, but the association's primary duty is to its members.

Customer-focused corporate compliance programs

These are internal self-regulatory programs that aim to ensure that a business meets its legal obligations to consumers, and to remedy any breach. Industries that adopt this approach embrace measures that improve relations with their customers. As different industries and businesses have different characteristics and circumstances, compliance programs will also vary. Some companies adopt simple programs with a complaints handling system and training for all staff members, while others have a team dedicated to compliance, regular risk assessments and reviews, detailed guidelines, and staff education programs. Compliance programs are often linked to companies' strategic goals.

Industry-based ombudsman

An industry-based ombudsman takes complaints from citizens or consumers about companies, workplaces or providers and investigates those complaints in order to reach a resolution that is fair to both sides. These schemes provide affordable dispute resolution for consumers who would face considerable cost and complexity if they had to take matters to court.

Some independent dispute resolution schemes are voluntary, but the main ones are part of licensing requirements for providers in a particular industry (for example, telecommunications, energy and water, financial and credit services, and insurance). The industry then sets up and funds an ombudsman scheme. For example, the Energy and Water Ombudsman NSW (EWON) investigates and resolves complaints from customers of gas and electricity providers in New South Wales. These schemes have consumer representatives on their councils to ensure that they act fairly and are not 'captured' by the industry.

The role of tribunals and courts

A tribunal is an adjudicative body that is chosen, often by the government, to decide on legal questions based on a particular area of law. Consumer redress and remedies can be obtained through the following bodies.

NSW Civil and Administrative Tribunal (NCAT)

The *Civil and Administrative Tribunal Act 2013* (NSW) governs the operation, functions and powers of this tribunal. NCAT replaced a number of tribunals and bodies, including the Consumer, Trader and Tenancy Tribunal. It deals with a broad range of matters, including appeals from various government agencies. Its Consumer and Commercial Division is responsible for resolving disputes between tenants, landlords, traders and consumers in a timely and effective way. Its website provides forms and YouTube videos that aim to make the NCAT a process that consumers and traders can use without needing legal representation. It conducts hearings across New South Wales. The Consumer and Commercial Division deals with the following matters:

- agent commissions and fees
- agricultural tenancy
- boarding houses
- consumer claims
- conveyancing costs
- dividing fences

Figure 10.13 A tribunal is an alternative to a court.

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- holiday parks
- home building
- motor vehicles
- pawnbrokers and second-hand dealers
- residential parks
- retail leases
- retirement villages
- social housing
- strata and community schemes
- tenancy
- travel compensation fund appeals.

The parties to a dispute will have had an opportunity to resolve their differences, but if an agreement is not reached an application will be heard by the tribunal.

The hearing is presided over by a tribunal member. Both parties are given an opportunity to present their evidence and question each other. The tribunal member may also require that the parties swear to or affirm the evidence. Once all evidence has been presented, the tribunal member will make a decision and explain the reasoning behind it. Both parties to the dispute usually receive a typed copy of the order within seven days of the completion of the hearing. Appeals against a NCAT order can be made only on certain grounds, and are made to the courts.

Courts

If consumers are unable to obtain a remedy through independent avenues (self-help), ADR or the relevant tribunal, another option is **litigation**. The courts resolve disputes by:

- considering the evidence and arguments put forward by each party
- interpreting the relevant statute law
- interpreting and applying common law principles
- following precedent when seen as appropriate
- determining the lawfulness of legislation.

litigation
civil legal proceedings in which disputing parties seek a binding remedy from a court

In recent times, court actions have become very costly. In some instances consumers can reduce these costs by joining or initiating class actions, which allow aggrieved consumers with similar complaints to pursue their legal action collectively.

Other avenues for redress

The role of non-government organisations

A variety of non-government organisations represent the interests of consumers. Many of these are advocacy groups that attempt to influence the legislative programs of political parties in government. While they do not generally take on and pursue individual complaints, they have links to resources that do. Some of these groups are:

- Financial Rights Legal Centre (NSW) Inc. and Redfern Legal Centre – community legal centres that specialise in issues related to financial services, such as consumer credit, banking and debt recovery. They have a particular focus on issues affecting economic and socially disadvantaged consumers.
- CHOICE, formerly known as the Australian Consumers Association – a non-profit organisation that researches and campaigns on behalf of consumers and publishes *CHOICE* magazine. CHOICE provides consumers with independent advice on product quality.
- Consumers' Health Forum of Australia – the national peak body for Australian health care consumers.
- Consumers' Federation of Australia – the national peak body for Australian consumer groups. Its members include legal centres, local organisations and public interest bodies.
- Not Good Enough (http://cambridge.edu.au/redirect/?id=6313) – a website created to help consumers resolve disputes with suppliers of goods and services. It publishes individuals' input about products and services, and facilitates responses from companies.

The role of the media

The print and electronic media provide consumers with information regarding the release, quality and safety of new products. Various lifestyle and current affairs programs feature segments that address consumer complaints and interests. While broadcasters and print media can be biased in favour of their sponsors, there can be little doubt that they generally provide consumers with another layer of information and publicise the shoddy practices of unscrupulous suppliers and manufacturers.

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Review 10.10

1. Differentiate between industry-based dispute resolution and customer-focused compliance programs.
2. Outline the level of consumer redress available through tribunals and courts in the Australian context.
3. What roles do non-government organisations play in the preservation of consumer rights in our society?

Specific remedies

Court-based remedies

A court may award any of a number of remedies to a successful complainant. These include:

- *damages* – monetary compensation awarded by the court and paid by the defendant to someone who proves that loss was suffered as a result of the defendant's actions
- *rescission and modification of contract* – where the court will set aside a contract and restore the parties to their original pre-contractual position
- *special order* – such as for rectification of the wrong (for example, the repair of defective goods)
- **injunction** – an order forbidding or commanding the performance of an act
- *specific performance* – an order requiring a party to a contract to perform their obligations under a contract.

injunction
a court order directing someone to do something or prohibiting someone from doing something

Alternative dispute resolution (ADR)

Mediation and **conciliation** are commonly referred to as ADR mechanisms because they provide an alternative to court-based litigation. If a consumer dispute cannot be resolved after the initial complaint is made, it may be necessary to use mediation or

Table 10.3 Individual consumer rights against suppliers

Statutory rights	Relevant legislation
Unfair contracts may be rescinded (unconscionable conduct).	*Minors (Property and Contracts) Act 1970* (NSW) *Contracts Review Act 1980* (NSW)
Goods offered for sale must be of merchantable quality and fit for purpose.	*Sale of Goods Act 1923* (NSW)
Terms of the contract regarding guarantees and **product warranties** must be honoured.	*Minors (Property and Contracts) Act 1970* (NSW) *Contracts Review Act 1923* (NSW)
Deliberately misleading or deceiving consumers is prohibited.	*Competition and Consumer Act 2010* (Cth) *Fair Trading Act 1987* (NSW)
Goods must fit the description given to consumers by the supplier.	*Competition and Consumer Act 2010* (Cth) *Fair Trading Act 1987* (NSW)
Product information standards must be provided to consumers (for example, labels relating to contents, ingredients and design standards).	*Competition and Consumer Act 2010* (Cth) *Fair Trading Act 1987* (NSW)

product warranty
a manufacturer's promise or assurance that it will repair or replace or otherwise compensate for defective goods; breach of a warranty entitles the aggrieved party to sue for damages, but not to end the contract

mediation
a form of alternative dispute resolution in which a neutral third party assists the disputing parties in reaching an agreement

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes a more active role than in mediation, advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for them

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Table 10.4 Individual consumer rights against manufacturers

Statutory rights	Relevant legislation
A manufacturer must honour its contractual warranties or guarantees.	*Minors (Property and Contracts) Act 1970* (NSW) *Contracts Review Act 1980* (NSW)
Manufacturers must supply reasonable repair and spare parts facilities.	*Minors (Property and Contracts) Act 1970* (NSW) *Contracts Review Act 1980* (NSW) *Competition and Consumer Act 2010* (Cth)
Manufacturers/importers must supply goods that are safe.	*Competition and Consumer Act 2010* (Cth) *Fair Trading Act 1987* (NSW)
Manufactured goods must be fit for purpose and of merchantable quality.	*Competition and Consumer Act 2010* (Cth) *Fair Trading Act 1987* (NSW)

conciliation. In mediation, a neutral umpire helps an aggrieved consumer and a supplier/manufacturer resolve their dispute in a manner that is agreed to by both parties. Conciliation, on the other hand, allows the neutral third party to actively facilitate communication between the disputing parties, with a view to resolution.

The *Community Justice Centres Act 1983* (NSW) has enabled the establishment of Community Justice Centres (CJCs) across the state. CJCs are places where mediation and conciliation can occur. More often than not, the courts have advised the parties in dispute to use these centres in the first instance rather than pursuing costly court procedures.

Benefits to the individual and society

In addition to an individual consumer who succeeds in obtaining redress from a supplier or manufacturer, society benefits from the legal protections in place. The societal benefits of consumer redress include:

- promotion of social equality – consumers are treated alike regardless of their educational levels and bargaining power
- safety – dangerous products are not allowed into our markets
- ethical conduct – by requiring suppliers and manufacturers to fulfil obligations to consumers, expectations of responsible behaviour are reinforced
- international cooperation – in a globalised marketplace, a national commitment to consumer protection may have consequences for other countries as well, at least in theory
- greater choice and quality – market conditions become more consumer-friendly.

Review 10.11

1. Outline and explain the range of court-based remedies available to consumers.
2. Differentiate between mediation and conciliation in the alternate dispute resolution process.
3. What are the most significant benefits that accrue to society as a consequence of having a predictable mechanism guaranteeing consumer redress in the marketplace?

Legal Links

The Consumer Action Law Centre has information about consumer issues, and a full list of consumer advocacy groups. See http://cambridge.edu.au/redirect/?id=6314.

10.5 Contemporary issue: Credit

Why this is an issue

Many individuals in our consumer-driven society obtain goods and services via the use of a credit card or loans. In a sense, the 21st century is rapidly becoming a 'cashless society' in which credit providers issue loans almost too readily.

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Figure 10.14 Credit is the purchase of goods and services in advance of future payment.

In fact, many consumers live well beyond their means, and as a consequence can risk exploitation by unscrupulous lenders.

They may have trouble meeting their repayments, and cars, household goods or even homes can be repossessed. In addition, consumers face other credit issues, such as:

- unfair contract terms
- credit providers with inadequate procedures for handling complaints
- time delays in the handling of complaints by credit providers
- so many steps involved in the process of seeking legal redress that only the most sophisticated consumers will persevere.

In recent times credit card providers in Australia have been criticised by the media, CHOICE and the Reserve Bank of Australia (RBA) for the exorbitantly high interest rates they are charging their customers. As a result, some consumers have accrued thousands of dollars of debt across numerous credit cards. Indeed, credit card interest paid in 2015 totalled $33 billion dollars despite mortgage and general interest rates being relatively low.

Banks and other credit card providers are therefore finding it increasingly more difficult to justify credit card interest rates of around 20% in a financial setting where the RBA reduced the nation's cash rate to 2%! Clearly, people from low socio-economic backgrounds suffer significant financial hardship in such situations.

Legal responses

A meeting of the Council of Australian Governments in 2008 determined that there should be a transfer of consumer credit regulation powers from the states and territories to the Commonwealth. This resulted in the evolution of the ACL, amendments to the *Australian Securities and Investments Commission Act 2001* (Cth), and to the *National Consumer Credit Protection Act 2009* (Cth) and its schedule, the *National Credit Code*. Australia now has a single uniform law for the regulation of consumer credit, providing both better protection for consumers and stability for the consumer credit sector.

One of the main aims of this legislation is to ensure that consumer protections for financial services are consistent with general consumer protections.

Substantial benefits arise from this legislation:

- Consumers and industry benefit from a robust licensing regime that excludes unscrupulous and incompetent credit providers.
- The credit market in Australia has greater integrity and consumers can be confident that credit providers are being monitored by the government.
- Rigorous entry conditions must be met before an Australian credit licence is granted.
- Credit providers must meet responsible lending standards when providing credit or credit assistance.
- The credit market benefits from an assurance that consumers are well protected.

All Australian jurisdictions are now, in accordance with the National Partnership Agreement to Deliver a Seamless National Economy, applying the full ACL.

National Credit Code (and Credit Law Toolkit)

The objective of the code, which is a schedule to the *National Consumer Credit Protection Act 2009* (Cth), is to provide laws which apply with equal force to all forms of consumer lending and to all credit providers, and which are consistent across all jurisdictions in Australia.

The code not only guarantees standardisation but it also requires credit information to be provided in a format that is clear and understandable. Banks, building societies, credit unions, finance companies,

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businesses and other credit providers are required to:

- inform consumers of their rights and obligations in any credit arrangement
- provide a written contract that truthfully discloses all relevant information about the arrangement, including interest rates, fees, commissions and other information.

Further, credit providers must not enter into contractual agreements with consumers who may find it difficult to make repayments. Courts will order changes to, or rescind, contracts deemed to be unconscionable.

A national uniform consumer credit code has many advantages:

- Credit obligations and liabilities are transparent to all parties. Clearly spelt-out obligations increase consumer confidence. Debtors know their contract is supported by national legislation.
- It gives credit providers more freedom to decide their fees and charges as long as they are explicitly disclosed.
- Non-compliance may result in civil penalties up to $500 000 and/or criminal charges.
- It provides for variations of repayments when consumers experience temporary hardship.
- A Credit Law Toolkit provides business owners with a 'plain English' guide to setting out a credit contract.
- Credit agreements between businesses and consumers must be in the form of a written contract.
- Credit providers must ensure that the consumer is given both a pre-contractual statement containing required details about fees and charges and a statement describing the consumer's rights and their obligations.

Non-legal responses

There are a number of useful non-legal avenues which are free, and thus accessible to all consumers experiencing credit concerns. Some are:

- NSW Fair Trading (http://cambridge.edu.au/redirect/?id=6315) – provides free advice (via phone, in person or online) regarding the *National Credit Code* (for example, regarding loan repayments, default notices and car repossession).
- Community Justice Centres (CJCs) (http://cambridge.edu.au/redirect/?id=6316) – provide free conflict management and mediation services throughout New South Wales to help people resolve disputes. They are funded by the NSW Attorney-General's Department.
- Financial Ombudsman Service Australia (FOS) (http://cambridge.edu.au/redirect/?id=6317) – provides a free mediation service specifically for resolving credit disputes between consumers and member financial institutions. It employs independent dispute resolution processes and addresses complaints about financial services relating to banking, loans, credit, financial planning, investments, managed funds, pooled superannuation trusts, stockbroking, general insurance and life insurance.
- Financial Rights Legal Centre (http://cambridge.edu.au/redirect/?id=6318) – provides free telephone and financial counselling advice, particularly for low-income consumers. The centre is a community legal centre specialising in financial services, with a particular focus on matters and policy issues related to consumer banking and credit.
- Redfern Legal Centre (http://cambridge.edu.au/redirect/?id=6319) – offers free legal advice, referral and case work to disadvantaged people and groups in the Botany, Leichhardt and City of Sydney municipal areas. It is an

Figure 10.15 Redfern Legal Centre is located in the old Redfern Town Hall.

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independent, non-profit community legal centre that provides face-to-face and telephone advice about credit and debt.

Responsiveness of the legal system

The uniform laws outlined above are designed to protect consumers entering credit agreements, and to regulate credit providers. A national response to this issue is appropriate, so that all Australian consumers are protected from unconscionable credit contracts to the same extent and with the same consequences for breach. These include:

- criminal penalties for licensee misconduct – those who do not follow responsible lending protocols may be imprisoned for up to two years
- civil penalties for licensee misconduct – ASIC can levy fines of up to $220 000 for individuals and $1.1 million for corporations
- infringement notices which let ASIC respond swiftly in penalising breaches of the law
- compensation or other remedies which can put aggrieved consumers back in their original position prior to the financial loss suffered.

Conclusion

The *National Credit Code* guarantees standardisation of credit contracts across Australia and ensures that credit information is presented in a clear and easy-to-understand format. Further, credit providers are required to inform consumers of their rights and obligations in any credit arrangement, and to honestly disclose, in a written contract, all details that are relevant to the credit arrangement. It should include interest rates, fees and commissions.

In addition to civil remedies for consumers against credit providers who breach the code, the state can initiate a criminal prosecution. However, you may wonder whether the civil and criminal penalties will be sufficient to deter some corporations from licensee misconduct. Historically, courts appear to have been reluctant to impose criminal sanctions on the board members of corporations, and have relied instead on fines that hardly put a dent in annual profit figures.

Review 10.12

1. Outline the major credit issues that exist in the 21st century.
2. Explain the benefits associated with Australia having a single uniform law for the regulation of credit.

10.6 Contemporary issue: Product certification

Why this is an issue

Consumer goods must pass performance and quality assurance tests according to an industry code and/or nationally accredited test standards. If a product gains certification, it has complied with a set of regulations governing quality and minimum performance standards.

In a globalised world, trade knows no boundaries. Products made in Australia can be sold anywhere on Earth. The same is true of goods manufactured in countries that do not have the same level of quality assurance as Australia. Consequently, it is vital that all products meet certain minimum safety and performance standards before they can be sold to Australian consumers.

Legal responses

The Australian Competition and Consumer Commission (ACCC) enforces mandatory product safety and information standards and bans unsafe goods under the *Competition and Consumer Act 2010* (Cth). NSW Fair Trading, via the *Fair Trading Act 1987* (NSW), also has an important role in monitoring product safety.

Product safety

Under Australian law, product suppliers and manufacturers are obliged to ensure that they only sell safe products. This is done by:

- providing clear instructions for use, including warnings against possible misuse
- keeping to industry and mandatory standards
- establishing plans and procedures for product recalls, including strategies for public communication
- incorporating safety into product design
- improving products to raise the level of safety standards

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- establishing a quality assurance program, incorporating consumer feedback
- reacting quickly when safety concerns arise.

Mandatory product standards

There are two ways a standard can be made mandatory: statutory regulation or publication of a notice in the *Commonwealth Gazette*. The notice normally references a published Australian Standard but there may be variations. Suppliers are legally required to reference both the gazette notice and its 'Standards Australia' benchmark.

There are two types of mandatory product standards in our country:

- Safety standards – these are legal requirements and contain safety, labelling and design requirements. They are established when there is a clear risk to consumers (for example, for children's nightwear and flotation toys). If these standards are not met, the product cannot be sold.
- Information standards – this is information which must be given to consumers when they buy specified goods (for example, label information as to contents and risks for cosmetics and tobacco products, and label information as to care for clothing and textile products).

Product certification

Certification of products indicates their established suitability for specified purposes. For example, computers and relevant software may have to be certified as being compatible with one another prior to marketing. Further, the certification process has varying levels of stringency. The greater the risk of injury to consumers, the more demanding the certification process will be.

Once a product is certified, it may be endorsed with a certification mark or logo. In Australia,

Table 10.5 Common Australian and international certification marks

Intertek	Products bearing the S-mark demonstrate compliance with legal European electrical safety requirements via third-party testing by Intertek Semko AB. Intertek is an internationally renowned organisation specialising in electrical product safety and benchmark performance testing. It operates more than 1000 offices and laboratories in 110 countries.
CE	The CE mark indicates that a product can be legally sold within the European Union. It means the manufacturer has prepared a 'Technical File' to demonstrate the product's compliance with applicable essential requirements and obtained a 'product-specific' CE marking certificate from a body specified by the European Union.
bsi. ISO 9001 Quality Management	The British Standards Institution (BSI) is a non-profit distribution organisation incorporated under a royal charter, and is formally designated as the National Standards Body for the United Kingdom. It certifies products and services as having met the requirements of specific standards within designated schemes.
JIS	Japanese Industrial Standards (JIS) specify the standards used for industrial activities in Japan.
Certified Product Australian Standard	The 'Five Ticks' standards mark is a well-known product certification symbol from SIA Global, used in Australia and internationally. It indicates that the product and its production processes meet recognised national or international standards. The standards mark is not just a manufacturer's claim – consumers can have additional confidence in the safety and performance of the product they are purchasing.

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Figure 10.16 A camera displaying the CE product certification symbol

consumer goods (both domestic and imported) must meet safety benchmarks prior to sale. Certification or quality marks are also regarded as powerful marketing tools that build consumer confidence.

Certification marks on goods provide the consumer with legal assurance that:

- there is a product certification agreement between the manufacturer of a product and an organisation with national accreditation for both testing and certification
- the product was successfully tested against a nationally accredited standard
- the accredited certifying organisation guarantees that the item offered for sale is identical to the one tested
- the successful test has resulted in a 'certification listing', which sets out the conditions of use for the certified product and its compliance with the law (de-listing occurs in the case of non-compliance)
- the manufacturer is regularly audited by the certification organisation to ensure the maintenance of the original quality standard that was employed in the manufacture of the test specimen
- if the manufacturer fails an audit, all goods certified will be immediately removed from the market with the consumer compensated accordingly.

A certification listing indicates to the consumer that:

- the product is manufactured under a certification that exists between the manufacturer and the certification organisation; this means that the certifier will conduct unannounced factory audits each year to ensure that the product being made is still identical to the one that was tested
- the manufacturer's marketing information, literature and packaging are authorised to use the certification mark
- listing is a matter of public record and can be checked for validity.

In Australia, consumers are protected from unsafe or substandard goods and services by a number of legal mechanisms:

- Part 3-3 of the ACL – this contains provisions specifically addressing unsafe products, through mandatory safety standards and information standards, banning of unsafe goods, compulsory product recalls, and warning notices to the public. This statute is policed by the ACCC, which is responsible for all areas of consumer protection and safety apart from financial products and services. It has the power to conduct random national surveys of retail outlets to look for non-complying products, to investigate allegations by consumers and suppliers about non-complying goods, and to investigate goods sold by direct marketing (internet and television). It can conduct recalls, obtain court-enforceable undertakings, and/or initiate prosecutions. It can seek proof of compliance from suppliers and arrange for goods to be tested; for example, bicycle helmets may be tested for impact resistance. The ACCC also has an educational role and provides information and advice to consumers and suppliers about the requirements of the mandatory product standards.
- The *Australian Securities and Investments Commission Act 2001* (Cth) – this legislation, enforced by ASIC, protects consumers by ensuring that market participants act with integrity with regard to contracts for loans, superannuation and other financial products and services.
- Various state/territory fair trading statutes whose powers have been absorbed into and/or 'mirror' the provisions of the *Competition and Consumer Act 2010* (Cth) – in New South Wales this is the *Fair Trading Act 1987* (NSW).

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News

Frozen berries: Australian producers angry about 'quality' statement

Esther Han, Consumer Affairs Reporter

Sydney Morning Herald, 19 February 2015

The frozen berries maker embroiled in the national hepatitis A outbreak has been telling customers it does not always use Australian fruit because of 'quality' concerns, outraging local growers.

The revelation comes as five more people were diagnosed with hepatitis A after eating frozen berries on Wednesday, bumping the national tally to 14 and intensifying consumer anger.

Schools and childcare centres across the country have also been caught up in the health scare, with some issuing parents with letters about their use of the potentially contaminated fruit.

In an email reply to a customer concerned about source countries two years ago, Patties Foods said: 'Australian growers cannot always provide either the quantity or the quality that we require on an ongoing basis.'

Local berry growers are outraged by the comment, saying it is a poor excuse from a company buying cheap produce.

'I certainly dispute that. We have premium, excellent quality berries that are now available 12 months of the year,' said Jonathan Eccles, executive officer of Raspberries and Blackberries Australia. 'It comes down to quantity and the price they're willing to pay. Not quality.'

The email also revealed Patties' 'policy was to acquire Australian fruit wherever possible,' despite the fact in the past two years it sourced berries from China, New Zealand, Canada, Chile, United States, Greece, Turkey and Serbia.

The four recalled products – one-kilogram packs of Nanna's Raspberries and Frozen Mixed Berries, as well as 300 gram and 500 gram packs of Creative Gourmet Mixed Berries – were largely sourced and packed in China.

About 90 per cent of China's groundwater is polluted, 65 per cent severely so, with contaminates such as pesticides, fertilisers and petrochemicals, a report from the Centre of International Security Studies at Sydney University showed.

Pressure is mounting on politicians to toughen country-of-origin labelling laws, with consumer group Choice launching a petition to end the 'labelling farce' aimed at federal Agriculture Minister Barnaby Joyce.

Patties Foods chief executive Steven Chaur told Fairfax Media that labelling laws were 'stringent' and adequate.

But Choice spokesman Tom Godfrey said: 'We've had inquiry after inquiry on this issue. Year after year it rates as a top concern of Australian consumers. It's time for action.

'Confused claims such as "Packed in Australia using imported fruit" or "Made in Australia using local and imported ingredients" offer very little information about a product's origin and are largely meaningless to consumers.'

As of Wednesday evening, there were 14 victims of the outbreak: five in New South Wales, five in Queensland, three in Victoria, and one in Western Australia.

Frozen berry products have been shooting up grocery sales charts, jumping to 10th place in the 'all frozen' category in the past year, according to Nielsen research.

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News

The federal health department, federal agriculture department and Food Standards Australia and New Zealand are working with state and territory health authorities and the food industry to resolve this public health issue, a spokesman said.

The first recall was issued nationally on Friday, February 13. On Tuesday, Mr Chaur said the raspberries were the common link and may be the culprit.

Symptoms of hepatitis A can include abdominal pain, loss of appetite, yellow skin and eyes, dark urine and pale faeces, tiredness and a mild headache. …

The Federal Health Department is in the midst of co-ordinating a national health response across all states with hepatitis A patients.

'Anyone who has eaten the recalled frozen berries and feels unwell should consult their GP,' a spokesman said.

Figure 10.17 A brand of frozen mixed berries led to a hepatitis A outbreak.

- The Federal Treasury also provides advice to the government on the consumer law provisions of the *Competition and Consumer Act 2010* (Cth) in order to promote a safer market for consumers.

Non-legal responses

Individuals may take action through one of the independent consumer groups which advocate on behalf of consumers, lobby parliament to influence legislation, and act as consumer 'watchdogs' to highlight unsafe products in the Australian market.

The media can also be a powerful tool for highlighting and publicising consumer safety issues.

Responsiveness of the legal system

Federal and state governments enforce mandatory product safety and information standards via the ACCC and NSW Fair Trading. Both organisations play a central role in educating consumers and

Research 10.7

Access the ACL product safety guide via http://cambridge/edu.au/redirect/?id=6442 and answer the following questions.

1. How does the ACL regulate consumer goods and product-related services? Is this an effective level of regulation? Why?
2. Briefly outline the legal responsibilities of suppliers.
3. What is a safety warning notice? Outline what can be included in such notices.
4. Under what conditions can a minister impose a ban on a consumer good or product-related service?

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businesses about product safety, and produce publications on safety and standards. They also conduct ongoing market surveys to be sure that products continue to meet acceptable standards. Both organisations can prosecute suppliers who ignore their statutory obligations.

Where problems do occur with a product, both the ACCC and NSW Fair Trading are able to remove unsafe goods from sale. They can issue public warnings about particular defects, or even recall dangerous products.

Conclusion

As we have seen, the Australian legal system seeks to ensure that all products consumers buy are safe and meet internationally recognised quality standards. This is achieved via product certification, which demonstrates that a product, process or service satisfies specified requirements.

Clearly, without a product certification process in operation, there would be a very real risk to the health and safety of Australian consumers, as a consequence of inadequate quality assurance and safety measures. Despite this, however, Australia is one of the most open markets in the world. With thousands of importers across our country, it is very difficult to ensure that unsafe products will not enter our market. While we have the requisite laws in place to protect consumers, we have to rely upon consumer watchdogs such as the ACCC, the media and various industry self-regulatory bodies to bring unsafe goods to the attention of the public. Sadly, this sometimes happens only after a consumer is injured.

Review 10.13

1. Why is product certification important in a global society?
2. Outline the essential obligations product suppliers and manufacturers have under Australian law to ensure product safety. Briefly evaluate each requirement.

10.7 Contemporary issue: Marketing innovations

Why this is an issue

Marketing is a process by which a business creates a 'consumer interest' in its products. Over time, the marketing process has become increasingly more sophisticated – especially with the advent of e-commerce. Therefore, recent innovations in global marketing technologies are of particular interest to law-makers.

As soon as a business website becomes operational, it is marketing to the world. When this is combined with Australian consumers' increasing reliance on their credit cards and online purchasing, consumer protection becomes problematic. Governments have a vital role to play in developing appropriate legislative responses that will facilitate a fair marketplace.

Legal responses

Marketing innovation can be utilised for bogus purposes, posing new challenges to Australian law. For example:

- Many Australian consumers routinely receive fraudulent overseas offers via the internet.
- Scammers have the ability to obtain email addresses and contact millions of internet users very quickly.
- Overseas pyramid selling schemes proliferate.
- Householders receive overseas phone calls from dubious investment advisers promoting suspicious share deals.
- 'Phishing' attacks are becoming quite common. This is a type of internet fraud that tries to steal credit card numbers, user IDs, passwords and other valuable information. It is often undertaken through the creation of forged websites that request consumer information. Phishing scams frequently involve placing links on websites, or in email or instant messages that seem to come from a trusted service such as a bank, credit card company or social networking site.
- Spam is also becoming commonplace. Spam is unsolicited commercial messages, sent via email, SMS, MMS, instant messaging or any other form of electronic communication. The *Spam Act 2003* (Cth) made it a civil offence

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Figure 10.18 Phishing scams are becoming more prevalent.

to use address-harvesting software to build distribution lists of recipients. Despite this, its use is on the rise by e-marketing companies.

As a consequence of these developments, consumer protection agencies such as the ACCC and NSW Fair Trading regularly scan the internet, radio and TV for illegal offers designed to exploit consumers. They also rely on consumers reporting deceptive marketing schemes.

As discussed above, deceptive advertising and marketing practices are addressed in both the *Competition and Consumer Act 2010* (Cth) and the *Fair Trading Act 1987* (NSW). The ACL strictly prohibits such practices. The key provisions that relate to marketing can be summarised as follows:

- Section 18 outlaws deliberate misleading or deception of consumers.
- Section 29 states that it is illegal for suppliers to make false or misleading representations when marketing/advertising their goods or services.
- Section 32 makes it illegal for suppliers or merchants to offer gifts and prizes if they do not intend to provide the advertised gift.
- Section 35 makes it illegal to use bait advertising.
- Section 49 outlaws referral selling: offering discounts or benefits to consumers in return for their introducing other customers to the supplier.
- Section 50 makes it illegal to coerce consumers via aggressive marketing practices.
- Section 44 prohibits pyramid selling: it is illegal to sell the right to 'distribute' as opposed to the actual product.
- Section 39 makes it illegal for suppliers to send unsolicited credit cards through the mail.
- Section 40 prohibits the act of sending unsolicited goods to a person and then demanding payment.

Research 10.8

Visit the Australian Consumer and Competition Commission Scamwatch website at http://cambridge.edu.au/redirect/?id=6320 and then complete the following tasks.

1. What is phishing?
2. How can you detect the 'warning signs' that a phishing scam might be in operation?
3. Outline the steps you can take to protect yourself from phishing scams.

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Figure 10.19 Scamwatch provides information about scams.

Non-legal responses

There are a number of 'consumer watchdogs' whose objective is to identify fraudulent marketing practices and scams. These groups include:

- CHOICE, which publishes a magazine for consumers and reports on a variety of issues including deceptive marketing practice.
- Scamwatch, a website operated by the ACCC (http://cambridge.edu.au/redirect/?id=6320). It provides information to consumers and small businesses regarding the recognition, avoidance and reporting of scams.
- the Australian Communications and Media Authority (ACMA), the government agency responsible for regulating telecommunications, radio communications, broadcasting and the internet. Consumers can make complaints to ACMA regarding deceptive marketing and advertising practices. For more information visit the ACMA website via http://cambridge.edu.au/redirect/?id=6321.
- the print and electronic media, which report questionable marketing activity to provide the consumer with a greater awareness of the nature and prevalence of scams.

Responsiveness of the legal system

The legal system responds very well to domestic marketing issues. Australian consumers buying products in Australia have a high level of protection. The emerging problem, however, relates to marketing that originates from foreign countries and is accessed via the internet.

Advances in electronic marketing make it easier for fraudulent marketers to communicate with their victims and to transfer money across borders. The transnational nature of scams makes it very difficult for Australian authorities to catch the perpetrators. Further, there are complicated and difficult questions of jurisdiction and foreign law.

For example, if marketers in country X use a service provider in country Y to establish a home page upon which false claims are made about the safety of their goods, where does the act of false representation take place? Millions of consumers globally can access that page and purchase online. How do Australian authorities prosecute violations in that instance? This will be an ongoing challenge for our domestic law.

Conclusion

There will continue to be consumer protection issues raised by marketing in the information society. Domestic law may prove to be powerless when it comes to online purchases from foreign marketers. Australia does not exist in a vacuum – we are part of a global marketplace that employs rapidly changing technologies. Countries cannot close their borders to keep out an incoming cyber threat. Attempts to solve these challenges at the national or regional levels are simply not sufficient. Cyber criminals are not bound to geographical locations, so laws and technological measures can no longer operate purely within national or regional boundaries.

Review 10.14

1. Explain why marketing innovation poses new challenges to the Australian legal system.
2. Briefly outline the provisions contained in the ACL that directly relate to marketing.
3. How effective is Australian law in dealing with transnational marketing? Why?

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10.8 Contemporary issue: Technology

Why this is an issue

The use of new technology in the areas of computing and global communication is constantly changing the level and complexity of interaction between consumers and sellers. Technology has infiltrated all levels of consumer transaction services, from Automated Teller Machines (ATMs) to Electronic Funds Transfer at Point of Sale (EFTPOS) and electronic home and office banking services.

The problem facing consumer law is that the various services now available over the internet operate in a less regulated environment. The web and telephony have facilitated electronic services such as:

- internet marketing
- electronic service delivery
- electronic lodgement services for submissions such as tax returns
- branchless banking from home
- teleshopping in 'virtual malls' anywhere in the world
- online reservation schemes for entertainment, travel and accommodation
- online ordering of and payment for goods
- telemarketing via telephone
- interactive voice response (IVR), used by suppliers via an answering machine, which provides automated prompts for simple transactions
- electronic service delivery (ESD) programs based on customer convenience; for example, websites, such as that of the ACCC, provide consumer protection advice and service 24 hours a day, seven days a week.

As global marketing and virtual shopping become the norm, Australian and international law will have to work hard to protect consumers regardless of whether a product is purchased domestically or internationally.

Legal responses

The use of technology in the global marketplace makes it very difficult for Australian law because it has no international jurisdiction, and legislative strategies for meeting these challenges are still developing. However, some effective legal responses can be used to achieve justice for consumers:

- The assets of a foreign online marketer can be frozen if the Australian legal system has

Figure 10.20 Online purchasing is becoming more popular.

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information about the location of the marketer's assets. However, the absence of international treaties, plus foreign bank privacy laws, may make it difficult to recover a consumer's money.

- When an online marketer's assets are within Australia and their location is known, a court can impose an order freezing them for compensation purposes.
- Arrest warrants can be issued in Australia, and if there is an extradition treaty with the foreign country, individuals in that country who breach our consumer laws can be extradited to Australia for trial.
- It is technologically possible for 'government monitors' to seek out and remove fraudulent telemarketing sites from the internet, although governments are often reluctant to do this.
- Part 20 of the *Telecommunications Act 1997* (Cth) gives the ACCC the authority to administer the Rules of Conduct (contained in that Act) governing dealings with international telecommunications operators. While this power has limitations, its inclusion in the legislation demonstrates a recognition of the scope of the adaptations that the law must continue to make.

Problems associated with the use of technology are not related just to international transactions. Consumers making domestic online purchases can also be victims of unscrupulous behaviour. Issues that arise in respect of online transactions, whether local or across international borders, include the following:

- There remains a need to ensure fair dealings between suppliers and consumers regarding terms and conditions of the sales contract. Where once consumers could speak with someone over a counter to obtain product information, people are increasingly forced to interact via telephone and the internet. Not all consumers have the requisite information technology (IT) skills or functional literacy, and this could lead to exploitation.
- Low-income people who cannot afford the technology or the connection fees become disadvantaged in both obtaining access to products and resolving complaints.
- Already we see people on hold for long periods on telephone complaint lines, only to speak with someone who has a script and little ability to deal with the particular problem. Independent dispute resolution schemes that are billed back to industry have proved useful in getting past these roadblocks.
- Computer-generated responses to consumer complaints (for example, using IVR) act as barriers to self-help strategies.
- The increasing trend towards 'remote purchasing' can compromise such things as product quality, correct installation, adequate demonstration of operation, provision of advice and 'after-sales service'.
- There is a need to ensure that the identity data gathered about consumers via their online transactions is protected and people's privacy is maintained.
- Information gathered about consumers can be used inappropriately by suppliers for 'consumer profiling' (for example, collecting consumer purchase data for the marketing of 'like products' via telephone, internet or direct mail).
- It is important to ensure that biometric data collected for consumer identification purposes (for example, fingerprints, retina scans and voice recognition) is not transmitted digitally

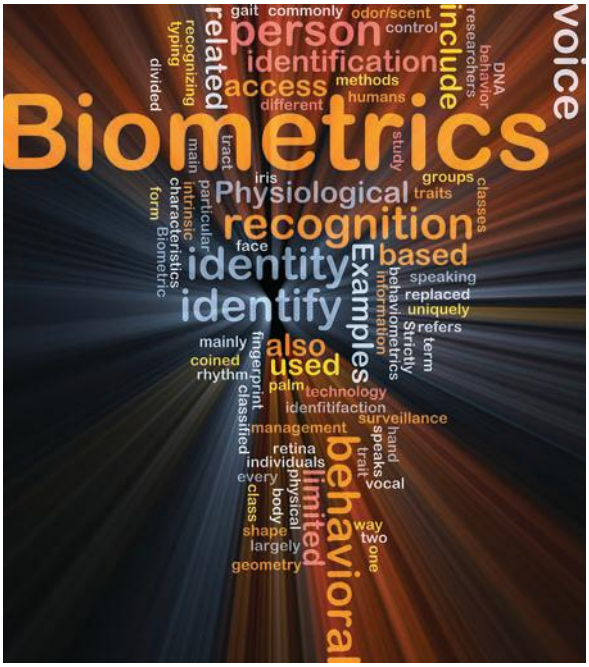

Figure 10.21 New technologies will continue to challenge law enforcers by creating new opportunities for fraud.

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to other organisations without the person's consent.

The *Competition and Consumer Act* empowers the ACCC to enforce the prohibitions contained in that Act, and, as noted above, it also has enforcement powers under Part 20 of the *Telecommunications Act 1997* (Cth). The extension of trade and commerce into the online environment poses interesting challenges for the law.

Non-legal responses

A number of organisations have a role in ensuring that technology is not misused. These include:

- the Australian Communications and Media Authority (ACMA), a statutory authority within the federal Department of Broadband, Communications and the Digital Economy. It is responsible for the regulation of broadcasting, radio and television communications, and the internet.
- the Australian Direct Marketing Association (ADMA), an industry body for direct marketing companies. It is strongly committed to self-regulation. With other industry and consumer representatives, it formulated the *eMarketing Code of Practice* (registered in 2005) to supplement the *Spam Act 2003* (Cth), which regulates commercial electronic messages and outlaws spam. This code stipulates how direct marketers can and cannot use electronic messages, including email, SMS and other online and wireless applications, with the aim of reducing the volume of spam.
- the Internet Industry Association (IIA), a similar organisation for internet service providers. It has developed several codes of practice, notably the *IIA Spam Code of Practice* (registered in 2006) to supplement the *Spam Act 2003* (Cth), explaining its requirements and how to comply with it.
- the Australian Securities and Investments Commission (ASIC), which has the mission of regulating and enforcing laws relating to fairness and honesty in financial services, markets and companies. In this context, it oversees the regulatory issues posed by developments in electronic communication. ASIC is also responsible for approving codes of practice in the financial services industries. One of these is the *Electronic Funds Transfer Code of Conduct*, which applies to banks and other financial institutions that offer electronic funds transfer services to their customers.

Responsiveness of the legal system

Generally, the Australian legal system affords consumers some protection against the misuse of technology provided that e-marketers are located within Australian borders. *The Competition and Consumer Act 2010* (Cth) and the *Telecommunications Act 1997* (Cth) allow the ACCC to police the consumer law domestically, with an arsenal of criminal and civil sanctions at its disposal. However, cross-border e-marketing raises complex jurisdictional questions, and the law's evolution in order to adapt is ongoing. Future consumer remedies may be dependent upon the existence of multilateral international treaties.

Review 10.15

1 Outline the electronic consumer services that have evolved as a consequence of the World Wide Web.
2 Evaluate the effectiveness of Australian law as it relates to the use of technology in the global marketplace.

Research 10.9

Learn about the work of Associate Professor Marios Savvides at Carnegie Mellon University at http://cambridge.edu.au/redirect/?id=6322, particularly his work on iris and face recognition. Then complete the following tasks.

1 Explain how iris and face recognition technology may affect consumers.
2 Suggest some potential legal issues for consumers if this technology is introduced into the marketplace of the future.

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Figure 10.22 Laws may have to be updated to cover the increased commercial and domestic use of drone technology.

Conclusion

The legal system will always trail behind technological innovation. It is clear that law-makers will continue to encounter significant problems as they attempt to ensure that the use of technology for sales, advertising and marketing does not weaken consumer protection in the domestic and global marketplace.

Both government enforcement and industry initiatives for self-regulation are required for effective consumer protection. The combined work of government, business and consumer groups is needed to provide consumers with the tools to protect themselves.

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Chapter summary

- The need for consumer protection grew from the operation of *caveat emptor* in the marketplace.
- Contract law attempts to define the circumstances under which parties who make promises to each other are legally bound.
- The essential elements of a contract are intention to be legally bound, offer, acceptance and consideration.
- Implied terms can provide protection to consumers from unjust contracts.
- The *Competition and Consumer Act 2010* (Cth) (formerly the *Trade Practices Act 1974* (Cth)) and the *Fair Trading Act 1987* (NSW) apply the ACL in New South Wales by prohibiting sellers from knowingly deceiving or misleading consumers.
- Occupational licensing and practising standards may come from either industry self-regulation or from state regulation.
- Consumer remedies are available through tribunals, courts, self-help, government agencies and industry organisations.
- The *National Credit Code* standardises credit transactions throughout Australia.
- Product certification guarantees that goods have passed performance and quality assurance tests.
- Advances in electronic marketing have allowed fraudulent marketers to exploit consumers via internet scams.
- The use of technology in the global marketplace makes it problematic for Australian law due to jurisdictional questions.

Questions

Multiple-choice questions

1 Merchantable quality has been achieved if goods:
- **A** are fit for purpose
- **B** fit the description of the manufacturer
- **C** fit the description in the advertisement
- **D** fit the description of the seller

2 *Caveat emptor* means let the:
- **A** seller beware
- **B** manufacturer beware
- **C** buyer beware
- **D** producer beware

3 Compliance with consumer law is guaranteed by:
- **A** statutory controls
- **B** the cost of goods and services
- **C** the goodwill of the supplier
- **D** the honesty of the supplier

4 Product certification is the process of:
- **A** ensuring that all goods sold in Australia have been certified
- **B** certifying that a product has passed performance and quality assurance tests
- **C** ensuring that all goods are labelled correctly
- **D** certifying that a product has undergone government inspection

5 Phishing scams rely on:
- **A** placing links in electronic communication to induce individuals to reveal personal information
- **B** downloading advertisements that seem to come from a trusted source
- **C** sending instant messages that seem to come from a trusted service
- **D** inserting links in instant messages

Chapter summary questions

1 Outline the essential elements of a contract.

2 List three ways a consumer can seek a remedy for injury or loss suffered as a result of defective goods.

3 List the major statutory provisions that govern marketing and advertising.

4 Briefly outline the main avenues available to consumers seeking redress.

5 Explain why both marketing innovations and technology pose challenges for consumer protection law.

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Extended-response questions

1. How effective is state and federal legislation in preventing manufacturers from making false claims about a product?
2. Discuss the types of assistance offered by the various non-government consumer organisations. In your answer, consider issues of access, awareness, resources available to the organisation, and effectiveness of the solutions offered.
3. Evaluate the effectiveness of industry self-regulation in protecting consumers, compared with government regulation.
4. Discuss the role of competition in the Australian and global economies. In your answer, consider the relationship between a competitive marketplace and consumer protection.

GO

In Section III of the HSC Legal Studies examination you will be expected to complete an extended-response question for two options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended-response questions can be found at htpp://www.cambridge.edu.au/education. Refer to these criteria when planning and writing your response.

Themes and challenges

The role of consumer law in encouraging cooperation and resolving conflict

- To ensure that consumers and suppliers operated on an equal footing, the *laissez-faire* approach to the marketplace, along with the principle of *caveat emptor*, had to be modified or superseded by a greater emphasis on state regulation.
- Contract law ensures that promises made by consumers, manufacturers and suppliers are kept.
- To constitute a legally binding contract, an agreement must have the essential elements of intention, offer, acceptance and consideration.
- Self-help remedies can be a means of achieving redress without costly litigation, and is more likely to encourage cooperative communication between the consumer and the supplier or manufacturer, rather than conflict.
- Cooling-off periods inserted into contracts allow consumers to rethink their position and withdraw without penalty.
- In an economy increasingly dominated by e-commerce, Australian direct marketers have established a code of conduct, which results in less conflict between buyers and sellers. Despite this, however, the global nature of the marketplace makes it increasingly difficult to resolve such conflict.

Compliance and non-compliance in consumer law

- A wide range of federal and state legislation operates to ensure that buyers and sellers comply with the law. Sanctions are imposed on parties who fail to do so.
- Express and implied terms of contracts guarantee that all goods sold are of merchantable quality, match their description and are fit for purpose.
- The ACL makes it an offence for a supplier or manufacturer to deliberately mislead or deceive a consumer.
- Any action by unscrupulous suppliers is punishable by law. The statutes seek to protect vulnerable consumers, especially with regard to unconscionable contracts.
- Non-statutory mechanisms such as industry self-regulation and media scrutiny will continue to have a significant role in ensuring compliance with consumer law.

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Laws relating to consumers as a reflection of changing values and ethical standards

- The fact that *caveat emptor* ('let the buyer beware') no longer governs consumer contracts of sale demonstrates a recognition of the unequal bargaining power and knowledge in the marketplace and that social outcomes of that market failure are too costly to both individuals and the economy. Also you might consider that societal values and ethical standards have changed.
- Consumer law reflects community awareness that modern markets are extremely complex and consumers need to be protected by a raft of legal regulations.
- NSW Fair Trading, ASIC (Commonwealth) and the ACCC (Commonwealth) are consumer watchdogs whose activities implicitly promote ethical standards in all consumer dealings.
- The Australian legal system endeavours to balance the rights and values of individuals against those of the community at large.
- Ethical standards are reflected in occupational licensing schemes, which ensure that unqualified and unscrupulous individuals cannot legally provide services to consumers.

The role of law reform in recognising the rights of consumers

- Consumer laws are constantly undergoing reform so that consumers are provided with uniform protection.
- The *Consumer and Competition Act 2010* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth) standardise the regulation of consumer credit across the entire nation. The *National Credit Code* guarantees that consumers have the same rights to redress no matter where they live in Australia.
- The ACCC monitors e-marketing and provides consumer protection advice and service delivery 24 hours a day, seven days a week. Further, it advises the government in areas of consumer law such as telemarketing.
- The *Spam Act 2003* (Cth) outlaws the sending of unsolicited commercial electronic messages by email, instant messaging, SMS and MMS.

The effectiveness of legal and non-legal responses in achieving justice for consumers

- Three federal acts governing consumer protection are the *Competition and Consumer Act 2010* (Cth) (formerly known as the *Trade Practices Act 1974* (Cth)), the *Australian Securities and Investments Commission Act 2001* (Cth) and the *National Consumer Credit Protection Act 2009* (Cth). At state level, there is the *Fair Trading Act 1987* (NSW), *Contracts Review Act 1980* and the *Sale of Goods Act 1923* (NSW).
- Occupational licensing protects consumers by ensuring that only licensed individuals can provide services. It is a state and territory responsibility. Self-regulating professional bodies such as the Australian Medical Association and the Law Society of NSW perform much the same role.
- The rise of the global marketplace and e-commerce will continue to be problematic as the state seeks to remedy consumer injustice. As more Australians purchase goods and services online from foreign suppliers, the jurisdictions of the above statutes will be keenly tested, especially with respect to fraud and the provision of after-sales service, guarantees and warranties.
- Effective consumer protection requires not only legislation against fraud and deception, but also initiatives resulting from the combined work of government, business and consumer groups.

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Chapter 11
Option 2: Global environmental protection

25% of course time

Principal focus

Students will be investigating environmental issues while exploring the way in which both legal and non-legal processes attempt to effectively promote and achieve environmental protection.

Themes and challenges

Themes and challenges to be incorporated throughout this option include:

- how state sovereignty influences international cooperation and the conflict resolution which then affects environmental protection
- dealing with compliance and non-compliance
- how changes in ethical standards and values standards have impacts on protecting the environment
- protecting the global environment through law reform
- how effective legal and non-legal responses are in the protection of the environment.

At the end of this chapter, you will find a summary of the themes and challenges relating to global environmental protection. The summary draws on key points from the text and links them to each of the themes and challenges. This summary is designed to help you revise for the external examination.

Chapter objectives

In this chapter, students will:

- identify the key legal concepts and terminology that relate to global environmental protection, especially the need to protect the global environment
- describe the key features of the relationship between domestic and international law and understand the effect of international law on sovereign states
- discuss the effectiveness of the legal system in addressing global environmental issues
- explain the role of the law in encouraging cooperation and resolving conflict, as well as its ability to respond to the dynamic nature of global issues
- describe the interrelationship between the legal system and society in relation to global environmental issues and the subsequent responses to global environmental protection
- impart legal information using arguments that are logical and well structured
- assess the effectiveness of legal and non-legal responses with respect to the global environment
- analyse different perspectives on contemporary issues concerning global environmental protection.

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Key terms/vocabulary

ad hoc
biodiversity
built environment
convention
declaration
ecological footprint
ecologically sustainable development (ESD)
enumerated power
envirostunt
ex aequo et bono
external costs (externalities)
free trade
globalisation
hard law
holistic
instrument
intergenerational equity
intragenerational equity
locus standi
multilateral treaty
natural environment
non-government organisation (NGO)
observer status
pollution
precautionary principle
profit
protocol
ratify (ratification)
reactionary
residual power
soft law
state
state sovereignty

Relevant law

IMPORTANT LEGISLATION

Environmental Planning and Assessment Act 1979 (NSW)
Protection of the Environment Operations Act 1997 (NSW)
Environment Protection and Biodiversity Conservation Act 1999 (Cth)

INTERNATIONAL TREATIES AND PROTOCOLS

UN Convention Relating to the Status of Refugees (1951)
Convention on Wetlands of International Importance (1971) (Ramsar Convention)
UN Convention on International Trade in Endangered Species of Wild Fauna and Flora (1975) (CITES)
UN Convention on the Law of the Sea (1982) (UNCLOS)
Convention on the Conservation of Migratory Species of Wild Animals (1983) (CMS)
Vienna Convention for the Protection of the Ozone Layer (1985) and Montreal Protocol
UN Convention on Biological Diversity (1993) and Cartagena Protocol on Biosafety
UN Framework Convention on Climate Change (1994) and Kyoto Protocol

SIGNIFICANT CASES

Bury v Pope, Cro. Eliz. 118 [78 Eng. Rep. 375] (1587)
Bradford Corporation v Pickles [1895] AC 587
Trail Smelter Case (United States v Canada) 3 RIAA 1905 (1941)
Bradley v The Commonwealth (1973) 128 CLR 557
Nuclear Tests (Australia v France) [1974] ICJ 4 (20 December 1974)
Nuclear Tests (New Zealand v France) [1974] ICJ 3 (20 December 1974)
Murphyores v The Commonwealth (1976) 136 CLR 1
Australian Conservation Foundation v The Commonwealth (1980) 28 ALR 257
Commonwealth v Tasmania (1983) 158 CLR 1
Tasmania v The Commonwealth (1983) 158 CLR 1
Certain Phosphate Lands in Nauru (Nauru v Australia) [1992] ICJ 2 (26 June 1992)
Case Concerning the Gabčíkovo-Nagymoros Project (Hungary/Slovakia) [1997] ICJ 1 (25 September 1997)
EPA v Gardner LEC [1997] NSWLEC 169
Southern Bluefin Tuna Cases (New Zealand v Japan; Australia v Japan), Provisional Measures ITLOS Nos. 3 and 4 (1999)
Booth v Bosworth & Anor [2001] FCA 1453
Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for the Environment and Heritage and Ors [2006] FCA 736
Aerial herbicide spraying case (*Ecuador v Colombia*) [2008] ICJ

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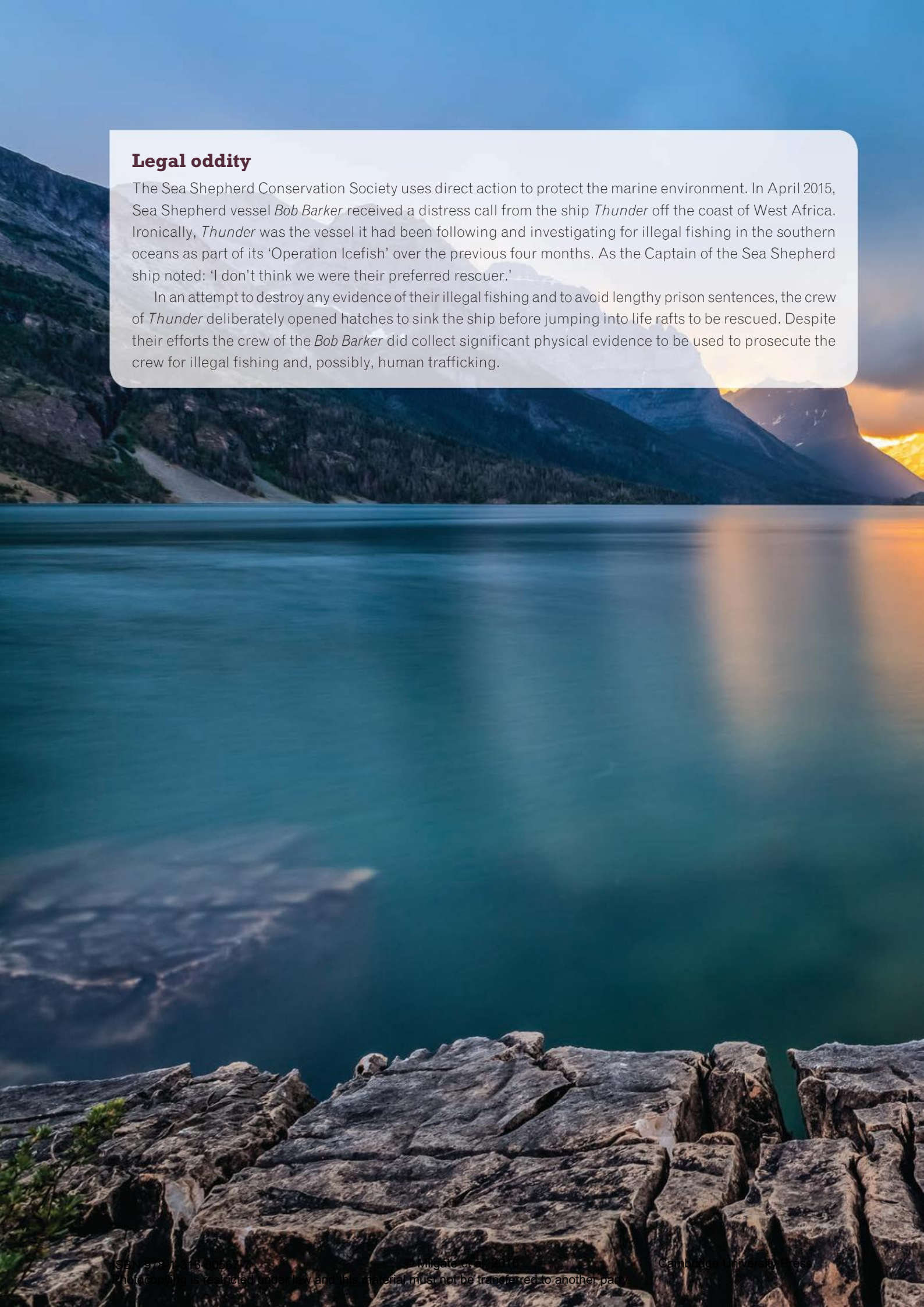

Legal oddity

The Sea Shepherd Conservation Society uses direct action to protect the marine environment. In April 2015, Sea Shepherd vessel *Bob Barker* received a distress call from the ship *Thunder* off the coast of West Africa. Ironically, *Thunder* was the vessel it had been following and investigating for illegal fishing in the southern oceans as part of its 'Operation Icefish' over the previous four months. As the Captain of the Sea Shepherd ship noted: 'I don't think we were their preferred rescuer.'

In an attempt to destroy any evidence of their illegal fishing and to avoid lengthy prison sentences, the crew of *Thunder* deliberately opened hatches to sink the ship before jumping into life rafts to be rescued. Despite their efforts the crew of the *Bob Barker* did collect significant physical evidence to be used to prosecute the crew for illegal fishing and, possibly, human trafficking.

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11.1 The nature of global environmental protection

The concept and scope of environmental protection

James Watt's improved steam engine in 1769 signalled the beginning of the Industrial Revolution, and while industry and economies have flourished the environment has paid a price. For generations, farmers, industrialists and developers were able to use the land, the waterways and the living organisms and non-living materials in any way they saw fit. Decisions as to the use of these resources were driven by **profit**, with little or no regard for the environmental consequences. Neither businesses nor governments gave much thought to the **external costs (externalities)** of economic activity.

profit
financial gain; money remaining after expenditure has been subtracted from total income

external costs (externalities)
the effects of an activity (such as the production, transport and sale of goods) on people who are not directly involved in the activity, and that are not paid for by those who are involved (such as the producer)

Early legal decisions reinforced the capacity of individual landowners to do with the land whatever was in their best interests. In *Bradford Corporation v Pickles* [1895] AC 587, Edward Pickles owned the land through which the Bradford town's water supply ran. He wanted to sell his land to the council at an inflated price. To 'encourage' this sale Pickles diverted the water flowing through his land away from the town by sinking shafts into the water supply and draining the water away. The House of Lords ruled under the 'nuisance' common law that, since nobody has a right to uninterrupted supplies of water percolating through from adjoining property, Pickles was not committing a legal wrong.

In *Bury v Pope, Cro. Eliz. 118* (1587) 78 Eng. Rep. 375 it was stated: 'And lastly, the earth hath in law a great extent upwards, not only of water ..., but of aire, and all other things even up to heaven, for *cujus est solum ejus est usque ad coelum*.' The Latin roughly translates as: 'Whoever owns the land, it is theirs all the way up to Heaven and down to Hell.'

A person's entitlement to use their land under the common law meant that the effects of the use to which the land was put only became an issue after damage had occurred. A party who suffered harm as a result could bring a tort action (for example, nuisance, negligence or trespassing) to seek compensation. In other words, the law was used not to prevent environmental damage but to act after the damage was done, and applied only to an individual's welfare and interests. In simple terms, environmental impacts were of no significance and were certainly not comprehended in terms of local and global consequences.

Over time, however, communities began to feel the consequences of things like acid rain, species extinction, depletion of natural resources, climate change, pollution, toxic waste and soil salinity, and the legal system was forced to respond. When English citizens began to fall ill as a result of hydrochloric acid in gas form from local factories, the government introduced the 1863 *Alkali Act.* The Act set dilution standards for what was emitted and appointed inspectors to enforce the law. This was one of the first of a vast array of environmental laws which have spread across the globe.

Initially, environmental laws were local or regional and targeted specific issues. It was only in the latter half of the 20th century that nations recognised the need for a coordinated approach. As businesses began to operate on an international scale, environmental problems also became globalised. These new issues – acid rain, the hole in the ozone layer, the depletion of fish stocks, transboundary pollution and climate change, for example – could not be adequately dealt with at a national level. Poverty, population growth and the accelerated pace of industrial development in developing countries have all contributed to the environmental challenges the world now faces.

Interests with respect to environmental protection

Definitions of 'environment'

How the law defines and perceives the environment will shape the attitude of legislative and judicial decision-makers towards environmental protection at all levels. In a legal sense, the environment can be considered in terms of the **natural environment** and/or the **built environment**. In some ways, these

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two elements of environmental law represent competing interests.

natural environment
all the elements that surround and influence life on Earth, including atmospheric conditions, soil, plants, animals, micro-organisms, the water cycle and the systems in which these elements interact

built environment
all of the buildings, transport routes and infrastructure, parks and other surroundings that have been made by people and constitute the setting for human activities

Current legal interpretations of what constitutes the environment reflect a gradual change in social attitudes. This is evident in both Australian and international law. No longer does the law focus on the rights of landowners, as was the case under common law. Laws are now designed to take a more **holistic** view of components, causes and effects. The definition of 'environment' in s 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) clearly illustrates this evolution. In addition, this definition encompasses what decision-makers need to take into account when deciding on matters that have environmental implications.

holistic
taking into account all aspects; looking at the whole system rather than just specific components

The definition of the environment in the Act considers:

(a) ecosystems and their constituent parts, including people and communities; and
(b) natural and physical resources; and
(c) the qualities and characteristics of locations, places and areas; and
(d) the heritage values of places; and
(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

Standing and interests

Since the decision in *Australian Conservation Foundation v The Commonwealth*, discussed in the 'In Court' box, a more liberal approach to standing has been taken by the legal system.

At state level, the *Environmental Planning and Assessment Act 1979* (NSW) grants 'open standing' to anyone. Section 123 states:

> Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach.

In Court

***Australian Conservation Foundation v The Commonwealth* (1980) 28 ALR 257**

The Australian Conservation Foundation (ACF) is an organisation which aims to protect the environment. In this case, the ACF challenged the statutory validity of federal ministers' decisions to approve a development proposal for a tourist area and resort near Rockhampton, Queensland. It sought declarations that the decisions did not comply with the requirements of the relevant Act, which was at that time the *Environment Protection (Impact of Proposals) Act 1974* (Cth).

The ACF was denied ***locus standi*** because it was held to lack a 'special interest' in the subject matter. Individual or special interest in the subject matter was the test of standing to seek a declaration or injunction. The party would have to be affected to a greater degree or in a significantly different way than the public at large. In other words, a party must be 'likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds, or to suffer some disadvantage, other than a sense of grievance or a debt for costs, if his action fails'. Instead, the ACF was held to have 'a mere intellectual or emotional concern' about the environment.

locus standi
a Latin term meaning 'a place for standing', also 'standing'; a requirement that a person or group have a sufficient interest in the subject matter in order to be permitted to bring an action

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In Court

***Booth v Bosworth & Anor* [2001] FCA 1453**

To protect their lychee farm, the Bosworths constructed an electric grid to electrocute flying foxes. Conservationist Carol Booth visited the farm in 2000 and found evidence of extensive killing of spectacled flying foxes. Under the common law she would have had no 'standing' to initiate legal action, but even though this species was not threatened it was endemic to the Wet Tropics World Heritage Area and thus came under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Booth was able to take action as she had been involved in 'conservation activities for the past two or more years' (see below).

The Federal Court found that in 2000 around 18 000 flying foxes were killed by the grid and if it was allowed to continue to operate the spectacled flying foxes may have been endangered within five years. The court ruled that the Bosworths had to stop using the grid as the loss of the species could have a significant impact on a World Heritage Area.

Figure 11.1 Thousands of spectacled flying foxes were killed by an electric grid.

Sections 252 and 253 of the *Protection of the Environment Operations Act 1997* (NSW) similarly grant open standing where the breach in question involves harm to the environment. Although there are still restrictions on standing at federal level, the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) extends standing to people who have been involved in conservation activities for the past two years or more, and to organisations established with the purpose of protecting the environment which have been similarly involved for the past two years or more (s 475(6) and (7); s 528).

While environmental issues affect everyone, the role of state, federal and international law in protecting those interests is not clear-cut. The different perspectives of people, shaped by their individual values and ethics, ensure that conflict and heated debates inevitably arise when discussions turn to prioritising environmental issues. Citizens from Pacific nations under threat from rising sea levels, those people suffering from more extreme weather patterns, loggers losing their family livelihoods due to forest conservation, individuals involved in the fierce debates about the merits of coal seam gas mining, people paying increasing energy costs and indigenous communities losing their traditional ways of life because of expanding urbanisation will all have different views on how

PACIFIC ISLANDS FORUM SECRETARIAT

Figure 11.2 Made up of 16 self-governing states, including Australia, Fiji, New Zealand and Papua New Guinea, the Pacific Islands Forum has continuously reaffirmed that climate change remains the single greatest threat to the livelihoods, security and wellbeing of the peoples of the Pacific.

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environmental issues should be managed and prioritised.

Global environmental protection requires an interdisciplinary approach involving science, international politics and diplomacy, social justice, economic reforms and changes in national and international priorities. Ensuring that the planet's capacity to support its inhabitants can be maintained indefinitely will require a global, coordinated and holistic approach.

Review 11.1

1. With reference to *Bradford Corporation v Pickles and Bury v Pope*, explain why environmental protection was not initially a major concern for the law.
2. Define the term 'environment' and distinguish between the two ways it can be understood.
3. Explain why global environmental protection requires a holistic approach.
4. Outline the significance of the change in *locus standi* (standing) for people wishing to take legal action over environmental matters. Distinguish the decisions in *ACF v The Commonwealth* and *Booth v Bosworthy*.
5. Divide the class into pairs or groups and research *one* of the cases at http://cambridge.edu.au/redirect/?id=6324. When presenting your information to the rest of the class describe the perspective of the 'competing parties' over the issue and the court's final decision.

11.2 The development of global environmental law

Local activism and domestic legislation

Localised issues generally form the basis for community reaction and pressure. The phrase 'Think globally, act locally' has been used frequently in the context of environmental activism; it suggests the power of grassroots initiatives undertaken with a view to the health of the whole planet. This is evident in recycling programs, the increased use of solar power and land care initiatives.

Any event that has an impact on a person's day-to-day life can prompt them to learn more about the consequences of environmental degradation, and to take action. As a result of growing awareness of environmental issues, individuals have joined forces to form lobby or pressure groups to educate others and to push governments into taking action. Concern about **pollution** placed environmental issues firmly in the public arena.

pollution
environmental damage caused by the discharge or emission of solid, liquid or gaseous materials into the environment

In response to the public concerns, domestic legislation emerged in the 1970s, including in Australia, to focus on pollution prevention and control. Much of Australian state and federal legislation relating to the environment falls into two general categories:

- Environmental impact assessment – a process for looking at and evaluating the environmental effects of proposed activities that are likely to affect the environment in significant ways. Most of the procedural requirements for environmental impact assessment at both state and federal level are contained in legislation regulating the use of land (planning laws), such as the *Environmental Planning and Assessment Act 1979* (NSW), or in legislation regulating

Figure 11.3 Concern about pollution placed environmental issues firmly in the public arena.

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Legal Links

A list of Commonwealth Acts pertaining to the natural and built environments is available at http://cambridge.edu.au/redirect/?id=6235.

protection of the environment generally, such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

- Pollution control – legislation setting standards for the quality of air, water and soil, identifying activities that can potentially cause pollution, and restricting these activities (for example, by imposing conditions and/or requiring a permit or approval before they can be carried out).

Significant social changes during the 1960s and 1970s also contributed to a rise in alternative views about the traditional profit-driven economy. 'Green' politics emerged in the 1970s and suddenly conservation, ecosystems, environmentalism and social justice became major issues that governments were forced to address. It was not long before this became a global phenomenon.

International conferences and treaties

These social changes, plus high-profile pollution and ecosystem disasters (see later in this chapter), created a push for change which led to the emergence of a number of international conferences and **multilateral treaties**. For example, the *UN Convention on the Law of the Sea* was the result of the third UN Conference on the Law of the Sea (UNCLOS), which took place from 1973 to 1982. It was a unique treaty in that it dealt comprehensively with a wide range of issues regarding the sea, unlike previous **conventions**, and was global in its reach. Part IV of UNCLOS deals specifically with environmental protection, which had not previously been a central element of international law with respect to the seas.

The UN Conference on the Human Environment, which was held in 1972 in Stockholm, Sweden, was the first major conference to address broadly defined environmental issues. It was motivated primarily by concern about regional pollution that crossed national boundaries, particularly acid rain in northern Europe. Every 10 years since there has been an attempt to hold a conference with a global environmental focus:

- 1982 – Nairobi
- 1992 – the 'Rio' Earth Summit
- 2002 – the Johannesburg Summit
- 2012 – the Rio+20 Earth Summit.

Later in this chapter we will look at these conferences in greater detail.

In some countries, a treaty that the nation has signed and **ratified** automatically becomes part of the domestic law of that country, and its citizens are bound by it. In many other countries, including Australia, a treaty does not have a direct effect unless

multilateral treaty
an international agreement involving three or more parties

ratify (ratification)
the process of a state formally approving a treaty, making it legally binding

convention
another term for a treaty: an international agreement between parties who are subject to international law (states and international organisations such as the UN and its bodies)

Research 11.1

Construct a table that illustrates the 'Think globally, act locally' concept. In the left-hand column describe 'local' initiatives that aim to protect the environment and in the right-hand column describe the corresponding 'global' initiatives relating to that issue. Some relevant issues include:

- fishing regulations
- littering (plastic)
- coal seam gas mining.

Class discussion

Are these issues dealt with differently at local compared to global levels?
(*Note*: These differences will become clearer later when we look at the role of 'sovereignty'.)

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and until it is incorporated into domestic law by the enactment of a statute. There are many domestic statutes that implement and reflect Australia's international treaty obligations. Nations where international law takes effect immediately upon ratification are called 'monist' nations (for example, France). 'Dualist' nations (like Australia) require treaties to be enacted into domestic legislation to take effect.

11.3 The need for global environmental protection

Environmental impact of consumption and development

Human activities have global dimensions. Developing countries whose economies depend on the export of primary natural resources (such as metal ores) or agricultural products (for food, housing and other uses) have been less likely to regulate the methods and extent of production. For example, one million hectares of forest are cleared per year in Indonesia – the highest rate of deforestation on the planet – for illegal logging and to convert the land for use as palm oil plantations. Palm oil is found in 40% of the products on supermarket shelves in Australia and other industrialised countries. The effects of deforestation include the removal of a major means by which carbon dioxide build-up in the atmosphere is minimised, as well as the addition of even more greenhouse gases when the trees are burned.

Globalisation not only gives markets worldwide operation, providing consumers with the goods they desire from other countries, but it also multiplies the problems associated with the production of those goods. For example, over one billion smartphones were sold in 2013. On average people upgrade their phones every two years, so this means that 3.5 million phones were purchased in Australia in 2014. It is estimated that Australians have 10 million 'old' phones lying around their homes. The key problem occurs when they are thrown out, as they contain concentrations of toxic heavy metals, including cadmium, lead, nickel, mercury, manganese, lithium, zinc, arsenic, antimony, beryllium and copper. The accumulation of such toxins in landfill could have major ramifications on the environment.

globalisation
the ongoing integration of regional economies, societies and cultures brought about by the removal of restrictions on international trade, and advances in travel and mass communication

The UN Environment Programme estimates that 50 million tonnes of electronic waste containing lead, cadmium, mercury and other hazardous substances are discarded each year, and that much of this waste is being dumped in Asia and Africa. Ghana, Nigeria and India have electronic waste processing areas that have significant environmental concerns.

The reasons for the links between development and environmental degradation are complex. Globalisation and **free trade** have been accompanied, in many countries, by policies encouraging economic growth. Without regulation, production of goods is usually highly energy intensive, uses enormous amounts of natural resources, and produces vast quantities of waste. Many of these resources are non-renewable or are used in an unsustainable manner.

free trade
trade between countries that is subject to few or no government restrictions

A globalised economy also has indirect effects. For example, countries with less stringent regulation of environmental and safety standards enjoy a competitive advantage over countries with more regulation. These countries can produce the same item at a lower cost, giving companies an incentive to relocate their factories to those countries.

Businesses' reluctance to accept measures designed to mitigate the negative effects of industry on the environment, and in turn governments' reluctance to introduce those measures, can therefore be traced to economic growth pressures. A constant issue in democratic societies is the need for political leaders to respond to voter demands – as elections approach the political will of leaders to tackle environmental concerns can often be compromised. Politicians face a dilemma when they wish to implement environmental protection measures that can be seen to increase unemployment, close some industries or lead to the relocation of industries to nations without strong environmental controls.

This relocation of industry to avoid environmental regulation is sometimes called the 'pollution haven

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Case Studies

1952 London smog disaster, London, England

In the winter of 1952–53, it was unusually cold in London so large numbers of people travelled by car rather than walking, and required additional coal combustion for heating of homes. The copious emissions of black soot, gaseous sulphur dioxide and sticky particles of tar led to the heaviest winter smog ever recorded. Approximately 12 000 people were killed: mostly children, the elderly and sufferers of chronic respiratory or cardiac disease.

1984 Bhopal disaster, Bhopal, India

A gas leak caused the Union Carbide Company's pesticide plant to discharge methyl isocyanate, exposing half a million people to the poisonous gas. Estimates of the death toll vary, but 2000–3800 people died immediately, with another 15 000–20 000 premature deaths occurring in the subsequent 20 years. Over 30 years later, the site was still contaminated, and the city has an unusually high incidence of birth defects and diseases, including cancers and diabetes.

1986 Chernobyl disaster, Chernobyl, Ukraine

A nuclear reactor exploded at the Chernobyl Nuclear Power Plant, killing 31 people immediately. Over 5000 square kilometres were evacuated and a radioactive cloud was detected all across Europe. Despite high rates of cancers, mutations and blood diseases in the years following the accident, the total death toll and sickness rates are disputed, because there have been no comprehensive, coordinated studies. Hundreds of thousands of people were evacuated, and records were lost after the break-up of the Soviet Union.

1989 *Exxon Valdez* oil spill, Alaska, USA

The *Exxon Valdez* oil tanker hit a reef in Prince William Sound, spilling approximately 40 million litres of crude oil. This killed as many as 500 000 seabirds, and devastated fish and otter populations in the area.

2000 Baia Mare cyanide spill, Romania

Cyanide solution, used to extract gold from waste, is carried by pipes from the mine at Baia Mare to two storage reservoirs. One of these burst a wall, releasing 130 million litres of water contaminated with cyanide and heavy metals into the Somes River and subsequently into the Tisza River. Fish populations were drastically affected, with all aquatic life killed on one stretch of the Tisza.

2010 The *Deepwater Horizon* rig explosion and fire, which started on 20 April 2010

The rig was drilling for oil 60 km off the Louisiana coast when it exploded and killed 11 workers. The rig was finally sealed after 85 days, but by then had caused a major offshore oil spill into the Gulf of Mexico contaminating over 1500 kilometres of shoreline. In July 2015, BP agreed to pay over A$24 billion to settle all legal claims against the company, on top of over A$40 billion it had already paid in clean-up costs.

Figure 11.4 The *Deepwater Horizon* oil rig explosion in 2010

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Case Studies

2011 Fukushima nuclear disaster

The Fukushima nuclear power plant had three of its six reactors suffer a meltdown after a tsunami hit the plant following a magnitude 9.0 earthquake in the area. Three hundred thousand people were evacuated and it is estimated that it will take decades to clean up the radioactive waste.

hypothesis'. It is apparent in the United States where stricter laws concerning lead pollution resulted in companies sending their spent batteries to Mexico so they did not have to pay for more expensive (but safer) recycling processes. It was estimated that in 2007 6% of America's used vehicle and industrial batteries crossed the border into Mexico; by 2015 it was up to 20%.

Like today's markets and economies, detrimental environmental effects are also global. Pollution, global warming and ecological catastrophes causing massive damage to an ecosystem or the broader environment are not confined by national boundaries. Hence, there is a need for international environmental law.

Challenges for international law include the rapidity of technological change, as well as the difficulty of integrating and reconciling environmental protection with measures that could hinder economic growth. The 2008 Global Financial Crisis and the 'Eurozone Economic Crisis' in 2013–15 have exacerbated this challenge. Nations facing severe austerity measures simply cannot afford to implement environmental controls that could mean further hardships for their community.

Both international and domestic laws need to be dynamic, and to some extent holistic, in order to take account of political and economic changes, and new issues in human rights. For example, the Intergovernmental Panel on Climate Change (IPCC) has estimated that by 2050 there could be 150 million environmental refugees – people forced to relocate because of environmental disasters – yet there is no recognition for such people under the *UN Convention Relating to the Status of Refugees* of 1951, as they are not 'fleeing persecution'.

ecological footprint
a measure of human demand on Earth's ecosystems, comparing human demand with the planet's ecological capacity to regenerate; a person's impact on the planet as a result of their lifestyle

Review 11.2

1. Explain why there is a need for global environmental protection.
2. Use examples to illustrate the conflict between economic growth and environmental protection.
3. List the benefits and drawbacks of industrial development and economic growth. Discuss.
4. Explain how globalisation contributes to environmental degradation. Give examples.
5. Explain why the 'pollution haven hypothesis' typifies the problem of balancing environmental and economic interests.

Research 11.2

1. Research the term '**ecological footprint**'. Calculate your own footprint and work out how many planets are needed if everyone on Earth lived a lifestyle like yours. Go to http://cambridge.edu.au/redirect/?id=6326.
2. The 'Story of Stuff' is an online resource that clearly describes how the planet's resources are being used in an unsustainable manner. Over the last couple of years this project targeted bottled water. Watch the clip at http://cambridge.edu.au/redirect/?id=6327. Do you buy bottled water? If so, why?

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Legal Links

For an insight into the specifics of many global environmental problems, visit http://cambridge.edu.au/redirect/?id=6328.

Interdependence and cooperation

Nations must cooperate if there is to be a comprehensive response to the need for global environmental protection. As we know, pollution does not stop at geographical or political boundaries (for example, the Great Pacific Garbage Dump and global warming), resources are dwindling (for example, oil), more species are becoming endangered (according to the International Union for the Conservation of Nature, Australia has 86 animals that are critically endangered) and ecosystems are being destroyed at alarming rates.

While the international community has only taken this on over the last 40 years, it was noted in 1854 by Chief Seattle in his famous speech:

Figure 11.5 The orange bellied parrot is one of the world's few migratory parrots (travelling from Tasmania in winter to Victoria and South Australia). It is considered the seventh most critically endangered animal in Australia according to the Australian Geographic Society.

> Will you teach your children what we have taught our children? That the Earth is our mother? What befalls the Earth befalls all the sons of the Earth. This we know – the Earth does not belong to man, man belongs to the Earth ... Man did not weave the web of life, he is merely a strand in it. Whatever he does to the web, he does to himself.

There are numerous case studies that illustrate the need for cooperative approaches. The actions of one sovereign nation can severely affect other nations – for global environmental protection there is a need for 'mutual dependence'. The situation concerning the overexploitation of the world's fishing stocks typifies this. The oceans are part of the 'global commons'; like the atmosphere and outer space they are considered the part of the Earth's shared natural resources. By the early 1990s, 13 of the world's 17 global fisheries were in serious decline. A decision by a group of countries to limit fishing in a certain fish breeding ground would have a negligible effect if even one country continued to exploit that area. According to the *Marine Nation 2025: Marine Sciences to Support Australia's Blue Economy* report, the oceans contributed $44 billion to Australia's GDP in 2013. When you consider this vast amount for just one country, you can imagine the economic pressure to continue to exploit the oceans across the globe – the best intentions for global cooperation often evaporate in the face of such opportunity for profit.

At the 2002 Earth Summit in Johannesburg, 189 countries made a commitment to create a group of protected marine areas by 2012, which would allow breeding by cod, herring and tuna, and other species. They also agreed to restrict fishing until populations had recovered, setting a deadline of 2015. Once again the lack of will to enforce and comply with these commitments has seen fisheries continue to be degraded; this has been exacerbated by the expansion of the world's long-distance fishing fleets.

Another means of halting the commercial trade in certain fish is to have them listed as endangered under the *UN Convention on International Trade in Endangered Species of Wild Fauna and Flora* (1975) (CITES). It may be the case that measures such as 'plans of implementation' need to be supplemented by additional agreements, and by binding,

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Figure 11.6 The *Albatun Tres* is the world's largest tuna fishing vessel – according to Greenpeace its 3000-tonnes catch from one trip is double that of some South Pacific countries' annual catches.

enforceable prohibitions. Whether it be overfishing, genetically modified crops, logging of rainforests, harmful mining practices or waste disposal, all the global goodwill to cooperate can vanish when the 'economic imperative' comes into play.

11.4 The importance of ecologically sustainable development

Origins

In 1983, the UN asked a commission to study the consequences of environmental degradation on economic and social development. Chaired by the then Prime Minister of Norway, Gro Harlem Brundtland, the World Commission on Environment and Development (WCED) produced an influential report in 1987 titled *Our Common Future*, also known as the Brundtland Report. The commission was concerned with economic and social equity – how resources could be afforded to poorer nations and those nations' economic growth encouraged – while tackling the problems of environmental degradation and resource depletion that accompany development. It concluded that both of these urgent goals can be met, but to achieve **ecologically sustainable development (ESD)**, both individuals' lifestyles and governments' policies regarding humans' environmental impact would have to change.

ecologically sustainable development (ESD) development which aims to meet the needs of today's society, while maintaining and conserving ecological processes for the benefit of future generations

The Brundtland Report defines sustainable development as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'. It aims to meet the needs of society today, including the alleviation of poverty, while managing natural resources, energy and waste in ways that can continue into the future without destroying the environment or endangering human health.

The 1992 Rio Conference generated five separate agreements which elaborate on the principles of ESD and commit the parties to taking steps to achieve it. These are:

- the *Rio Declaration* – 27 principles to guide states in environmental behaviour
- Agenda 21 – a 'blueprint' setting out actions that can be taken at local, national and international level to achieve ESD
- the *UN Framework Convention on Climate Change*
- the *UN Convention on Biological Diversity*
- the Principles of Forest Management.

Central principles of ESD

Four central principles of ESD are found in the agreements produced by the Rio Conference. Although they are not listed as 'four central principles' in a single document, they have been embraced by many groups seeking to promote the goals of ESD. Bodies that have elaborated and built on them include the Australian Government (Department of the Environment), state governments; local councils, and organisations such as state and territory Environmental Defender's Offices. Each of these components of ESD is set out below.

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Biodiversity

Biological diversity, or **biodiversity**, is the variety of life forms within an ecosystem, a biome or the planet. (An ecosystem is the set of relationships among the plants, animals, micro-organisms and habitats in a small area, and a biome is a regional, much larger group of ecosystems in a wide geographic area.) There are different types of biodiversity as well: diversity among species, diversity of habitats on Earth (for example, deserts, forests, wetlands and rivers) and genetic differences within each species (for example, different breeds of cattle or wheat).

biodiversity
the variety of life forms on Earth; the complete range of types that are possible within an ecosystem, biome or species

Biodiversity is important for many reasons. Diverse ecosystems are more productive, which is a significant issue for agriculture. They can better withstand and recover from disasters. Diverse ecosystems, species and habitats are more sustainable over the long term, and species' interdependence within an ecosystem contributes to the health of both the ecosystem itself and the life forms within it. A variety of genes in a population is important to health (for example, in decreasing the incidence of harmful mutations).

The *UN Convention on Biological Diversity* ('Biodiversity Convention') sets out three main goals – the conservation of biological diversity, the sustainable use of resources, and the fair and equitable sharing of the benefits from the use of genetic resources – and commits the parties to the convention to maintaining biological diversity.

Intergenerational equity

Intergenerational equity, or equity between generations, is the idea that ecosystems and the environment in general should not be passed on in any worse condition from one generation to the next. Principle 3 of the *Rio Declaration* refers to development that meets the needs of both present and future generations, reflecting the idea that the decision-makers at a particular time – as well as the individual consumers and citizens at that time – have a responsibility to those who will be living in the future.

intergenerational equity
fair and just behaviour of one generation towards subsequent generations; in terms of environmental issues, a concept that centres on preserving Earth's resources for future generations

Intragenerational equity

Intragenerational equity, in contrast to intergenerational, refers to fair and just treatment of groups of people within a generation. It is accomplished through policies that endeavour to raise the standard of living of disadvantaged peoples and nations, and to ensure that the management and use of the environment does not exploit them. Principle 5 of the *Rio Declaration* enjoins states and individuals to cooperate in eradicating poverty as a necessary condition of sustainable development, and Principle 8 articulates their duty to reduce and eliminate wasteful patterns of production and consumption.

intragenerational equity
fair and just treatment of people and groups within a generation; in terms of environmental issues, a concept that focuses on fair management and use of Earth's resources among different groups of the same generation

Principle 6 states that international actions involving development and the environment should address the interests and needs of all countries, and refers to the special situations and needs of developing countries. Principle 22 deals specifically with indigenous peoples and communities, whose cultural knowledge and traditional practices give them an important role in sustainable environmental management. States are to recognise and support their participation in ESD, and their unique contributions.

The precautionary principle

Principle 15 of the *Rio Declaration* states that 'where there are threats of serious or irreversible damage [to the environment], lack of full scientific certainty shall not be used as a reason for postponing ... measures to prevent environmental degradation'. In other words, when an activity raises the risk of serious harm, but there is uncertainty about how likely the risk and how serious the harm, a cautious approach is the best way to avoid that harm. This entails taking steps to halt or modify the activity, even though the

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Figure 11.7 Wind farms are a step towards protecting our environment.

decision-maker does not know, and may never know, whether it was necessary to stop or change the activity. The **precautionary principle** arose as a response to effects on the environment and human health caused by rapid industrial growth after World War II, and the lack of strong environmental legislation.

precautionary principle
the principle that if an action or policy may cause serious harm to people or to the environment, the best course is to halt or modify that activity or policy, even when there is no proof of the probability of the risk or the seriousness of the harm

An interesting view on the precautionary principle is that it applies to 'omissions' as well – that is, to failing to act. For example, if we do nothing about climate change because there may be some uncertainty in the science, there is a risk that we will cause significant environmental harm.

ESD in domestic law

As mentioned above, the principles of ESD are well established in the domestic and international arena. Numerous countries, including Australia, have incorporated it in their domestic legislation. The importance of ESD at a national level in Australia is probably best exemplified by the National Strategy for Ecologically Sustainable Development, which was adopted by all levels of government in 1992 (see http://cambridge.edu.au/redirect/?id=6331). It is important to note that ESD is considered to be a holistic package; that is, for effective application all four elements need to be considered and not in isolation.

In 1997, the Council of Australia's Governments (COAG) produced an agreement on the 'Commonwealth – State Roles and Responsibilities for the Environment', which led to the enactment of the *Environmental Protection and Biodiversity Conservation Act 1999* (Cth). This legislation overarched much of the state and local government laws and regulations regarding environmental protection and aimed to overcome the fragmentation of authority that was evident. This key piece of Australian legislation has as one of its key objectives to 'promote ecologically sustainable development'.

Examples of references in domestic legislation include s 136(2)(a) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth), which states that the relevant minister must consider the principles of ESD before deciding whether or not to approve a project, development, undertaking or activity, or a change to any of these things. Section 391(1) requires the minister to take account of the precautionary principle when making such a decision, and defines the precautionary principle in nearly identical terms to Principle 15 of the *Rio Declaration*.

Various state laws include the principles of ESD: the *Fisheries Management Act 1994* (NSW) and the

Legal Links

Coal seam gas extraction

The coal seam gas industry has the potential to be a multibillion dollar industry for Australia, but faces criticism for a perceived lack of certainty about the long-term environmental impacts of the processes involved. This example is typical of the issues confronting decision-makers when the precautionary principle is applied to a proposed activity.

Look at Lock the Gate (http://cambridge.edu.au/redirect/?id=6329) and Natural Coal Seam Gas (http://cambridge.edu.au/redirect/?id=6330) and outline the views of these two opposing lobby groups on the merits of coal seam gas mining.

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Local Government Act 1993 (NSW), for instance. In *Leatch v National Parks and Wildlife Service* (1993) 81 LGERA 270, the precautionary principle was also applied. As a result, a licence granted to 'take or kill' endangered animals in the course of a road development project was reversed. Although the Act under which the licence was granted did not explicitly refer to the precautionary principle, the court held that the principle applied 'as a matter of common sense' and was one of the factors that the Act permitted the court to take into account.

The case *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for the Environment and Heritage and Ors* [2006] FCA 736 centred on the development of two Queensland coal mines. The Preservation Society argued that the impact of the sites on local communities and the greenhouse gases released from the coal mining needed to be taken into account. Essentially, it claimed that the decision-maker did not consider the precautionary principle when approving the mines. The court ruled that the Preservation Society did not show conclusively how these two mines would cause serious irreversible damage to national heritage and biodiversity, and the mines were developed. Thus while the precautionary principle is an element of Australian law, it is quite difficult to enforce by virtue of its uncertain nature – it essentially involves some degree of 'predicting uncertain impacts' and this becomes very difficult to prove in legal proceedings.

Conclusion

At the international level, ESD is referred to in numerous treaties. The UN Educational, Scientific and Cultural Organization (UNESCO) develops and disseminates materials on ESD that can be used by educators, professionals and organisations. ESD is also a primary consideration of the UN Environment Programme (UNEP).

The development and application of ESD correspond with an evolution in society's values. In particular, the precautionary principle is indicative of a new consideration of the potential consequences of proposed activities, apart from financial benefits. Recognition of the importance of biodiversity reflects an increasing acknowledgement of the interrelationships between humans, other life forms and ecosystems. Seeking intragenerational equity with regard to living standards entails consideration of distribution issues (including the provision of goods and services as well as a healthy environment) across communities, indigenous peoples and nations of the world. Addressing intergenerational equity illustrates a shift from short-term thinking to formulating policies and laws regarding global environmental protection based on the wellbeing of future generations.

The emergence of ESD as the cornerstone of international laws aimed at global environmental protection reflects values and ethical standards that have developed over the last 50 years.

Review 11.3

1. Explain why ESD is essential to global environmental protection. In your response indicate how ESD emphasises the need for global cooperation to address the issues raised by the 'interdependence' of nations.
2. Summarise the four central principles of ESD in your own words.
3. Explain how the precautionary principle is applied under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).
4. Outline how the development of ESD reflects changing values (you may wish to refer to the decisions in *Pickles v Bradford Corporation* and *Bury v Pope* and compare them with the key elements of ESD).

11.5 The role of the state and state sovereignty in responses to global environmental protection

The terms 'country', 'state' (not a state of Australia) and 'nation' are often used interchangeably. They all refer to a **state**, which has a defined border and population, is politically recognised and is able to enter into international arrangements as a discrete entity.

state
a government and the people it governs; a country

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State sovereignty is the implicit recognition under international law that a state has authority over its citizens and territory, and can govern as it sees fit. The tension between a consistent global approach to environmental protection and national sovereignty is clear. At times what is best for the environment is not considered the best option for a country. Generally, states will consent to behave in a particular way if it is in their best interests to do so, and 'best interests' have often been equated with innovation, economic growth and corporate profitability. Various nations' approaches to addressing climate change and Japan's insistence on whaling for 'scientific purposes' illustrates national sovereignty in action.

state sovereignty
the authority of an independent state to govern itself (for example, to make and apply laws; impose and collect taxes; make war and peace; and form treaties with foreign states)

Some have argued that environmental health is crucial to long-term wellbeing or that economic prosperity without it is ephemeral. In other words, there are many reasons why international environmental protection is essential, apart from considerations of equity and fairness. As Klaus Toepfer, then executive director of UNEP, stated in his address to the Johannesburg Summit in 2002:

> Our world is characterised by divided and dysfunctional cities, dwindling water supplies and potential conflict over scarce resources and the accelerating loss of the environmental capital that underpins life on Earth. We suffer from problems of planetary dimensions. They require global responses. Investing in sustainable development will be investing in the future security of us all.

Ironically, such a strong statement at the 2002 Summit was contradicted by various groups at the conclusion of the 2012 Rio+20 Earth Summit. While UN Secretary-General Ban Ki-moon stated that the *The Future We Want* document produced would provide a clear guide for global sustainable development, Greenpeace International Executive Director Kumi Naidoo felt that the summit was an epic failure:

> We didn't get the Future We Want in Rio, because we do not have the leaders we need. The leaders of the most powerful countries supported business as usual, shamefully putting private profit before people and the planet.

In other words the 'consensual theory' and the doctrine of sovereignty have together undermined a global, holistic response to sustainable development.

It is the implementation of various international agreements and how vigorously they are acted upon which will determine their effectiveness in providing global environmental protection. Every sovereign state has the right to modify or even reject international law even if it is a signatory to the treaty in question.

As stated earlier, in Australia treaties and conventions are not part of domestic law until

In Court

***Bradley v The Commonwealth* (1973) 128 CLR 557**

Starting in 1965, the UN Security Council had passed resolutions condemning Rhodesia, whose white minority party, the Rhodesian Front, had declared independence from Britain and formed a government opposed to majority rule, complete with apartheid policies. Sanctions were imposed. Member states, under the terms of the sanctions, were not to trade with Rhodesia. In Sydney, the Postmaster-General issued a direction that all communication services with Rhodesia be withdrawn, in particular to the 'Rhodesia Information Centre', which purported to be an official body of the Government of Rhodesia. Although Australia did not recognise the Rhodesian regime as legitimate, the High Court held that the Postmaster-General's direction was *ultra vires* (beyond executive power), as it was unauthorised by domestic legislation. In other words, international law and resolutions have no effect in Australia until enacted into domestic legislation.

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they have been incorporated or enacted into law by domestic legislation. Nor are international resolutions, declarations or directives sufficient to authorise the actions of Commonwealth agents or bodies. See the decision in *The Commonwealth v Bradley* in the 'In Court' box as the authority for this statement.

State sovereignty therefore enables nations to implement international agreements, but also to reject them if they so choose.

Research 11.3

For an interesting perspective on states, see http://cambridge.edu.au/redirect/?id=6332.

You can create your own nation state and investigate the way it operates in a simulated world.

Review 11.4

1 Define 'national sovereignty' and explain how it operates alongside international law.
2 Describe the relationship between international laws and Australian domestic laws.

11.6 The role of the UN in response to global environmental protection

The UN was established in 1945 with international peace and security as its main objective, along with developing friendly relations among nations, promoting human rights, and facilitating social and economic progress. Over time, however, its aims and functions have evolved to keep pace with changing global conditions. In its early years, global environmental protection was of little significance, but now it is one of the dominant aspects of UN affairs. The UN has five principal organs or bodies:

- General Assembly – the main organ, made up of representatives of all 192 member states
- Security Council – the organ with responsibility for international peace and security
- Secretariat – the body that handles the day-to-day work of the UN, carrying out tasks in all areas dealt with by the UN
- Economic and Social Council – the body that coordinates the work undertaken by the UN and its specialised agencies in this large area
- International Court of Justice (ICJ) – the judicial organ, which settles disputes between states and provides advisory opinions to the UN and its agencies.

The full UN organisation is much larger, however, encompassing 15 specialised agencies and related bodies, secretariats of conventions (for example, the *UN Framework Convention on Climate Change* and the *UN Convention to Combat Desertification*) and many programs and funds. The programs and funds are subsidiary bodies of the General Assembly. The specialised agencies are linked to the UN by agreements; they report to the Economic and Social Council and/or the General Assembly. The related bodies (such as the International Atomic Energy Agency and the World Trade Organization) address particular areas and have their own governing bodies and budgets.

Several programs and specialised agencies have been established by the UN to deal with environmental issues. The main ones are discussed below. Additionally, many UN bodies have other primary tasks but nonetheless include environmental

Figure 11.8 International flags outside the UN building

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protection and sustainable development as objectives in their activities. Some of these are:

- Food and Agriculture Organization (FAO) – a specialised agency whose aim is defeating hunger and achieving sustainable agricultural, forestry and fishing practices. Current focus areas include the use of plant material for fuel ('bioenergy') and the specific challenges that climate change poses to agriculture, fishing and forestry.
- United Nations Development Programme (UNDP) – established by the General Assembly, this program helps developing countries obtain and use aid effectively in their efforts towards democratic governance, poverty reduction and sustainable development.
- International Maritime Organization – this autonomous specialised agency works through the Economic and Social Council. It develops international standards to regulate shipping, especially safety standards, and is also concerned with the prevention and control of marine pollution from ships.

United Nations Environment Programme (UNEP)

The UN General Assembly established the UNEP in 1972, following the UN Conference on the Human Environment ('Stockholm Conference'). It is a 'programme' (that is, a subsidiary body of the General Assembly) and its stated mission is:

> to provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations.

More recently, the UNEP has promoted the 'Post-2015' sustainable development agenda. This 'integrated approach' aims to address the interlinkages between the economic, social and environmental dimensions to ensure a more sustainable future.

The UNEP's work encompasses:

- assessing global, regional and national environmental conditions and trends
- developing international and national **instruments** and guidelines
- acting as an advocate and educator, both within the UN and with international organisations, national governments, **non-government organisations** (**NGOs**), private corporations and society at large, on behalf of the environment
- assisting the transfer of knowledge and technology for sustainable development
- hosting several environmental convention secretariats, including CITES, the Biodiversity Convention and the *Convention on the Conservation of Migratory Species of Wild Animals*.

instrument
a document by which some legal objective is achieved; it may be binding (for example, statutes, treaties and deeds) or non-binding (for example, guidelines, declarations and recommendations)

non-government organisation (NGO)
an independent, non-profit group that often plays an important role in advocating, analysing and reporting on human rights worldwide

Some of its areas of priority are environmental aspects of disasters and wars, management of ecosystems, harmful substances, resource efficiency and climate change. In 1988, the UNEP and the World Meteorological Organization (another specialised agency of the UN) established the Intergovernmental Panel on Climate Change (IPCC), the primary international source of scientific information about climate change.

Since the 1992 Rio Conference and the new focus on ESD, the scope of the UNEP's activities has expanded.

Research 11.4

Class research

Visit the UNEP home page at http://cambridge.edu.au/redirect/?id=6333 and divide the class into three groups. Each group is to prepare a presentation on the key role of the UNEP in regard to:

1. climate change
2. ecosystem management
3. environmental governance.

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Intergovernmental Panel on Climate Change (IPCC)

As an intergovernmental body, the IPCC is open to all member states of the UN and of the World Maritime Organization. Member states participate in the government review stage of the process of preparing reports and assessments, and in the sessions where decisions about the work of the panel are made and reports are accepted, adopted and approved.

The work of the IPCC involves reviewing and assessing the most recent scientific information from around the world relating to climate change. It does not itself conduct scientific research. Reviews are conducted by scientists from every part of the world, working on a voluntary basis. The IPCC strives for a complete survey and assessment of current information, and its reports reflect different viewpoints within the scientific community. While it seeks to provide rigorous scientific information to governments for the purpose of formulating policy, the IPCC does not itself prescribe policy. The IPCC's fifth authoritative assessment report was published in 2014 and includes statements like:

> Human influence on the climate system is clear, and recent anthropogenic emissions of greenhouse gases are the highest in history. Recent climate changes have had widespread impacts on human and natural systems. …
>
> Warming of the climate system is unequivocal, and since the 1950s, many of the observed changes are unprecedented over decades to millennia. The atmosphere and ocean have warmed, the amounts of snow and ice have diminished, and sea level has risen.

While the IPCC reports are backed by the vast majority of scientific experts, there are some groups who believe that climate change is a hoax. Research online will find a range of climate sceptics and in 2009 their views gained global exposure when leaked emails from the University of East Anglia purportedly showed concealment of data and sloppy research methods that undermined evidence of human induced climate change.

Research 11.5

Read the *Sydney Morning Herald* editorial from 22 June 2015 at http://cambridge.edu.au/redirect/?id=6334.

1. Suggest why attitudes towards climate change are now changing.
2. Create a timeline listing the events related to political action on climate change from 2009 and 2015.
3. Outline the emissions targets that Australia made at COP 21 – the 2015 Paris Climate Change Conference.

United Nations Educational, Scientific and Cultural Organisation (UNESCO)

UNESCO was founded in 1945. Its primary function is to promote international dialogue and cooperation in the fields of science, communication, education and culture. Its two highest priorities are Africa and gender equality, but it also focuses on promoting

Case Study

UNESCO's work in preserving heritage

Human heritage is a part of our environment that needs protection. Sustainable management programs are needed not only for natural resources but also for cultural heritage sites. There are hundreds of these around the world that UNESCO and other IGOs and NGOs aim to preserve. Palmyra in eastern Syria is one example: its remarkable history and potential as a major future tourist destination prompted UNESCO, in conjunction with the European Union and the Syrian Government, to implement a sustainable management plan for its preservation for future generations. The political and civil unrest which began in 2011 has resulted in the suspension of this program. In May 2015, ISIS entered Palmyra and destroyed significant historical features such as the Temple of Baal and the Arch of Triumph. Palmyra's heritage is at risk of being lost forever.

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sustainable development and biodiversity along with overcoming poverty and preserving cultural heritage. Its Natural Sciences Sector has a particularly direct role in fostering ESD.

Review 11.5

1. How and why has the UN approach to the environment changed over time?
2. Describe the functions of UNEP and UNESCO.
3. Explain the origin of the IPCC and describe its functions.

11.7 Other international responses to global environmental protection

International instruments

International instruments are documents setting out commitments or obligations of states and sometimes other parties such as international organisations. They can generally be classified into two categories: **soft law** and **hard law**. Hard law instruments are those that have legally binding consequences. By contrast, while instruments in the category of soft law impose moral obligations on states, parties that do not comply are not subject to enforcement penalties through international law. Table 11.1 shows a range of key hard law and soft law in the area of environmental protection. Each instrument has a different focus, but fundamentally, like all international law, their role is to stipulate a body of rules and principles which regulate states' relations with one another.

soft law
international statements, such as declarations, that do not create legal obligations for states but do create pressure to act in accordance with them

hard law
conventions and treaties that under international law create legally binding obligations

Figure 11.9 Sustainable development is covered by soft law.

Soft law

Non-binding norms include resolutions and declarations of the UN General Assembly, as well as statements, principles, codes of conduct, codes of practice, action plans such as Agenda 21, and other obligations that are not contained in a treaty. Soft law instruments usually identify a problem and set out in general terms how the problem will be dealt with, but do not include specific commitments. They have the potential to become hard law in the future, if their provisions are later codified in a treaty. Soft law may influence the behaviour of states, especially when the media or public opinion becomes a factor in decision-making.

A framework treaty is a multilateral treaty whose provisions are not directly applicable to the domestic law of the state parties that have signed it. It does not contain specific commitments or enforcement mechanisms. In that sense, it can be considered legally non-binding. It sets out a general framework or structure for commitments to be negotiated at a later stage. These commitments are often contained in a protocol, or in state parties' domestic legislation. An example is the *UN Framework Convention on Climate Change*, which was followed by the Kyoto Protocol, which set out binding commitments.

Hard law

Hard law includes binding international agreements (treaties) as well as customary international law. Treaties are international agreements between states, in written form, that are governed by international law. They may be bilateral (between two parties) or multilateral (more than two parties).

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Table 11.1 A selection of international instruments

International law	Year entered into force	Hard or soft?	Mission or aim	Number of parties*
Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)	1975	Hard	To ensure that international trade in wild animals and plants, and products made from them, do not threaten their survival	181
Convention on Wetlands of International Importance (the Ramsar Convention)	1971	Hard	Provides a framework for national and international bodies to cooperate and take action on the conservation and wise use of wetlands and their resources	168
Vienna Convention for the Protection of the Ozone Layer	1988	No legally binding targets for reduction of substances that deplete the ozone layer (notably chlorofluorocarbons)	To protect human health and the environment from adverse effects of human activities that alter the ozone layer	197
Montreal Protocol on Substances That Deplete the Ozone Layer	1989	Hard	Sets out a mandatory timetable for the phasing out of ozone-depleting substances	197
Biodiversity Convention	1993	Hard	To conserve biological diversity, to aim for its components to be used sustainably, and to ensure that benefits from the use of genetic resources are shared fairly and equitably	196
Agenda 21	1992	Soft	Sets out a plan to balance the capacity of the Earth with population and consumption, in a sustainable manner	178
Rio Declaration on Environment and Development	1992	Soft	Provides principles guiding sustainable development: defines humans' responsibilities to safeguard the common environment, as well as the rights of people to be involved in the development of their economies	178

* In the case of a treaty, 'number of parties' means the number of states for whom the agreement has entered into force.

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Table 11.1 A selection of international instruments

International law	Year entered into force	Hard or soft?	Mission or aim	Number of parties*
UN Framework Convention on Climate Change	1994	No legally binding targets or enforcement mechanisms	To stabilise atmospheric concentrations of greenhouse gases at a level that would prevent harm to the climate system	196
Kyoto Protocol	1997	Hard	The protocol's first commitment period to reduce greenhouse gas emissions ended in 2012. In 2012, the Doha amendment saw 37 countries commit to binding targets (including Australia). In June 2015, Australia was singled out as a 'climate change free rider' by the Africa Progress Panel's report in the lead-up to the IPPC Paris climate summit.	192
The Future We Want – Rio+20 Summit outcome document	2012	Soft	The common vision was to renew commitment to sustainable development at a global level, aiming for a future that is sustainable at economic, social and environmental levels.	192

* In the case of a treaty, 'number of parties' means the number of states for whom the agreement has entered into force.

A **protocol** is a negotiated instrument that supplements a treaty or agreement, containing specific actions to be taken to fulfil the terms of the treaty, or provisions that modify the original treaty. For example, the Montreal Protocol is an addition to the *Vienna Convention for the Protection of the Ozone Layer* (1985) and, as noted above, the Kyoto Protocol is an addition to the *UN Framework Convention on Climate Change*. The Cartagena Protocol on Biosafety, which came into force in 2002, is a supplement to the Biodiversity Convention. That protocol seeks to protect biodiversity from potential risks posed by technological modifications to living organisms, by governing their movement from one country to another. It contains a procedure for nations to obtain the information necessary to make informed decisions as to the importation of genetically modified organisms, and contains several provisions referring to the precautionary principle.

Most international agreements, despite being termed 'hard', have relatively weak compliance mechanisms, CITES and the Montreal Protocol probably being the main exceptions (and both of these are considered 'successful'). According to Jutta Brunnee, nations will more likely abide by such international laws when there is:

> a sound treaty-making process, well-defined obligations, transparent compliance mechanisms with foreseeable consequences for Parties' and benefits of compliance that outweigh the costs of non-compliance.

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protocol
an instrument that supplements a treaty, containing specific provisions that the parties have committed to in order to fulfil the terms of the treaty

It is important to realise that a treaty or protocol may contain enforcement mechanisms but their effectiveness is questionable. States' ability to exercise their sovereignty will sometimes mean that a country will refuse to comply with its international obligations.

Courts

Ad hoc tribunals and the International Court of Justice

Prior to the establishment of the UN (and thus also of the International Court of Justice), there was practically no court or tribunal in place to settle environmental conflicts between states, since few issues had arisen. In 1928, and again in 1935, the United States and Canada referred a matter to the International Joint Commission (a tribunal that had jurisdiction to consider issues arising along their common border) for resolution. It involved sulphur dioxide emissions from a zinc and lead smelter located in the town of Trail, British Columbia, 15 kilometres from the Washington state border. The main problem was the damage being done to fertile farming and logging lands in the Columbia River Valley.

In both instances the Canadian Government had to pay damages to the state of Washington, and in the 1935 decision the two parties decided to enact a special agreement or 'convention' for the settlement of difficulties arising from the smelter operation. As part of this agreement a tribunal was established to determine the extent of damages, whether compensation should be paid, and whether the smelter should operate under restricted conditions. The tribunal determined that:

- Canada had to pay $78 000 to the United States as compensation for all damage
- the smelter operators had to refrain from emitting harmful materials (instruments were put in place to record weather conditions and emission levels, and if emissions exceeded the prescribed levels further compensation was payable).

The *Trail Smelter Case (United States v Canada)* 3 RIAA 1905 (1941) highlighted the responsibilities of neighbouring states for damage caused by transboundary pollution. It is important to realise that the nations involved consented to the establishment of the tribunal and it only had jurisdiction over this particular matter. With the establishment of the ICJ, a forum for such disputes that did not rely on the creation of an **ad hoc** tribunal for each and every environmental dispute came into existence.

ad hoc
for a particular purpose, usually exclusive and often temporary

Only states can be parties to a case before the ICJ. It has the power to decide a case only where the parties to a dispute have consented to its jurisdiction, either by special agreement of the parties, where it is specifically provided for in a treaty, or where the state parties to the *Statute of the International Court of Justice* recognise its jurisdiction as compulsory in relation to any other state. Where the parties have consented, it is rare for a decision of the court not to be implemented. However, a state can raise 'preliminary objections' to the court's jurisdiction, or refuse to appear before the court because it totally rejects the court's jurisdiction. This limits the effectiveness of this judicial body.

Article 38 of the *Statute of the International Court of Justice* lists the sources of international law that the ICJ can apply in its rulings. These are:

- international conventions
- customary international law
- general principles of law recognised by civilised nations
- judicial decisions and the teachings of the most highly qualified academic writers of the various nations.

It can also make decisions ***ex aequo et bono*** if the parties agree. This means it can simply consider what is fair and just in the circumstances, rather than basing its decision on one of the sources of international law.

ex aequo et bono
a Latin term meaning 'according to the right and the good'; on the basis of what is fair and just in the circumstances

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Environmental disputes have never dominated the ICJ. The UN did recognise the importance of global environmental issues in 1993, establishing the Chamber for Environmental Disputes (a discrete section of the ICJ) to provide a forum for settling disputes in this area. However, it has never been used, and in 2006 the UN stopped holding annual elections for the chamber's membership.

One problem with the ICJ's role in settling global environmental disputes is that its jurisdiction depends on whether two or more nation states have consented to be bound by it. This seriously constrains its jurisdiction, given that corporations are responsible for a vast number of the environmental problems today but cannot be held accountable by the ICJ.

Some NGOs and academics believe a more effective solution lies in the formulation of an International Environmental Court that follows the International Criminal Court model. It could

In Court

Aerial herbicide spraying case (*Ecuador v Colombia*)

The significance of this case is that this is the first time in a generation that the ICJ has been specifically requested to resolve a case essentially centred on global environmental protection.

Ecuador is the eighth most biodiverse country on Earth, and the threat to its habitats and ecosystems by the Colombian aerial spraying of illegal coca (the key raw ingredient for cocaine) and poppy plantations highlights the role of sovereignty in both assisting and impeding global environmental issues.

Colombia instituted aerial spraying to eradicate illegal drug plantations (in line with its responsibilities under the 1988 *UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*). At the same time, Ecuador claimed that Colombia violated its obligations under international law by 'causing or allowing the deposit on the territory of Ecuador of toxic herbicides that have caused damage to human health, property and the environment'.

In its application before the ICJ, Ecuador requested that Colombia indemnify Ecuador for any loss or damage caused by its 'internationally unlawful acts', and that it 'respect the sovereignty and territorial integrity of Ecuador' by stopping any toxic herbicides being deposited on Ecuadorian territory.

Ecuador instituted proceedings against Colombia in April 2008 and in its application stated: 'The spraying has already caused serious damage to people, to crops, to animals and to the natural environment on the Ecuadorian side of the frontier, and poses a grave risk of further damage over time'. In addition, Ecuador claims to have made 'repeated and sustained efforts to negotiate an end to the fumigations [but] these negotiations have proved unsuccessful'.

In September 2013, the ICJ announced that the *Ecuador v Columbia* case had been consensually discontinued; in other words the case was settled out of court. While such peaceful resolution is always desirable, many commentators believe that it would have been useful to have a definitive ICJ case which covered the issue of transboundary harm. The case does highlight how the judicial processes (negotiation and mediation before arbitration) of the ICJ did promote a resolution considered acceptable by both parties.

Figure 11.10 Poppy spraying in Columbia to eradicate cocaine crops. The toxic herbicides floated across the border to disrupt Ecuador's delicate ecosystems.

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be permitted to settle disputes between private and public parties, if the issues are global in their magnitude; to mediate and arbitrate; and to institute investigations. Such a court could readily apply ESD principles, and could provide a high level of consistency by using experts in relevant fields to determine complex scientific issues. It could also be compulsory, rather than requiring consent to its jurisdiction. However, the lack of global will to create such an institution means its creation is unlikely.

Legal Info

Cases heard by the ICJ

Since the establishment of the ICJ in 1945, a range of environmental cases have been heard. These include:

- the nuclear test cases (1974–75) involving Australia and New Zealand against France, which was testing nuclear devices in French Polynesia. The cases (*Nuclear Tests (Australia v France)* [1974] ICJ 4 (20 December 1974) and *Nuclear Tests (New Zealand v France)* [1974] ICJ 3 (20 December 1974)) did not proceed to the merits stage, as the ICJ decided that once France stated that it was ceasing the atmospheric tests of its own accord, the cases no longer had any object. Later, France commenced underground nuclear testing.
- Nauru's case against Australia for failing to remedy the environmental damage caused by 90 years of phosphate mining (*Certain Phosphate Lands in Nauru (Nauru v Australia)* [1992] ICJ 2 (26 June 1992)). In 1992, a negotiated settlement was reached whereby Australia agreed to pay $107 million in compensation for the extensive damage caused to Nauru prior to its independence.
- the Danube Dam case of 1997 (*Case Concerning the Gabčíkovo-Nagymoros Project* (Hungary/Slovakia) [1997] ICJ 1 (25 September 1997)), which concerned a dispute over water resources between the neighbouring countries of Hungary and Slovakia and allegations of transboundary environmental harm. After Hungary withdrew from the joint venture to build a dam to drive a hydroelectric plant, Slovakia diverted the river to operate the dam on its own. The ICJ found both Hungary's withdrawal and Slovakia's diversion of the river unlawful. It held that the 1977 treaty between the countries was flexible enough to take account of new international environmental norms, and that the Slovakian action was unjustifiable in light of shared water resources and equitable use, and invoked the principle of ESD.
- Australia's 2013 case against Japan, which concerned the *International Convention for the Regulation of Whaling* (ICRW) – specifically the provision of zero catch for commercial whaling. Japan had authorised and implemented the Japanese Whale Research Program under Special Permit in the Antarctic Phase II (JARPA II) in the Southern Ocean, and Australia argued this was in breach of the ICRW. As the *Sydney Morning Herald* on 17 July 2013 noted, 'And after all of the papers and speeches, the case boils down to one question: is Japan's Antarctic whaling allowed under the IWC's scientific permit clause?' Technically, this means that it is not an environmental or ethical decision – it is purely a legal interpretation of the convention's terms. In April 2014, the ICJ ruled in favour of Australia and demanded Japan stopped whaling with 'immediate effect' in the Antarctic. This was the first attempt by any country to use the ICJ to stop whaling; it voted 12 to four that Japan had indeed breached the whaling convention. Ironically, the Japanese delegation stated after the case that the decision did not apply to its Northern Pacific hunt as it was outside the scope of the proceedings before the court. In December 2015, in defiance of the ICJ ruling, Japan announced that it would kill 33 minke whales in the Southern Oceans as a 'scientific imperative' to research the impact of climate change on the whales. The *Economist* described this as 'Japan is killing to be kind'.

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Review 11.6

1. Using examples, explain the difference between hard and soft international law.
2. Explain the nature and function of a framework treaty. Give examples.
3. Explain the nature and function of a protocol. Discuss in regard to international law.
4. 'The ICJ is ineffective as a means of resolving serious environmental issues.' Discuss.
5. Under the following headings, analyse the *Ecuador v Colombia* case:
   - the environmental issue
   - Colombia's justification for aerial spraying
   - the role of national sovereignty in the case.
6. Re-read the whaling case notes. What do Japan's actions say about its attitude towards the ICJ and the International Whaling Commission?

Conferences

Prior to 1972, international instruments promoting environmental protection were predominantly **reactionary**. They addressed discrete areas of environmental protection as the need arose. Early international law in this area was ad hoc and generally regional in its approach (for example, the Protocol Amending the Agreement on the Protection of the Salmon in the Baltic Sea, adopted in 1972).

reactionary
responding to a situation after it has occurred

During the 1960s it was recognised that this sort of piecemeal approach was insufficient to address the global threats facing the environment. Under the guidance of the UN, the first international conference to focus on the global environment was organised for Stockholm in 1972. Since then a so-called 'mega conference' has been held every decade to look at global environmental issues.

In addition, a number of other conferences have been held, focusing on specific issues. These often relate to a particular treaty or convention. 'Meetings of the parties' to a framework convention are generally held at intervals to continue negotiations for specific, legally binding commitments from the state parties. For example, the Conference of the Parties to the *UN Framework Convention on Climate Change* of 1992 meets every year; and the 1997 Conference of the Parties in Kyoto, Japan gave rise to the Kyoto Protocol. The 21st Conference of the Parties was held in Paris during December 2015.

Stockholm Conference 1972

According to the UN Environment Programme (UNEP), formed as a result of the Stockholm Conference, the conference's main aim was to consider 'the need for a common outlook and for common principles to inspire and guide the peoples of the world in the preservation and enhancement of the human environment'. Officially titled the 'UN Conference on the Human Environment', this was the first international gathering to consider the natural environment and material human needs – economic development – together.

The conference produced the *Stockholm Declaration*, which can be credited with providing the impetus for sustainability becoming the focus of global environmental protection. **Declarations** have no binding legal effect, but they do have an undeniable moral force and provide practical guidance to states about how they should behave. The *Stockholm Declaration* contains four key themes:

- States have a responsibility to manage their environment and they are accountable to their neighbours.
- All people have a right to an adequate environment.
- There is a need for intergenerational equity.
- There is a need for international cooperation.

declaration
a formal statement relating to a particular issue or set of issues, agreed to by a group of states but without binding legal force

While it can be argued that the Stockholm Conference produced nothing concrete in international law, it did result in the formation of UNEP. Stockholm's real success lay in the foundations it provided for all subsequent international environmental law. It produced

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non-binding guidelines that were open to wide interpretation, but it also introduced the concept of ESD, and UNEP became the major forum for promoting global environmental protection.

Nairobi Conference 1982

The main emphasis of the conference, held in Nairobi, Kenya, was to mark the 10th anniversary of the Stockholm Conference and reaffirm the participants' and the world's commitment to the *Stockholm Declaration* and Action Plan. The conference did not generate as much worldwide interest as Stockholm – possibly due to international political tensions at the time between the United States and the Soviet Union, and Kenya's internal difficulties – and for that reason it is not considered an official Earth Summit. The *Nairobi Declaration* urged 'all governments and people of the world ... to ensure that our small planet is passed over to future generations in a condition which guarantees a life of human dignity for all'.

Rio Conference: the 1992 Earth Summit

The Rio Earth Summit is more formally called the UN Conference on Environment and Development (UNCED), and was held in Rio de Janeiro, Brazil in 1992. It was hoped that Rio would produce a range of binding environmental agreements, but the different perspectives of the 180 states and NGOs represented made it difficult to reach a consensus.

While Stockholm provided the general guidelines for ecologically sustainable development, it was Rio that produced a framework for domestic and international law aimed at global environmental protection. Five key agreements came out of Rio, including the *UN Framework Convention on Climate Change*, the *Rio Declaration* and Agenda 21. The *Rio Declaration* contains 27 principles for using the environment in a sustainable manner. Agenda 21 is a comprehensive, voluntary plan of action to help all levels of government work towards sustainable development. It covers using resources efficiently, fostering an equitable world, protecting global resources, making the world habitable and increasing the input of disadvantaged groups (such as children, women and indigenous communities). It also recommended the strengthening of communication and partnerships between governments and NGOs. The main achievement of Agenda 21 is that it placed pressure on states to implement ESD.

Johannesburg 2002

Whereas the earlier conferences provided the guidelines and the framework for sustainable development, the aim of the 2002 Earth Summit in Johannesburg, South Africa was to put these concepts into practice. In particular, its focus was on establishing timelines and enforcement mechanisms. As usual, state sovereignty provided the biggest obstacle, as expressed in South Africa's opening statement for the event: 'Sadly we have not made much progress in realising the grand vision contained in Agenda 21 ... it is no secret that the global community has, as yet, not demonstrated the will to implement it.'

Johannesburg's theme was 'Building Partnerships for Sustainable Development', and its most notable achievements were:

- setting a target to reduce the proportion of people without access to safe drinking water by half by 2015, and obtaining commitments from governments such as those of the United States and the European Union, as well as bodies such as the Asian Development Bank, to fund initiatives to achieve this
- commitments and funding for sustainable energy programs in developing countries
- increased ratification of environmental agreements including the Kyoto Protocol – Thailand, India, Canada and Russia all announced their intention to ratify, or that they had ratified, Kyoto.

Despite the intentions of the conference, the final result was disappointing, as not all of the commitments were sufficiently firm. For example, no specific aims were set for one of the key aims: diversification of energy sources.

Rio+20 Earth Summit 2012

This summit had as its key theme 'Vision, Cooperation, Transformation'. The Rio+20 Earth Summit was never going to achieve as much as its 1992 version: 20 years later species extinction rates remain high, marine and land ecosystems are being destroyed, carbon emissions are increasing and the unsustainable use of natural resources continues unabated. The Rio+20 outcomes document is, at best, a declaration that provides only a superficial statement about the need for action but lacks any real commitment initiatives.

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NGOs were almost unanimous in their condemnation of the conference outcomes. WWF International described Rio+20 as a 'colossal failure of leadership and vision' while Care International called it a 'charade'. Even the director of the UN Environment Programme, Achim Steiner, stated, 'We can't legislate [for] sustainable development in the current state of international relations'.

The Future We Want outcomes document from the Rio+20 Summit included several key initiatives, such as:

- the establishment of set sustainable development goals (SDGs) to be blended with Millennium Development Goals by 2015
- a more secure budget and stronger powers for UNEP to initiate scientific research and coordinate global environmental strategies
- identification of the 'Green Economy' as an important tool for sustainable development
- vague commitments to phase out harmful fossil fuel subsidies.

A plan to protect the high seas was blocked by the United States, Nicaragua, Canada and Russia and in its place a statement that nations will try to prevent overfishing and ocean acidification, and reduce the amount of plastics entering the oceans, was included. Clearly plummeting fish stocks have indicated this has not occurred.

Global financial considerations have always limited national and international responses to sustainable development measures. A state of financial paralysis allows no leeway to provide funding for sustainable development measures as the state simply tries to cater for the current demands of its citizens. One promising development from Rio+20 was the push towards the green economy involving a range of public–private partnerships (there were over 1500 corporate leaders at the 2012 Rio Conference). However, while the promotion of a green economy is commendable, the lack of will by individual nations and even groups like the G20 to take action limits its effectiveness.

Paris 2015

The Paris conference objective was to achieve a legally binding and universal agreement on climate change from all the nations of the world.

The UN Climate Change Conference held in Paris (December 2015) adopted a historic accord for a new treaty to commence in 2020. Its aim is to limit global warming to well below 2°C with an aspirational target of 1.5°C. Formally adopted by 195 countries, the first universal climate deal aims to see fossil fuels gradually phased out, the growth of renewable energy globally and the creation of new carbon markets to enable countries to trade emissions and protect forests.

The agreement does not mandate specific measures or targets, but instead instigates a legally binding five-yearly global stocktake combined with a review mechanism to assess each country's performance. The agreement acknowledges that developed and developing countries have different responsibilities with regard to reducing emissions. This 'differentiation of responsibilities' is evident in the industrialised nations' agreement to deliver a minimum of US$100 billion a year in public and private funding to help poorer nations cope with the impacts of climate change and cut their emissions.

While there is no doubt about the historic nature of this accord, the real challenge for nations will be to exercise their sovereignty to implement the required domestic changes to reduce emissions while at the same time making energy affordable for their

Research 11.6

1. What were the main outcomes of the Paris climate conference in December 2015?
2. Do you consider it a success? Explain your reasoning.

Figure 11.11 The 2015 conference took place in Paris.

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citizens. The key question is whether the immense goodwill that ensured the accord was reached will be reflected in action around the world.

Review 11.7

1. Outline the key developments of the five 'mega conferences'.
2. Explain the purpose of a conference of the parties to a framework convention.
3. How does sovereignty influence the effectiveness of the conferences?

Intergovernmental organisations

Various international bodies not directly linked to the UN also play a role in global environmental protection. The European Union (EU) has developed an Environment Section whose function is implementing environmental policies for the 28 states now in the EU; this also includes an EU Sustainable Development Strategy that took effect in 2006.

The Organisation for Economic Cooperation and Development (OECD) has a primary focus on the economic growth, employment and living standards of its member nations, but it too has recognised the need for the environment to be taken into account. The OECD has introduced environment performance reviews in conjunction with its usual economic reviews of member countries. The OECD Working Party on Environmental Performance has been conducting peer reviews of the environmental performance of OECD member countries since 1992. The review assesses the efforts of each state in meeting domestic objectives and international commitments.

In 2004, the Director of the OECD Environment Directorate, Lorents Lorentsen, stated:

> We have made progress towards several environmental goals … But much more progress is needed. Ecosystems continue to be degraded, persistent and toxic chemicals are widespread in the environment, many fish stocks are declining, and greenhouse gas emissions – particularly from road transport and energy use – continue to grow.
>
> In sum, the basic question still is: how can we continue to grow and overcome global poverty, while doing relatively less damage to the environment that sustains us and all our activities?

The fact that even those institutions with a dominant focus on economic matters recognise the need for environmental frameworks and review strongly suggests that today's world is a vastly different place from the one that existed at the time of the Stockholm Conference in 1972.

Non-government organisations

Governments are political in nature and often their perspectives on an issue are influenced by factors such as business and industrial interests. In response to growing environmental awareness over the last four decades, various NGOs have put pressure on governments to take into account environmental considerations. NGOs use a combination of action and advocacy to advance their agendas. Some operate nationally (within a single state) and others are international.

Significant examples of environmental NGOs are:

- Greenpeace
- World Wide Fund for Nature (WWF)
- Friends of the Earth (FOE).

NGOs are involved in researching and publicising environmental issues, and in educating the public. They are not subject to international law. However, they have been formally recognised

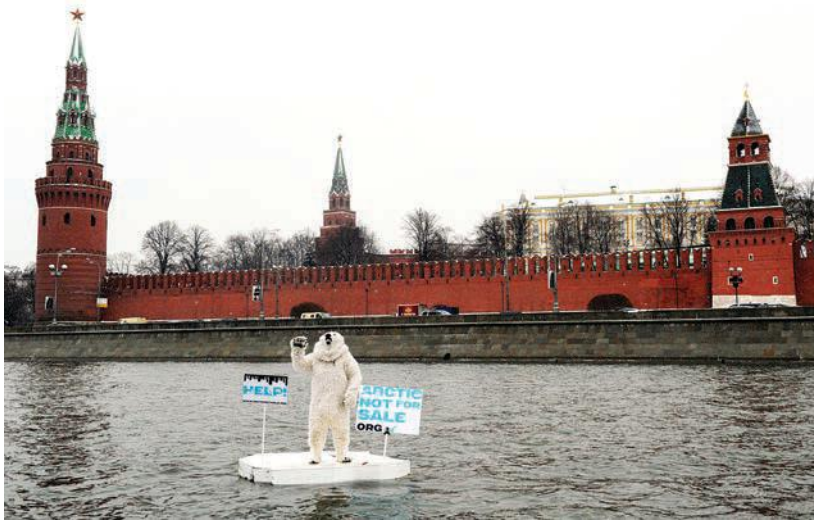

Figure 11.12 NGOs are involved in researching and publicising environmental issues, and in educating the public. This stunt from Moscow, Russia resulted from Nature Geoscience stating that the 20th century was the hottest century in the last 1400 years.

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by governments, notably in Agenda 21. Some NGOs have **observer status** at the UN and they are often consulted for their views when international law on the environment is being drafted.

The most famous (or infamous, depending on your perspective) activities of some NGOs are their **envirostunts**, which are used to pressure and sometimes embarrass governments and corporations into changing their behaviour. An NGO's best weapon is the media.

In June 2015 Pope Francis issued a strong statement on climate change and the state of the environment. He posted on Twitter:

His full statement included the following:

> With regard to climate change, the advances have been regrettably few. Reducing greenhouse gases requires honesty, courage and responsibility, above all on the part of those countries which are more powerful and pollute the most.

When one of the world's most prominent religious leaders makes definitive comments like these, it appears that the push for a holistic approach to global environmental protection is going beyond the traditional protagonists like NGOs and UN bodies. Despite this, the obstacle created by sovereignty remains.

observer status
in the UN General Assembly (UNGA), the position of an organisation or other entity that has been granted the right to speak at UNGA meetings, participate in procedural votes, and sponsor and sign resolutions, but not to vote on resolutions and other important matters

envirostunt
a publicity stunt to attract attention to a particular environmental issue

Case Study

NGO action

- In 1995 Greenpeace occupied the *Brent Spar* oil rig operated by Shell Oil in the North Sea to stop it from being scuttled and dumped in the sea. A global audience watched the Greenpeace actions and a large section of the public exerted its own pressure by boycotting Shell service stations. Shell then agreed to dismantle the *Brent Spar* and recycle it on land. The action led to a worldwide ban on this means of disposing of such rigs.
- The Wilderness Society and the Australian Conservation Foundation were instrumental in stopping the construction of a dam in the 'Wild Rivers' region of Tasmania.
- People for the Ethical Treatment of Animals (PETA) often use attention-grabbing promotions to raise awareness of environmental issues involving animals.

Figure 11.13 A PETA campaign.

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The media

The media is one of the most powerful forces on the planet. It has the potential not merely to shape popular opinion but also to determine it.

The nature of media ownership in industrialised countries, especially where it is concentrated among just a few corporations, means that the line between information (reporting the news) and persuasion (influencing opinions about an issue) is not always clear. While promoting or protecting corporate interests may not be the sole or primary purpose of the information transmitted via print, broadcast media or the internet, a news agency whose parent company is a multinational with a broad range of financial interests may be to some degree constrained. Economic imperatives, especially in a period of recession, may also influence the amounts a newspaper or broadcaster can afford to spend on investigative journalism: it can be less expensive to obtain stories from a wire service or syndicate than to pay writers and researchers to produce a unique story or program on current events.

Even where a media agency is publicly owned, it is not immune from financial considerations. In some countries, public broadcasters are not as well funded as the ABC and SBS are in Australia, and must appeal to listeners and viewers for financial support. Also, governments must take care not to exert too much influence on publicly owned media, even by well-intentioned efforts to ensure 'balance'. A recognition of the potential for political 'spin' is important to counteract tendencies towards selective coverage or bias. However, the financial resources of corporations mean they are far more likely to influence public understanding and perspectives on environmental issues.

In Australia, the power of the media in environmental matters was highlighted in the Franklin Dam protest movements of the early 1980s, which culminated in the case *Commonwealth v Tasmania* (1983) 158 CLR 1. The Wilderness Society and the Australian Conservation Foundation joined forces to use the media to present their version of the situation. They were spectacularly successful.

Review 11.8

1. Describe the relationship between intergovernmental organisations, national governments and the global environment.
2. Using examples, outline how NGOs can promote global environmental protection.
3. Discuss the positive and negative roles that the media may play with respect to environmental protection.

11.8 Effects of Australia's federal structure in responding to global environmental protection

State powers and legislation

Under the *Australian Constitution*, the power to legislate on environmental issues can be considered a **residual power**. It is not one of the **enumerated powers** of the federal parliament, and therefore it belongs to the states. Like the rest of the world, Australia was unaware of the consequences of exploiting the environment until relatively recently. New South Wales passed the *Forestry Act* in 1916, but it was primarily concerned with the regulation of the timber industry and made little reference to the responsible management of this resource.

residual power
a government power that is not listed in s 51 of the *Australian Constitution* as a legislative power of the Commonwealth Parliament, and thus belongs to the states

enumerated power
a legislative power that is specifically set out as belonging to a particular parliament; in Australia, the enumerated powers of the Commonwealth Parliament are listed in s 51 of the *Constitution*

During the 1960s and 1970s, New South Wales passed a number of laws that were clearly aimed at the protection of the environment, including the *Clean Air Act*, *Clean Waters Act* and *Pollution Control Act* (all since repealed by the *Protection of the Environment Operations Act 1997* (NSW), which consolidated these Acts and added some significant new provisions); the *Heritage Act 1977* (NSW), the *Pesticides Act* (repealed and superseded by the *Pesticides Act 1999* (NSW)) and the *National Parks and Wildlife Act 1974* (NSW).

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Prior to 1979, environmental law and town planning law developed separately. The creation of the New South Wales Land and Environment Court in 1979 indicated a major shift in policy and direction. It was instituted as a superior court of record, with exclusive jurisdiction in environmental and planning law. In that same year, the *Environmental Planning and Assessment Act 1979* (NSW) was passed, mandating that town planning decisions must take account of environmental considerations.

Federal powers and legislation

The *Australian Constitution* limited the role the Commonwealth could play in environmental affairs for much of the 20th century. However, as awareness of environmental degradation and the loss of species and habitats became increasingly obvious, the federal government began to take a more active role. The 'In Court' boxes illustrate how this was accomplished through interpretations of the *Constitution* by the High Court.

The main federal environmental law is the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act). It provides the legal framework for the protection and management of nationally and internationally important animals, plants, ecosystems and places defined in the Act as matters of national environmental significance. Under this Act, any activities involving matters regulated by the Act may require assessment and approval from the Minister for the Environment. The matters under Commonwealth jurisdiction include:

- World Heritage sites
- national heritage
- nationally protected wetlands (Ramsar wetlands)
- nationally listed threatened species and ecological communities
- listed migratory species
- nuclear actions (including uranium mines)
- Commonwealth marine areas
- land owned by the Commonwealth
- activities by Commonwealth agencies.

In Court

***Murphyores v The Commonwealth* (1976) 136 CLR 1**

During the early 1970s, the Queensland Government granted a lease to a company called Murphyores to extract certain minerals from sand on Fraser Island. Today such a proposal would seem preposterous, but at the time Queensland saw it as an economic opportunity.

The federal government requested that the mining cease, but it did not have the constitutional authority to order Murphyores to stop. The Commonwealth did, however, have power over exports and imports under s 51(i) of the *Constitution*: the trade and commerce power. The Commonwealth refused to issue Murphyores with an export permit, effectively denying it a market.

The case went to the High Court, which held that the federal government's denial of the permit was a valid use of its constitutional power. Technically, the Commonwealth did not stop the mining; it stopped access to the markets.

The significance of this case was that it highlighted the increasing importance placed on the environment by the Commonwealth, and its indication that it would be prepared to intervene in affairs traditionally handled by the states if necessary.

Figure 11.14 By denying a permit, the Commonwealth was able to protect Fraser Island.

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In Court

***Tasmania v The Commonwealth* (1983) 158 CLR 1**

In the 1980s, the Tasmanian Government wanted to build a hydroelectric dam on the Franklin and Gordon River system. A group of environmentalists began a protest campaign against this proposal, and the Wilderness Society and the Australian Conservation Foundation became actively involved. Nationwide protests were organised under the 'No Dams' slogan and a range of high-profile personalities took up the cause.

The Tasmanian Government argued that the building of the dam was a residual power and the protesters, while entitled to their view, were not going to change the government's decision. In the lead-up to the 1983 federal election, the leader of the Australian Labor Party promised to stop the dam if elected. Labor won the election, but the Tasmanian Government continued to build the dam.

The federal government recognised Tasmania's Wild Rivers area as a region of special significance and it was listed under the World Heritage Convention. Since international law is not binding until implemented by domestic legislation, the federal government passed the *World Heritage Properties Conservation Act 1983* (Cth), which specified that areas of special significance should be protected. The Franklin was included as one such area. This created a conflict, however, as now there was a state law allowing the construction of the dam and a federal law demanding that it be stopped. The case then went to the High Court.

In a four to three decision the High Court ruled that the federal government was making valid use of the external affairs power (s 51(xxix)), which gives it the authority to legislate on any matter of 'international concern'. Under s 109 of the *Constitution*, when a law of a state is inconsistent with a law of the Commonwealth, the Commonwealth law prevails. The construction of the dam was stopped.

The significance of this case was enormous. For example:

- The Commonwealth could now make environmental laws using the external affairs power if this was necessary in order to fulfil its obligations under international law.
- It ensured that Australia could implement its international obligations to override unwilling states.
- It is the leading example of how NGOs (in this case, the Australian Conservation Foundation and the Wilderness Society) can shape community values and standards and thus promote law reform.
- It highlighted how the democratic process (in this case, the 1983 federal election) can place pressure on governments to assume responsibility for the environment. Since then, the environment has become a central policy of all political parties.

Relationship between federal and state environmental law

Australia's three-tiered system of government (federal, state and local) has resulted in a degree of fragmentation of environmental authority. An important initiative to define state and federal roles more clearly, reduce jurisdictional disputes, foster a cooperative approach, and ultimately provide better environmental protection was the 1992 Intergovernmental Agreement on the Environment (IGAE), which reflected some elements of the *Rio Declaration* as well as setting out the agreed areas of responsibility between the Commonwealth and all state and territory governments. The National Environment Protection Council (NEPC) was set up under the *National Environment Protection Council Act 1994* (Cth) (NEPC Act) to oversee the implementation of the IGAE. As stated in s 3 of the NEPC Act, the objects of the legislation are to ensure that people enjoy equivalent protection from air, water or soil pollution and from noise wherever they live in Australia, and to protect businesses and markets from inconvenient effects of jurisdictional variations.

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In Court

***EPA v Gardner LEC* [1997] NSWLEC 169**

From October 1993 to April 1996 Charles Gardner, while operating a caravan park in Karuah, pumped over 120 000 litres of raw sewage into the Karuah River. Gardner had installed a system of underground pipes and valves to pump the raw effluent directly into the river to avoid $850 a week in sewage removal fees. Not only did this material create offensive smells in Karuah but it also posed an enormous threat to the health and safety of users of the river and the nearby oyster farms.

The Hon. Justice David H. Lloyd made history in this case by sending Gardner to prison for his activities. Gardner was sentenced to 12 months in prison and was also ordered to pay $420 000 in fines and costs. Brian Gilligan, the director of the Environment Protection Authority (EPA), stated that the decision sent a powerful message to polluters. The Land and Environment Court had held the power to imprison people since 1989, but had never used that power until this case. Ian Lloyd QC was the prosecutor for the EPA in the case and he noted after the decision: 'I see the function of prosecuting environmental criminals as equally if not more important than prosecuting murderers.'

Another means of streamlining federal and state responsibilities is the use of bilateral agreements between the Commonwealth and each of the states and territories. In 2007, the federal and New South Wales governments signed a bilateral agreement which allows the Commonwealth to accept an environmental assessment done by the state if it fulfils certain conditions. In other words, some assessment procedures under the *Environmental Planning and Assessment Act 1979* (NSW) can replace the need for assessment under the EPBC Act, although they still require approval from the Commonwealth Environment Minister.

Often the various levels of government attempt to operate collaboratively, as with the Murray–Darling Basin Ministerial Council, made up of the relevant ministers from New South Wales, Victoria, South Australia, Queensland and the Commonwealth.

The council was established by the Murray–Darling Basin Agreement in the *Water Act 2007* (Cth), and it has a decision-making role in federal–state plans for sustainable use of the resources of the Murray–Darling Basin, which are used by all of these states.

Review 11.9

1. Explain the difference between enumerated and residual powers.
2. Describe the development of environmental law in New South Wales.
3. List some ways in which federal and state governments cooperate with respect to environmental protection law.
4. Outline the significance of the Tasmanian Dam case.

11.9 Contemporary issue: The law's role in relation to global environmental threats

The law and the legal system not only set out the rules that all parties in a jurisdiction are expected to follow but they also provide for when and how breaches should be punished. In the area of the environment, laws have the aim of preventing, mitigating and/or remedying damage that human activities have caused to the environment. To achieve these aims, the law must also encourage cooperation and resolve conflicts between parties whose interests are affected.

At an international level, treaties and protocols set out the rules with respect to environmental protection. The ICJ is the pre-eminent body for resolving disputes between states. As we have seen, soft law such as declarations and action plans can also play a role in prompting national government action and influencing the behaviour

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of corporations and other agents. The primary actors at international level, however, are states, and national sovereignty is enshrined in the UN Charter (art 2). While the conventions, protocols and declarations may outline brilliant strategies for promoting ecologically sustainable development, they accomplish very little unless states comply. And unless a nation considers that it is in its best interests to comply with an external obligation, it is unlikely to do so. The July 2015 settlement by BP over the *Deepwater Horizon* oil rig explosion (over A$24 billion plus A$40 billion in clean-up costs for the nearly five million barrels of oil spill) highlights the contrast between domestic and international enforcement mechanisms.

However, when states do implement their obligations, they can be characterised as 'thinking globally and acting locally'. To have domestic effect in Australia, an international treaty must be implemented in national law. And in Australia there can be heavy penalties for individuals and organisations that breach domestic environmental law.

When the world's states do work collaboratively, the results can be spectacular.

The *Vienna Convention for the Protection of the Ozone Layer* was negotiated in 1985 and came into force in 1988. The accompanying Montreal Protocol came into force in 1989 and set out legally binding reduction targets for states. A management plan for phasing out CFCs (chlorofluorocarbons) was introduced and states have complied by banning their use and introducing alternative products.

In September 2006, the ozone hole reached its largest size – 27.4 million square kilometres – but by September 2009 it had contracted to 25 million square kilometres. Roger Dargaville, a research fellow in climate change at the University of Melbourne, noted

Case Study

Ozone layer destruction

The hole in the ozone layer was first recognised as a global issue in 1978, when satellite technology enabled its size – and over the next few years, its growth rate – to be measured. Chlorofluorocarbons (CFCs), a class of chemical compounds that are able to break the bonds between ozone molecules, were identified as the main culprit. CFCs are stable and non-toxic and have been used in refrigerators and air-conditioning units, and as propellants in aerosol products. It soon became apparent that the only long-term solution to ozone depletion was to phase out the use of CFCs. Ozone prevents the most harmful UVB light (ultraviolet radiation of relatively short wavelengths) from reaching the Earth's surface, and its continued depletion could have dire consequences, including accelerated global warming, harm to marine life and increased rates of skin cancers. As explained above, the implementation of the Montreal Protocol has seen the reversal in the hole in the ozone layer. As noted by World Meteorological Organization Secretary-General , Michel Jarraud:

> International action on the ozone layer is a major environmental success story ... This should encourage us to display the same level of urgency and unity to tackle the even greater challenge of tackling climate change.

For an insight into the latest research relating to the ozone hole, go to the Ozone Hole Tour website at http://cambridge.edu.au/redirect/?id=6336.

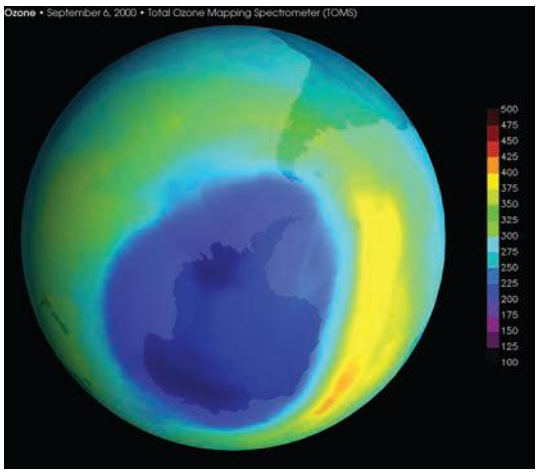

Figure 11.15 A graphical depiction of the hole in the ozone layer

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in a 2009 interview in the *Sydney Morning Herald*: 'The Montreal Protocol was absolutely critical. It is ... the world's most successful treaty, with every country on Earth signing on.' Kofi Annan, a former Secretary-General of the UN, once referred to it as 'perhaps the single most successful international agreement to date'.

The Montreal Protocol is the classic example of what can be achieved through global cooperation. At current rates, the hole in the ozone layer is expected to be repaired within 50 years. Conversely, when states do not work together in accordance with international law, the results can be disappointing. The reluctance of many countries to commit to

Case Study

Southern bluefin tuna

The southern bluefin tuna is one of the world's most prized delicacies. It is listed as critically endangered by the World Conservation Union and one-third of the catch takes place in Australian waters, primarily off the coast of South Australia. Some estimates have only 3% of its breeding stock remaining. Moves were made by Sweden in 1991 and Kenya in 1994 to have the bluefin tuna included in CITES Appendix I (which prohibits trade) or Appendix II (which provides for enhanced monitoring of the species but allows limited trade under certain conditions). Both attempts failed due to intense pressure from Japan. In fact, the Australian Government also refused to list the fish as endangered under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) because doing so 'would be detrimental to the survival of the species, as it may weaken Australia's ability to influence the global conservation of the species, and by implication, its conservation in Australian waters'.

However, in May 1993, Australia, Japan and New Zealand signed the *Convention for the Conservation of Southern Bluefin Tuna*. This voluntary management arrangement, including quotas, came into force in 1994. Like its whaling program, Japan had insisted on scientific experimental fishing of bluefin tuna. The convention created the Commission for the Conservation of Southern Bluefin Tuna (CCSBT).

In 1999, the case *Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Provisional Measures ITLOS Nos. 3 and 4* (heard by the International Tribunal for the Law of the Sea) determined that Japan's 'program of scientific fishing' was in breach of the CCSBT. ITLOS ordered that Japan cease its 'experimental fishing', adhere to the agreed quotas and act in accordance with the 'precautionary principle'. It was noted that Japan's 'experimental quota' was five times New Zealand's actual quota.

In the 20 years up to 2007 it has been estimated that Japan had illegally taken over $6 billion worth of bluefin tuna. These illegal catches have been so significant that the breeding stock of southern bluefin tuna has been drastically reduced. 'Illegal, Unreported and Unregulated' (IUU) fishing has become one of the most significant issues regarding the protection of marine fishing stocks.

As a result, the Australian Government now requires Japanese boats to have an independent observer on board to monitor catches. (Many countries, including Australia, have programs that place observers on boats fishing within the Australian Fishing Zone and some adjacent areas, under international arrangements.)

According to Australian Fisheries Management Authority's former managing director, Richard McLoughlin, Japan had a national quota of 6000 tonnes but was catching up to 20 000 tonnes a year. McLoughlin described it as an 'enormous international fraud' that has been allowed to occur because 'the Japanese only ever allowed Japanese observers on Japanese boats'. If Japan had kept within its quota, fish stock would be five times larger than current levels. Japan's quota has now been reduced by half, to 3000 tonnes a year.

A full explanation of the decision by Australian authorities not to list southern bluefin tuna as endangered under the EPBC Act can be seen at the Department of the Environment website (http://cambridge.edu.au/redirect/?id=6337).

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binding targets on greenhouse gas emissions is an example of this.

The *UN Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) has 181 parties and applies to more than 30 000 species. Yet it is common knowledge that the black market trade in endangered species continues. The difficulties of enforcing treaty provisions are exacerbated by the fact that many of the individuals engaged in the trade are from developing countries. Such countries may find that the costs of maintaining an office for administration of treaty obligations and participating in the parties' meetings are prohibitive. In addition, fees for hunting licences and permits may be a major source of revenue for the countries.

In response to these difficulties, NGOs have arisen to try to fill the gaps. Traffic, formed as a specialist agency of the International Union for the Conservation of Nature and also affiliated with the World Wide Fund for Nature (both of which have a wider scope), actively monitors wildlife trade to ensure that it does not pose a threat to the conservation of species and their habitats (see the Traffic website at http://cambridge.edu.au/redirect/?id=6335). Highlighting the effectiveness, or otherwise, of international law with respect to global environmental protection is often a focal point for NGOs. As they are independent of governments as well as of corporations, NGOs are able to publish inconsistencies, problems and breaches of international obligations without a conflict of interest. Nationally based NGOs perform a similar function within domestic jurisdictions. The Tasmanian Dam and *Brent Spar* cases illustrate the effectiveness of NGOs. The impact of NGOs was evident in the New South Wales state election of 2015 when the Northern Rivers seat of Ballina went to the Greens, who benefited from a massive campaign by the 'Lock the Gate' anti-CSG movement (research the 'Bentley Blockade' for more on this issue).

Conclusion

International law works most effectively when it is not only directly implemented by domestic law but also supported by additional domestic initiatives. The failure of the Rio+20 Earth Summit to produce any hard law commitments highlights the roles of sovereignty and the 'consensus theory' in the formulation of global, holistic international initiatives aimed at addressing global environmental threats.

Review 11.10

1. Outline the role of international and domestic law in relation to global threats to the environment.
2. Write a report explaining the success of the Montreal Protocol.

11.10 Contemporary issue: The demand for resources and global environmental protection

A non-renewable resource is a naturally occurring resource that cannot be produced, regrown, regenerated or reused on a scale comparable with its rate of consumption. Non-renewable resources are generally considered finite because their consumption rate far exceeds the rate at which nature can replenish them; examples include coal, uranium, petroleum and natural gas. Renewable resources are those that can regenerate themselves via natural or human management processes, meaning they can be replenished for future generations (for example, timber, fish, solar energy and wind power). If a resource such as fish or timber is overharvested, it will not have the opportunity to reproduce at a rate that is sufficient to ensure that it can last indefinitely.

There is obviously a strong link between resource use and sustainability. Resources are the fundamental components of the economic system in both industry and agriculture. The legal system has in recent times intervened in the resource markets to provide more equitable outcomes. The paradox is that the use of resources generates revenue, which provides wealth and raises living standards, but if the resources are non-renewable, they will not be available to future generations. The problems for future generations will be compounded by the 'side effects' of resource use, such as global warming, species extinction and pollution.

The 'ecological footprint' model (see the Global Footprint Network website at http://cambridge.

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edu.au/redirect/?id=6338) and the 'Story of Stuff' (see http://cambridge.edu.au/redirect/?id=6327) highlight the global use of resources and clearly illustrated the inequities in resource consumption between nations. Redressing this imbalance to provide justice for states and society creates numerous dilemmas. States have their own ideas about what they hope to achieve and are averse to external standards being imposed by the international community.

The international legal system is engaged in an ongoing effort to implement a framework to monitor climate change and limit greenhouse gas emissions. The *UN Framework Convention on Climate Change* formulated at Rio was the first step, but it was the additional Kyoto Protocol that outlined a legal response to the conflict between resource use and global environmental protection.

The Kyoto Protocol recognised that developed countries were primarily responsible for greenhouse gas emissions and thus placed a heavier burden on them than on developing nations, on the basis of 'common but differentiated responsibilities'. This has proved to be quite a stumbling block for nations trying to decide whether or not to ratify and comply with the Kyoto Protocol. The concept of 'differentiated responsibilities' was another key stumbling block in the 2015 Paris Climate Conference debates.

The Kyoto Protocol contained some novel incentives for industrialised countries, including:

- emissions trading (the carbon market) – this allows nations to sell unused emission units to countries that have exceeded their targets
- clean development mechanisms – these enable industrialised countries to invest in emissions reduction projects in developing countries (where costs are lower), as an alternative to more expensive reduction projects in their own territory.

These mechanisms were designed to stimulate 'green investment' and help countries meet their targets in a more cost-efficient manner. The Kyoto Protocol also required countries to accurately monitor and report on emissions and any carbon trades.

The need for a more comprehensive global response after Kyoto led to the Copenhagen Conference in December 2009 and the Durban Climate Change Conference in November 2011. It has generally been accepted that Copenhagen was a great disappointment, as only a weak political accord was reached – it involved no numerical targets. Durban did reach an agreement: that developed and developing countries will work together on an agreement that should be legally binding on all parties. *The Guardian* (UK) described it as a 'deal to agree to a deal'. See page 310 for an overview of the Paris Climate Change Conference.

Undermining the success of such conferences are the usual key stumbling blocks:

1. *Equity*: states must agree on targets for emissions cuts. This would involve considerations including past emissions, prior attempts to limit emissions, their populations and how they can continue to develop. There may be considerable antagonism between states on 'agreed' emission cuts.
2. *Funding*: developing countries are demanding financial support if they are to cut emissions, as this will affect living standards domestically.
3. *Sovereignty*: political leaders have different philosophies, and states change leaders, so there is no certainty that new leaders will comply with the 'deal'. Global financial concerns have already seen environmental issues pushed aside.
4. *Legal enforcement*: the final outcome is 'an agreed outcome with legal force', but the 'toothless' nature of international law and the ability of nations to ignore even ICJ decisions have the potential to weaken any global response. After all, many nations only comply with international law when it is in their best interests to do so.

Research 11.7

As a class, undertake online research about the outcomes of the 2015 Paris Climate Change Conference. Conclude the research with a class discussion on whether the conference could be considered a success.

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Case Study

Fossil fuels and greenhouse gas emissions

Fossil fuels (oil, gas and coal) have long been major contributors to greenhouse gas emissions and thus are often held to be the major 'culprit' in climate change. Essentially, sunlight enters the atmosphere and the Earth warms up as it absorbs the infrared radiation; greenhouse gases limit the re-radiation of the sunlight back into space. According to the US Energy Information Administration, about 75% of anthropogenic (human-caused) greenhouse gas emissions have come from the burning of fossil fuels over the last 20 years.

In addition to the excesses of the affluent, demand for resources in developing nations has surged over the past decade. According to the World Watch Institute, fossil fuel consumption in developing countries has exceeded that of the developed nations. Developing countries have over four times the population of the industrialised world and there is a huge demand for more energy resources to 'fuel' economic development and thus improve living standards.

International attempts to curb consumption will inevitably come up against resistance from countries that have only recently begun to enjoy the material living standards of the industrialised world.

Figure 11.16 Fossil fuels have long been the major contributors to greenhouse gas emissions.

Case Study

Uranium and nuclear energy

Australia has about 40% of the world's uranium. One tonne of uranium can generate the same amount of energy as 13 000 tonnes of coal. The burning of coal produces nine billion tonnes of greenhouse gases each year. Australia would reap enormous economic benefits from embracing nuclear energy and selling uranium on the global markets, and our output of greenhouse gases would fall markedly. So why hasn't Australia embraced nuclear energy?

Australia does sell uranium to 36 nations who are signatories to the *Nuclear Non-Proliferation Treaty* (1970). The fears relate to plutonium, which is produced in the nuclear process and is the building block for devastating nuclear weapons. Any nuclear accidents could have dire consequences, as occurred in Chernobyl in 1986 and in Japan in 2011 at the Fukushima plant.

Figure 11.17 The moment of impact when the tsunami hit the Fukushima nuclear plant, causing a nuclear disaster in March 2011

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Legal Links

As in criminal law, the purpose of punishment is to deter, but in some environmental cases some people consider fines disproportionately low and of minimal impact on polluters whose profits increase by disregarding the law. Another factor is the relatively low conviction rate for environmental crimes.

The Australian Crime Commission published a report on this issue in 2014, which can be accessed at http://cambridge.edu.au/redirect/?id=6339.

Conclusion

The need to resolve the conflict between resource use and global environmental protection is at the core of sustainable development. The legal system must take into account an enormous range of competing interests (including developers, financial institutions, NGOs, governments, corporations and future generations in both rich and poor countries) and somehow balance their competing rights. The case studies on page 321 illustrate some of the dilemmas faced by states, but underpinning every decision is the doctrine of sovereignty. The extreme scenario faced by a state is exemplified by what is confronting the Maldives, one of the lowest-lying nations in the world. Maldives President Nasheed has announced that a fund is being established to purchase land to relocate its population in the event that rising sea levels make occupation of the Maldives untenable.

Review 11.11

1. Explain the difference between renewable and non-renewable resources.
2. Explain the link between resource usage and sustainability.
3. Discuss why developed countries are responsible for the most greenhouse gas emissions.
4. Did any of the four 'stumbling blocks' listed become a major issue at the 2015 Paris Climate Change Conference?

11.11 Contemporary issue: Australia's responses to international initiatives

Australia has traditionally been proactive in its responses to international initiatives for global environmental protection. The states have the bulk of the power to legislate regarding the environment, as it is considered a residual power, but the Tasmanian Dam case established that the federal government can use its external affairs power (s 51(xxix) of the *Constitution*) to implement international obligations. Furthermore, no international law has effect in Australia until it is enacted into domestic legislation. Responses to international initiatives must therefore comply not only with the *Constitution* but also with the limitations set by relevant legislation.

It is not only the creation of international laws (both hard and soft) that influences the direction of Australia's responses to international environmental initiatives; the outcomes of the various conferences and findings of intergovernmental organisations also play a critical role.

NGOs play a pivotal role by placing pressure on governments. Any environmental event or issue that has a direct impact on Australian citizens will inevitably lead to pressure from parts of the community on elected representatives. Governments respond to community demands because of the power of elections. If a policy or law is not aligned with community views and expectations, a government's election chances are in peril.

Former Prime Minister Kevin Rudd once called climate change 'the greatest moral, economic and social challenge of our time', but during his term he did not introduce any key legislation. The Australian response to this issue over the last decade has largely reflected the political views of the government of the day and often comes into conflict with international perspectives. The Gillard government introduced the *Clean Energy Act 2011* (Cth), which placed a pricing mechanism on carbon emissions (polluters paid a 'carbon tax'). Tony Abbott repealed this legislation in 2014, making Australia the first nation to introduce a carbon tax and then repeal it. It has been replaced with the Direct Action Plan, which has the Emissions Reduction Fund as its centrepiece and involves providing financial incentives for polluters to reduce emissions.

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Research 11.8

Research a significant Australian environmental law case. Identify whether or not international initiatives played a part in this case and provide a summary of the events that unfolded.

Enforcement of environmental laws

The enforcement of laws aimed at global environmental protection is another way in which Australia (at both federal and state levels) has responded to global initiatives. The case of *EPA v Gardner* (see the 'In Court' box on page 316) highlighted the growing recognition of 'environmental crimes' relating to pollution and toxic waste in domestic jurisdictions.

Ratification of international laws

As discussed, there is a vast array of international laws relating to global environmental protection. The key international laws that Australia has ratified are shown in Table 11.2 on page 324.

Legal Links

According to the NGO Global Financial Integrity, the illegal trade in wildlife is third behind drugs and human trafficking in scope and value internationally. In 2014, it was valued at US$22 billion.

The Department of the Environment covers the situation in Australia at http://cambridge.edu.au/redirect/?id=6340.

Conclusion

Australia has been proactive in enacting environmental legislation, including responses to global problems, when it identifies an issue as one that directly affects its own territory and citizens. Resolving the tension between national sovereignty and international environmental protection may require individuals and governments to see their own interests either as inextricably bound up with those of other peoples and countries, or as being directly affected by a particular environmental threat. As Australia's population is located primarily around the coast, it may see global warming and rising sea

Case Study

Illegal wildlife imports and exports

The stealing (and destruction) of biodiversity has been another activity that has been routinely monitored – and where the law has been enforced. For example, in November 2004 a Sydney man was caught at the airport with 23 parrot eggs hidden in his clothing. He was charged with attempting to export regulated native specimens. The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) sets the maximum penalty for wildlife smuggling as 10 years' jail and/or a $110 000 fine. This is an example of domestic enforcement of CITES.

Over 17 000 illegal wildlife imports and exports were captured in Australia between 1999 and 2007: 43% were reptiles, 26% were birds and 11% were native plants.

Figure 11.18 Parrot eggs contained in a specially designed vest

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Table 11.2 Key international laws relating to global environmental protection ratified by Australia

International law	Date of Australian ratification	Australian law reflecting international obligations
Ramsar Convention	1975	*Environment Protection and Biodiversity Conservation Act 1999* (Cth), in conjunction with the National Framework and Guidance for Describing the Ecological Character of Australia's Ramsar Wetlands
CITES	1976	Initially by the *Wildlife Protection (Regulation of Imports and Exports) Act 1982* (Cth), but since 2002 by Part 13A of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)
Montreal Protocol	1989	*Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth)
Biodiversity Convention	1993	*Environment Protection and Biodiversity Conservation Act 1999* (Cth). Australia's first national report was produced in June 2009 and can be viewed via http://cambridge.edu.au/redirect/?id=6341.
UN Climate Change Convention and Kyoto Protocol	UNCCC in 1994 and Kyoto in 2007	Following ratification of the Kyoto Protocol the Australian Government has attempted to introduce measures to reduce national greenhouse gas emissions. The Gillard government's carbon tax was repealed in 2014 and replaced by the Direct Action Plan.

levels as urgent and immediate threats, but, as we have seen with the climate change debate, pressure from the international arena has little impact if it is not Australia's best interests.

Review 11.12

1. Describe the changes in Australian Government policy towards climate change since the 1990s.
2. Refer to Table 11.2 and explain, using examples, why international law is of no effect until enacted into domestic legislation.
3. Explain why the stealing and/or destruction of biodiversity needs to be monitored.

11.12 Contemporary issue: Barriers to achieving an international response to global environmental protection

A cohesive, coordinated, global and holistic approach based on ESD is the most effective way to achieve global environmental protection. Such a large-scale international response is the ideal, but what is attainable is a different matter. A number of barriers limit a coordinated international response and the most obvious one is sovereignty. A state's own unique circumstances can make it very reluctant to comply with international initiatives. The UN is in the difficult position of having to respect state sovereignty – as mandated by its charter – while serving as the means of achieving international cooperation.

When states work collaboratively the results can be extremely positive, as evidenced by the results of the Montreal Protocol on ozone depletion. The reluctance of states to take decisive action on climate change over the past two decades suggests that they have found the short-term costs too high, and have had insufficient incentives to work together for long-term goals. States were generally more than willing

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Figure 11.19 Countries do not always agree on what is fair; this can create difficulty in creating a globally accepted approach to issues.

to sign and ratify the *UN Climate Change Convention* in 1992, but once legally binding targets were proposed, many refused to undertake the ratification process. This situation was further exacerbated by the emergence of so-called climate change sceptics and the pressure of the Global Financial Crisis.

Environmental processes and natural phenomena are different from political and other social events; they are arguably more difficult to deal with in the process of negotiation and compromise that constitutes policy-making. Environmental policy-makers must have at least some understanding of the science supporting the instruments they propose to enact, and must be able to resolve various tensions between the ethical and political implications of the precautionary principle.

The UN is large and labyrinthine, and there is some lack of coordination between the General Assembly and the other organs and agencies and between the various development funds and programs. These all may be factors in international bodies' difficulties in influencing national laws and policies.

There is also the inherent difficulty of enforcing international law.

International agreements are often geared to specific issues considered in relative isolation. When they are not, as in the framework conventions arising out of international conferences, there is a greater potential for fragmentation and disagreement about the various issues, resulting only in soft law.

The treaty-making process is time-consuming. Ratification by the parties requires persuasion at the domestic level, as governments attempt to create support for the treaty and consensus among their citizens.

Other challenges for international environmental protection stem from the fact that the world is much more complex than it was when the UN was formed. Development, consumers' expectations and population growth all contribute to increased competition for natural resources. In addition, corporations exert a much greater influence on domestic economic and social policies today, and governments must find ways of making sustainability attractive to entities whose chief objective is profit or political survival.

Conclusion

The key barrier to achieving international environmental protection is resolving the tension between the need for coordinated action and states' wishes to protect their own interests. It is universally recognised that deep cuts in greenhouse gas emissions must be made, but who should shoulder the burden? Developing and industrialised countries have different views on what is fair. Frequently, in order to simply get a global response, conditions and enforcement mechanisms are watered down. Is a soft law better than no agreement at all?

Review 11.13

1. Outline the barriers that limit a coordinated international response to global environmental protection.
2. Explain how collaboration between states can positively influence global environmental protection.
3. Suggest why international bodies have difficulty influencing national laws and policies.

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Chapter summary

- Environmental problems, like economic development, have become globalised.
- Current laws and policies recognise that ecologically sustainable development (ESD) should be the basis of all efforts aimed at global environmental protection.
- The four key elements of ESD are biodiversity, intergenerational equity, intragenerational equity and the precautionary principle.
- The UN and its various agencies (UNEP and UNESCO) have a major role in promoting ESD internationally.
- A vast array of international instruments (both hard and soft law) have focused on global environmental protection.
- The two major international conferences on the environment have been Stockholm (1972) and Rio (1992). The Rio Conference resulted in several influential instruments, including the *Rio Declaration*, Agenda 21, the *UN Framework Convention on Climate Change* and the *UN Convention on Biological Diversity*.
- Other international conferences focus primarily on a single treaty and elaborate its provisions or negotiate binding commitments, formulated in a protocol.
- In addition to ad hoc tribunals, the ICJ is the main forum for resolving environmental disputes between states.
- Intergovernmental and non-government organisations (IGOs and NGOs) play a pivotal role in publicising, educating and promoting global environmental issues.
- Australia's federal structure and power over environmental issues are determined by the *Constitution*. The environment is a residual power and thus the states have the bulk of environmental law-making power, but the precedent set in the Tasmanian Dam case has given the federal government the authority to introduce environmental laws of international importance.
- State sovereignty is a key factor in the success of international initiatives. States will act in their own best interests and this can both assist and impede international law.

Questions

Multiple-choice questions

1 What element of ESD refers to looking after the needs of future generations?

A The precautionary principle
B Biodiversity
C Intergenerational equity
D Intragenerational equity

2 The *Stockholm Declaration*, the *Rio Declaration*, the Copenhagen Accord, Agenda 21 and the outcomes document from Rio+20 are all considered:

A hard law because they contain enforcement mechanisms
B hard law because they were all formulated at UN 'mega conferences'
C soft law because they do not contain enforcement mechanisms
D soft law because they only come into effect after they have been ratified by states

3 Which court has the jurisdiction to resolve disputes between states concerning environmental matters?

A Land and Environment Court
B International Court of Justice
C High Court of Australia
D Intergovernmental Panel on Climate Change

4 Which of the following statements is true?

A In Australia, the environment is considered a residual power and thus the federal parliament has jurisdiction.
B In Australia, the environment is considered a residual power and thus the states have jurisdiction but the federal government can use its legislative powers from s 51 of the *Constitution* to override the states in appropriate circumstances.

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C In Australia, the environment is an exclusive power of the federal government but the federal government has delegated this authority to the states.

D In Australia, the environment is a legislative power of the federal government through s 51 of the *Constitution*.

5 If the UN General Assembly passed a resolution that all nations must reduce greenhouse gas emissions by 25% over the next decade, what would its impact be in Australia?

A It would bind the Commonwealth Government immediately.

B It would have no effect until enacted into domestic legislation.

C It would require Australia to ratify the relevant treaty to take effect.

D It would have no effect until ratified by all nations.

Chapter summary questions

1 Use examples to explain the operation of international law in Australia.

2 Outline how state sovereignty can limit the effectiveness of international instruments aimed at global environmental protection.

3 Use examples to illustrate how soft law can protect the global environment.

4 With reference to specific cases, outline the effectiveness of the ICJ in resolving environmental disputes.

5 Explain how the world's demand for resources conflicts with the need for global environmental protection.

Extended-response questions

1 Choose a global environmental issue (for example, depletion of food resources, climate change or industrial pollution) and discuss past and current attempts to remedy it. Evaluate the effectiveness of these attempts.

2 Discuss the elements of ecologically sustainable development. Explain why it is considered the best path for global environmental protection and outline the factors that form a barrier to its implementation.

3 Explain the conflict between increasing standards of living and environmental protection. Suggest strategies for resolving this conflict. What agencies should take an active role? Would the UN (or its agencies), national governments, intergovernmental organisations or some other body be most effective?

4 Discuss the relationship between domestic law and international law. What changes could feasibly be made at either national or international levels to strengthen global environmental protection?

5 Assess the role of law reform in protecting the global environment.

6 Choose one global environmental issue (such as climate change, exploitation of fishing or whaling stocks, loss of biodiversity, transboundary pollution and depletion of non-renewable resources) and:

a Describe the issue and why it is a concern.

b Outline any international law/s aimed at resolving this issue.

c Assess the effectiveness of these international responses.

d Explain the significance of any ICJ cases that addressed this issue.

e Describe how Australia has responded to this issue (indicate any domestic legislation that applies to this issue).

f Explain the impact of any NGOs that have taken action over this issue.

In Section III of the HSC Legal Studies examination you will be expected to complete an extended response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended response questions can be found at http://cambridge.edu.au/redirect/?id=6342. Refer to these criteria when planning and writing your response.

GO

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Themes and challenges

The effect of state sovereignty on international cooperation and the resolution of conflict regarding environmental protection

- Sovereignty plays a crucial role in determining nation states' cooperation with international initiatives.
- Sovereignty is a fundamental right of nation states, as is clearly stated in art 2 of the charter of the UN.
- Nation states may sign and ratify international agreements, but in Australia they are of no effect until enacted into domestic law.
- Consequently, international law aimed at environmental protection relies heavily on the willingness of nation states to act in accordance with global needs, or their perception that it is in their own best interests to do so.

Issues of compliance and non-compliance

- The means of enforcing compliance with international agreements are limited. Without the enforcement mechanisms that exist at a domestic level (see *EPA v Gardner*), compliance at an international level often involves intense negotiations and compromise (as occurred in the ICJ case of *Ecuador v Columbia*).
- The means of enforcing compliance (for example, by the ICJ) are limited, yet enforcement is the cornerstone of the law's effectiveness.
- Both individuals and nations decide to comply or not with the law depending on a range of factors, such as ethical considerations, fear of consequences and what is in their best interests.
- Overcoming the effects of climate change by reducing greenhouse gas emissions is clearly in everyone's best interests, but international compliance is limited by economic considerations.
- Differences in the circumstances of developed and developing nations means that they have different perceptions of a just and fair agreement that will limit industrial development.

The effect of changing values on environmental protection

- People's attitudes towards environmental protection have changed radically over the past 50 years, but these changes have not been uniform across the planet. Cultural characteristics as well as material and economic circumstances are different.
- Information about the environment has influenced these changes in values and attitudes. Environmental catastrophes, species extinction, dwindling resource supplies and pollution have a strong effect on people's wellbeing. Communication technology and the media allow people to view events in distant locations, and can strongly influence the way they view such issues.
- Social attitudes give rise to pressure placed on governments and businesses by voters and consumers to implement change – for example, see the anti-CSG, the *Brent Spar* and the Tasmanian Dam protests.
- A major example of changing values is the emergence of ESD as the basis for environmental protection, particularly the idea of considering future generations when making decisions involving the environment. Since the Global Financial Crisis of 2008, there has been a shift in the priorities placed on global environmental protection as people feel that economic concerns override the need to make allowances for future contingencies.

The role of law reform in protecting the global environment

- Scientific data indicates that there are significant reasons to change current practice, but the law reform process often reflects priorities that are inconsistent with such data.
- With respect to the environment, the process of law reform means that both domestic and international law must be continually updated to take into account factors such as:
  - changing values that will influence government actions

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  - resource depletion and corresponding changes in the prices and markets for non-renewable resources
  - the failure of existing law
  - new technology.
- An example of attempted international law reform is evident with the annual Conference of the Parties (COP) for the *Climate Change Convention*. Paris 2015 was the 21st meeting, which originated with the *Climate Change Convention* created in Rio in 1992.

The effectiveness of legal and non-legal responses in protecting the environment

- The general objective of non-legal efforts towards global environmental protection is to influence the legal system. Non-legal efforts such as the campaigns of NGOs are generally more effective when they gain widespread community support so that genuine pressure can be placed on decision-makers (governments and corporations) to introduce measures aimed at protecting the environment.
- Agenda 21 is credited with being the blueprint for the 21st century, but it is only soft law. Some people consider it to be of immense importance as a guide, while others claim that it is impotent because it lacks any form of enforcement process. The effectiveness of international legal measures must be assessed according to their stated aims (for example, whether they contain achievable targets).
- The Montreal Protocol and CITES are considered the most successful international legal responses aimed at global environmental protection.

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Chapter 12
Option 3: Family

25% of course time

Principal focus

While examining current issues and examples, students will be investigating the role of the legal system in regard to family relationships and how effective the law is in achieving justice in this area.

Themes and challenges

Themes and challenges to be incorporated throughout this option include:

- using the law to encourage cooperation and resolve conflict in the family context
- dealing with compliance and non-compliance
- changing values in the community resulting in changes to family law
- how family law reform attempts to achieve just outcomes for both family members and society
- effectively achieving just outcomes for families through legal and non-legal means.

At the end of this chapter, you will find a summary of the themes and challenges relating to family. The summary draws on key points from the text and links them to each of the themes and challenges. This summary is designed to help you revise for the external examination.

Chapter objectives

In this chapter, students will:

- identify and apply legal concepts and terminology
- communicate legal information using well-structured and logical arguments
- discuss the problems associated with defining 'family' and how the concept of family is changing
- discuss how federal and state family law jurisdiction differs
- explain the requirements of a valid marriage and the changing nature of 'marriage'
- discuss the legal rights and obligations of family members, including rights derived from international law
- understand and outline the legal processes required in dealing with family relationship problems
- evaluate how effective the law is in protecting victims of domestic violence
- discuss the role of media and other non-government organisations
- evaluate the effectiveness of the law in achieving just outcomes for family members
- identify and investigate contemporary issues that relate to family law and evaluate the effectiveness of legal and non-legal responses to these issues.

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Key terms/vocabulary

adoption
ancestor
annulment
Apprehended Domestic Violence Order (ADVO)
Apprehended Violence Order (AVO)
assault
autonomy
blended family
breach
celebrant
compensation
decree absolute
decree nisi
de facto relationship
descendant
divorce
domestic violence
ex-nuptial
extended family
injunction
marriage
neglect
nullify
nuptial
polygamous
referral of powers
relinquishing parent
testator

Relevant law

IMPORTANT LEGISLATION

Crimes Act 1900 (NSW)
Marriage Act 1961 (Cth)
Family Law Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Property (Relationships) Act 1984 (NSW)
Children (Criminal Proceedings) Act 1987 (NSW)
Children's Court Act 1987 (NSW)
Child Support (Registration and Collection) Act 1988 (Cth)
Status of Children Act 1996 (NSW)
Children (Protection and Parental Responsibility) Act 1997 (NSW)
Young Offenders Act 1997 (NSW)
Children and Young Persons (Care and Protection) Act 1998 (NSW)
Adoption Act 2000 (NSW)
Succession Act 2006 (NSW)
Crimes (Domestic and Personal Violence) Act 2007 (NSW)
Surrogacy Act 2010 (NSW)
Bail Act 2013 (NSW)
Surveillance Devices Amendment (Police Body-Worn Video) Act 2014 (NSW)
Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption

SOME AMENDING ACTS

Family Law Reform Act 1995 (Cth)
Marriage Amendment Act 2004 (Cth)
Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth)
Adoption Amendment Act 2008 (NSW)
Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008 (Cth)
Miscellaneous Acts Amendment (Same Sex Relationships) Act 2008 (NSW)
Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008 (Cth)
Succession Amendment (Family Provision) Act 2008 (NSW)
Children and Young Persons (Care and Protection) Act Amendment 2009 (NSW)
Succession Amendment (Intestacy) Act 2009 (NSW)
Adoption Amendment (Same Sex Couples) Act 2010 (NSW)
Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth)
Child Protection Legislation Amendment Act 2014 (NSW)

SIGNIFICANT CASES

Hyde v Hyde and Woodmansee (1866) LR 1 P&D 130
Di Mento v Visalli (1973) 1 ALR 352
B v J (1996) 21 FamLR 212
C and M [2006] FamCA 212
Re Michael: Surrogacy Arrangements [2009] FamCA 691

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Legal oddity

A couple was divorced in July 1964, but the wife passed away in November of the same year, before the decree had been made final. The following August, a judge ordered the man to present his late wife's entire estate … including the jewellery that had been buried with her. This meant that he had to either exhume her body to get the jewellery, or make up the thousands of dollars out of his own pocket.

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12.1 The nature of family law

The concept of family law

Family law is a wide-ranging area of law governing behaviour in the context of the family, including rights and responsibilities regarding children and the disposition of property when a marriage breaks down.

The main function of the family is the care and protection of its members. Law governs family relationships to ensure that people in family relationships are financially secure and that any children of that relationship are cared for. The more traditional and easily recognisable family relationship is one based on **marriage**. However, as our society has changed, so too has the structure of families, reflecting a great diversity in domestic relationships. The many different family arrangements in Australian society include Aboriginal and Torres Strait Islander customary marriages, **de facto relationships**, same-sex relationships, single-parent families, **blended families** and **extended families**. Family law has continued to change in order to extend protection to all members of these alternative family relationships.

marriage
the union of a man and a woman to the exclusion of all others, voluntarily entered into for life

de facto relationship
a relationship where the partners act as a married couple but are not legally married

blended family
a family that is created when a parent remarries; it includes the stepmother or stepfather and stepchildren

extended family
a family that includes individuals related through marriage or parentage and not limited to one couple and their children; in some cultures, close family friends are regarded as members of the extended family

Under s 51(xxi) and (xxii) of the *Australian Constitution*, the federal government has the power and authority to make laws governing marriage and divorce. The *Marriage Act 1961* (Cth) established the legal requirements of a valid marriage, and the *Family Law Act 1975* (Cth) sets out the legal duties and obligations that a marriage creates. The principal aim of the *Family Law Act* was to reform the law governing the dissolution (end) of a marriage.

In the past, only state parliaments could pass legislation about de facto relationships. However, most state governments have now **referred their powers** to the Commonwealth with respect to both parenting disputes and property disputes, in the contexts of a marriage and a de facto relationship. After the passage of the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), questions regarding property division and de facto spousal maintenance are now determined under the *Family Law Act 1975* (Cth).

referral of powers
the giving up of a state's legislative powers in a certain area to the Commonwealth by passing an Act, pursuant to s 51(xxxvii) of the *Australian Constitution*

As of July 2010, de facto couples who usually reside in South Australia are able to apply to the Family Court to determine property settlements. Western Australia has continued to have a separate Family Court of Western Australia, which deals with both state and federal family law issues.

Although family law is concerned with ensuring that the best interests of the child are secured and that individuals meet their family obligations, it is also about family relationships. For this reason, family law focuses more on conciliation and on encouraging compliance than on the use of sanctions or coercion to enforce compliance.

Legal requirements of marriage

Marriage is a legal institution, and individuals who intend to marry must take into consideration the legal consequences of this union. When two people marry, they make a promise, in front of witnesses, to provide and care for one another. The law has evolved to enforce this promise, and to protect the rights of both parties and the rights of any children born during the relationship.

The legal definition of marriage

The descriptions of marriage in Australian legislation are based on the definition in the English case of *Hyde v Hyde and Woodmansee* (1866) LR 1 P&D 130. Lord Penzance, in his decision, stated that a marriage is the 'voluntary union for life of one man and one woman, to the exclusion of all others' (that is, a formal, monogamous and heterosexual union).

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These elements can be explained as follows:

- Marriage must be voluntarily entered into. The marriage is not legally binding if one of the parties was forced or tricked into the marriage.
- Marriage, by definition, is for life. However, a married couple do have the right to divorce, thereby ending the marriage legally, before the death of either party.
- The specification of one man and one woman indicates that the parties to the marriage must be of different sexes.
- 'To the exclusion of all others' means that marriage is the union of two people only. Some cultures and societies do allow individuals to have more than one spouse – to have **polygamous** relationships. However, polygamous marriages are not recognised in Australia and are void if entered into within Australia.

polygamous
having more than one wife or husband at the same time

Requirements for a valid marriage

Certain requirements must be met if a marriage is to be legally valid. These requirements, found in the *Marriage Act 1961* (Cth), are discussed next.

Figure 12.1 According to the *Marriage Act 1961* (Cth), marriage is 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life'.

Gender

In 2004, the Commonwealth Government passed the *Marriage Amendment Act 2004* (Cth) to add the above definition of marriage to the *Marriage Act 1961* (Cth), which had not previously contained one. Section 5(1) of the Act defines marriage as 'the union of a man and a woman to the exclusion of all others, voluntarily entered into for life', and s 88EA explicitly states that a same-sex marriage performed in another country will not be recognised in Australia.

Marriageable age

A person may marry at the age of 18 years (s 11). If either of the parties wanting to marry is between the ages of 16 and 18, they must apply to a judge or magistrate for an order authorising the marriage (s 12). Such an order will only be granted in circumstances that are sufficiently 'exceptional and unusual' (for example, if the couple's parents consent and/or if the couple are shown to be mature and financially independent). Pregnancy alone will not guarantee an order. No person under 16 years can marry.

Prohibited relationships

A person cannot marry anyone who is closely related either by 'blood' (consanguinity) or by marriage (affinity). This means that a person cannot marry their **descendant**, **ancestor**, brother or sister. This also applies to half-siblings and to adopted siblings, including adopted descendants and ancestors who are related to the person by marriage. However, a person can marry her uncle or his aunt, his niece or her nephew, or a first cousin.

descendant
a person who by genetics or adoption follows the family line of another, such as a child, grandchild or great-grandchild

ancestor
a person from whom someone is descended, on either parent's side, such as a parent, grandparent or great-grandparent

Notice of marriage

A couple intending to be married must complete a Notice of Intended Marriage form and give it to the authorised marriage **celebrant** who will conduct the ceremony, no earlier than 18 months before the marriage and no later than one month and one day before it. The notice must be in writing and be

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signed by both parties in the presence of a witness. Parties who intend to marry must provide proof of age, usually their birth certificates. If either party has been married previously, they must provide evidence that that marriage has been dissolved by death of the spouse or divorce.

celebrant
a person who is authorised to perform a civil or religious marriage ceremony

Requirements for a valid marriage ceremony

The marriage ceremony must meet set criteria. An authorised marriage celebrant must perform the ceremony and there must be two witnesses, both aged over 18. There are no formal requirements concerning the attire, the structure of the ceremony or the words of the ceremony. If the marriage ceremony satisfies the conditions in Parts IV and V of the *Marriage Act*, then it is valid.

The celebrant issues a marriage certificate after the ceremony is completed. This document is legal proof that the ceremony took place according to law. The marriage celebrant usually provides three copies of the certificate. The celebrant, husband, wife and two witnesses must each sign all copies of the marriage certificate. One copy must be lodged at the state Registry of Births, Deaths and Marriages within 14 days of the date of the marriage.

Void marriages

A marriage can be declared void, or invalid, if it fails to meet the definition of marriage – if, for example:

- the parties were of the same sex
- consent was not freely given by one of the parties
- one or both parties at the time of the marriage were married to someone else.

A marriage may also become void if the marriage fails to meet the criteria for a valid marriage – if, for instance:

- one or both parties were too young
- the parties are too closely related, by blood or marriage
- the marriage did not meet the requirements set out in the *Marriage Act 1961* (Cth).

If a marriage is found to be invalid, the court can **nullify** the marriage. This **annulment** means that the marriage, in the eyes of the law, is deemed to have never taken place because it was illegal.

nullify
to declare legally void or invalid

annulment
a declaration by a court that a supposed marriage is in fact void

However, any children born during the marriage are considered to be the legitimate children of the marriage.

In Court

***Di Mento v Visalli* (1973) 1 ALR 352**

Mattia Di Mento, who was 14 years old at the time, was living in Sicily with her parents when she was kidnapped by Visalli, a 20-year-old man. Visalli repeatedly asked her to marry him, but she refused. Di Mento was eventually released; however, her father told her that he would shoot her if she did not marry Visalli.

The father argued that if she did not marry him the family's reputation would be ruined. Di Mento agreed and married Visalli. Two years later, she gave birth to a child, and when the child was a month old Visalli left her, never to return.

Di Mento emigrated to Australia and sought to have the marriage annulled on the grounds that she did not voluntarily give her consent. The court held that the marriage was void because it was obtained by duress, and noted that the Act does not require that the duress exerted be that of the spouse; in this case, it was exerted by Di Mento's father.

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Review 12.1

1. Define 'family' and explain why the family is considered both a legal and social institution.
2. Explain how families have changed. Provide examples to illustrate your answer.
3. Explain the meaning of each part of Lord Penzance's definition of 'marriage' and use examples to illustrate each part.
4. Define 'prohibited relationship', and provide examples of who a person is and is not permitted to marry.
5. Outline the reasons why a marriage may be declared invalid.

Alternative family relationships

Aboriginal and Torres Strait Islander peoples' customary law marriages

Relationships within Aboriginal and Torres Strait Islander communities are bound by traditions and enforced through customary law. Children may be betrothed at an early age and parents or elders generally arrange marriages. Typically, such customary law marriages do not conform to the requirements of a valid marriage under the *Marriage Act 1961* (Cth). These marriages are generally not legally recorded, or registered with the relevant authorities. The law, therefore, does not formally recognise Aboriginal and Torres Strait Islander customary law marriages as having any legal standing.

In 1986, the Australian Law Reform Commission tabled a report (*Recognition of Aboriginal Customary Laws*) in parliament dealing with this. The part of the report focusing on marriage, children and property settlement recommended that traditional marriages of Indigenous Australians should be recognised and given legal status in order to:

- ensure the legitimacy of the children of those relationships
- ensure that any child of those relationships will be given the same protection as children of married couples under adoption and welfare laws
- protect the right of inheritance of the surviving spouse if their partner dies without a will (intestate)
- allow a surviving spouse to claim any **compensation** payments owing to their partner, including workers' compensation
- allow the couple to claim the same tax benefits as those that are currently available to de facto or married couples.

compensation
a monetary payment made to a person to make amends for any loss, injury or damage to property they have suffered

The federal government's response to the report, in 1995, suggested that most of the recommendations were more appropriate for implementation in state and territory law. However, the circumstances of Indigenous children are specifically provided for in legislation such as the *Family Law Act 1975* (Cth); for example, s 61F states that a court making decisions about parental responsibility must take into account kinship and the Aboriginal or Torres Strait Islander culture of the child.

The state parliaments have addressed some of the recommendations since then, including recognition of traditional marriages for limited purposes.

Children, **ex-nuptial** or **nuptial**, are protected under the *Family Law Act 1975* (Cth) and the *Status of Children Act 1996* (NSW). If a Aboriginal or Torres Strait Islander customary marriage does break down, the Family Court has the power to determine an appropriate parenting order, including maintenance arrangements and deciding which parent will be given parental responsibility for the child. The orders are made on the basis of what the court determines is in the 'best interests' of the child, and of the child's need to maintain a connection with Aboriginal or Torres Strait Islander culture and traditions.

ex-nuptial
a Latin term meaning 'outside marriage'; an ex-nuptial child is a child born outside a marriage

nuptial
a Latin term meaning 'marriage'; a nuptial child is a child born within a marriage

Single-parent families

The increase in the number of divorces, the changes in social attitudes, improved welfare provisions and greater financial independence of women have all contributed to the growth of single-parent families.

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Figure 12.2 Single-parent families are becoming more common.

According to the Australian Bureau of Statistics, in 2012–13 there were just over 6.7 million families in Australia; of these, 15% were single-parent families. The majority of these families were single-mother families (81% of one-parent families). One in six children (18%) lives in a single-parent family.

In addition to the many social issues confronting single parents, they may face difficulties in accessing legal advice, pursuing their rights in court and obtaining adequate legal protection. The high cost of taking a matter to court may discourage single parents from doing so. The Child Support Scheme was introduced to enforce maintenance orders on parents who do not reside with their dependent children. The scheme, which was originally part of the Australian Taxation Office, ensures that parents fulfil their responsibility towards their children.

The *Child Support (Registration and Collection) Act 1988* (Cth) shifted the collection and enforcement of child support from the courts to an administrative system, and the *Child Support (Assessment) Act 1989* (Cth) introduced a formula for the calculation of child support owed, again using an administrative rather than judicial procedure.

Legal Links

For more information on changes to family structures see 'Australian households and families', Australian Family Trends No. 4, July 2013 at http://cambridge.edu.au/redirect/?id=6343.

Blended families

When a parent and their children from a former marriage or relationship live with another parent and children in similar circumstances, the result is considered a blended family. The family includes the stepmother or stepfather and stepchildren. One out of every four registered marriages in Australia in 2013 involved individuals who were marrying for the second time. Nearly half of those who have been divorced remarry.

Although a step-parent may be viewed as the parent of their partner's child, step-parents do not have the same legal responsibilities for that child. A step-parent does not have an automatic right or duty to discipline their partner's child or to make day-to-day decisions concerning the health and welfare of the child. A step-parent is not responsible for the maintenance or support of a partner's child; the financial obligations towards a child remain with the child's parents. However, a court may make an order requiring a step-parent to pay financial support if satisfied that the step-parent has a duty to maintain the child (*Family Law Act 1975* (Cth) ss 66D, 66M, 66N). A step-parent may also become financially responsible for their partner's children if the family has existed for a long time and the natural parent is dead or cannot be found.

Step-parents intending to adopt must first apply to the Family Court (*Family Law Act 1975* (Cth) s 60G). Upon approval, the step-parent must then apply to the state Supreme Court for an adoption order. For such an order to be granted in New South Wales, the step-parent must have lived with the child and the child's natural or adoptive parent for no less than two years, and the child must be at least five years old (*Adoption Act 2000* (NSW) s 30). If a step-parent does adopt their partner's children, these children will have the same legal rights as children born naturally into the parental relationship.

Stepchildren do not have an automatic claim to the estate of their step-parent if the step-parent dies intestate. In order to claim successfully against the estate of a step-parent, stepchildren must prove that they were financially dependent upon the step-parent. Stepchildren in this situation may apply for a family provision order (*Succession Act 2006* (NSW) s 57(1)(e)).

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Review 12.2

1. Discuss the status of traditional Aboriginal and Torres Strait Islander marriages under federal and state law.
2. Identify some challenges for single-parent families and ways the federal government has tried to address these challenges.
3. Discuss the rights and obligations of a step-parent to stepchildren under: (a) federal law; and (b) state law.

De facto relationships

A de facto relationship is defined in s 4AA of the *Family Law Act 1975* (Cth) as one in which the partners:

- are not married to each other by law
- are not related by family, and
- are living together on a genuine domestic basis as a couple.

According to the Australian Bureau of Statistics, in 2013 over 76% of couples who marry have lived together prior to marriage. De facto relationships also include same-sex couples.

Same-sex relationships

State legislation

The law recognises relationships that exist outside the traditional concept of marriage. The *De Facto Relationships Act 1984* (NSW) was amended by the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and renamed the *Property (Relationships) Act 1984* (NSW). The *Property (Relationships) Act 1984* (NSW) recognises same-sex relationships as having the same legal standing as heterosexual de facto relationships, and provides the same protection. Section 4 of this Act defines a de facto relationship as 'a relationship between two adult persons who live together as a couple, and who are not married to one another or related by family'. The Act provides protection to people in same-sex de facto relationships in the areas of property division, inheritance and decision-making in illness and after death.

The definition of 'de facto' in this Act also applies to people making an application for family provision under the *Succession Act 2008* (NSW), and to entitlements of the de facto partners of individuals who died intestate, under the laws amended by the *Succession Amendment (Intestacy) Act 2009* (NSW).

Figure 12.3 Same-sex relationships have the same legal standing as de facto relationships.

Federal legislation

As discussed at the beginning of this chapter, the 'marriage power' is one of the enumerated powers of the Commonwealth Parliament under the *Australian Constitution*. However, as a result of states referring their powers to the Commonwealth, the *Family Law Act 1975* (Cth), as amended by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), governs property settlements and maintenance orders for de facto couples who are separating. The federal legislation applies to couples whose relationship broke down on or after 1 March 2009, and to those whose relationship broke down earlier if they choose to be bound by federal rather than state law in this matter. Matters relating to the children of de facto relationships are heard in the Family Court.

Section 4AA(5) of the *Family Law Act 1975* (Cth), inserted in March 2010, states that a de facto relationship can exist whether the people are of the same sex or different sexes. Therefore, the *Family Law Act* now governs property settlements between separating same-sex couples.

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Under s 18 of the *Evidence Act 1995* (Cth) and s 18 of the New South Wales and Victorian Evidence Acts, which are modelled on that Act (the Uniform Evidence Acts), a de facto partner in either a same-sex or opposite-sex relationship cannot be compelled to give evidence against their partner in certain criminal proceedings. Not all states have such provisions in their Evidence Acts, however.

In response to the Australian Human Rights Commission's report *Same-Sex: Same Entitlements: A National Inquiry into Discrimination against People in Same-Sex Relationships: Financial and Work-Related Entitlements and Benefits* (2007), 84 Commonwealth Acts were amended by the federal government in 2008 to eliminate differential treatment of same-sex couples. These Acts included laws about tax, superannuation, Medicare, aged care, veterans' entitlements, workers' compensation, employment entitlements, family law and child support.

While these amendments gave same-sex couples most of the same rights as de facto heterosexual and married couples, no federal government has been in favour of amending the *Marriage Act 1961* (Cth) to allow same-sex marriage. A bill that would have done so, the Marriage Equality Amendment Bill 2009, was introduced by the Greens but was defeated in the Senate in February 2010. Since then, a number of state and territory governments (New South Wales, South Australia, Tasmania and the Australian Capital Territory) have expressed support for the legalisation of same-sex marriage. However, 'marriage' remains within the federal government's jurisdiction, so even though a growing number of states support same-sex marriage, it will not become legal until the federal government changes the current definition of marriage. A growing number of countries have legalised same-sex marriage, including Canada, France, New Zealand, Norway and the United Kingdom.

Polygamous marriages

A polygamous marriage is a relationship that is formed when an individual marries more than one person. While some cultures and religions permit polygamous marriages, polygamous marriages are not legal in Australia. However, under s 6 of the *Family Law Act 1975* (Cth), a polygamous marriage that was entered into overseas is deemed to be a marriage for the purpose of children's matters, property settlements and other court proceedings under the *Family Law Act*. This means that if an illegal polygamous marriage breaks down, the parties may seek orders for child and/or spousal maintenance, division of property, and parenting plans. A party can also seek domestic violence orders.

Review 12.3

1. Define 'de facto relationship'.
2. Explain the status of same-sex relationships with respect to:
   - **a** property settlements
   - **b** wills
   - **c** giving evidence against one's partner in a criminal proceeding
   - **d** superannuation and identify whether the matter is governed by state or federal law.
3. 'Same-sex marriage is a human rights issue.' Discuss.

Legal rights and obligations of parents and children

Within the family, the rights of the child are paramount, because children are seen as the most vulnerable members of the family and as such require the greatest legal protection.

As noted above, the *Family Law Act 1975* (Cth) governs proceedings for a divorce or annulment of a marriage, as well as maintenance and property proceedings, whether the parties are married or in the process of ending the marriage. Part VII of the Act governs proceedings in relation to children, particularly parenting arrangements. However, most of the laws relating to the care and protection of children are at state or territory level.

Children have the obligation to obey the law just as adults do, though the procedures for enforcing those laws are different from the legal mechanisms that apply to adults.

Some of the Acts concerning children in New South Wales are listed in Table 12.1.

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Table 12.1 Legislation concerning children in New South Wales

Name of the Act	Area covered by the Act
Adoption Act 2000 (NSW)	Adoption of children and access to information relating to adoption
Child Protection (Offenders Registration) Act 2000 (NSW)	Requirements of people convicted of certain offences against children, including the requirement to register with the police upon their release into the community and to provide specified information about themselves to police
Children (Criminal Proceedings) Act 1987 (NSW)	Sets out court procedures in dealing with children who commit crime
Children (Protection and Parental Responsibility) Act 1997 (NSW)	Responsibility of parents for the behaviour of their children; greater police powers in respect of children, such as removal of children from public places and returning them to their parents' residence
Children and Young Persons (Care and Protection) Act 1998 (NSW) *Children and Young Persons (Care and Protection) Amendment Act 2009* (NSW)	Responsibilities of Family and Community Services (in New South Wales) and other agencies regarding the care and protection of children and young people who are at risk of harm or are being abused This act was amended in 2009 to make further provision for out-of-home care agencies.
Children's Court Act 1987 (NSW)	Establishment of a Children's Court of NSW; its jurisdiction and functions
Status of Children Act 1996 (NSW)	Ex-nuptial children are recognised as having the same rights as children born in a marriage
Young Offenders Act 1997 (NSW)	Procedures for dealing with child offenders, including youth justice conferences, cautions and warnings; court proceedings are seen as a last resort

Parental care

Rights derived from international law

The rights of children are articulated and protected by the *UN Convention on the Rights of the Child* (CROC), which was adopted by the United Nations (UN) in 1989 and has been signed and ratified by all 194 UN member states except Somalia, South Sudan and the United States. The convention declares that people under 18 years of age must be protected from violence, discrimination, exploitation and neglect, and that states must act in the best interests of the child.

Australia ratified CROC in 1990 and so is bound, in international law, to its terms.

International instruments may be used by courts in interpreting statutes and in judgements that develop the common law. In addition, CROC was declared a 'relevant international instrument' under the *Australian Human Rights Commission Act 1986* (Cth), so the Australian Human Rights Commission can refer to it when hearing complaints of discrimination.

However, as with the other human rights treaties to which Australia is a party, no federal legislation has been passed implementing it in Australian domestic law. This means that it is not binding at the domestic level (not enforceable in Australian courts). The 2011 report from the NGO Child Rights, *Listen to Children*, recommended that CROC should be comprehensively incorporated into Australian law. The Commonwealth has left implementation of CROC obligations to the state governments.

Many of CROC's principles are already embedded in state child protection legislation. Following art 3 of CROC, legislation in both federal and state jurisdictions states that children's best interests

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Legal Links

Look up the *Children and Young Persons (Care and Protection) Act 1998* (NSW) at http://cambridge.edu.au/redirect/?id=6344, and read s 10, 'The principle of participation'.

Legal Links

Go to http://cambridge.edu.au/redirect/?id=6345 for a simplified version of the *UN Convention on the Rights of the Child*, as well as links to the full text of the convention.

should be a primary consideration in decisions concerning children. Other elements of CROC that are reflected in state legislation include art 12 – a child has the right to express their opinions and be heard in proceedings affecting them, in a manner consistent with the procedural rules of the jurisdiction, and the child's views are to be given due weight in accordance with the child's age and maturity. This is reflected in legislation providing for children's participation in decision-making.

'Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child' is one of the aims of legislative provisions that specifically prescribe taking an Indigenous child's culture into account in decision-making procedures (for example, in *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 11, 12 and 13). For judicial applications, see also *In the Marriage of Sanders* (1976) 10 ALR 604 and *F v Langshaw and Others* (1983) 8 Fam LR 832.

Parental responsibility under the *Family Law Act 1975* (Cth)

Part VII of the *Family Law Act 1975* (Cth) has the object of ensuring that the best interests of children is the chief factor that courts must take into consideration when making parenting orders. 'Best interests', as listed in s 60B of the Act, include:

- the opportunity to maintain a meaningful relationship with both parents
- to be protected from harm, including neglect and abuse
- proper parental care.

Section 60B(2) also sets out the principles underlying these objects:

(a) children have the right to know and be cared for by both their parents …

(b) children have the right to spend time … and communicate on a regular basis with, both their parents, and other people significant to their care welfare and development …

(c) parents jointly share duties and responsibilities concerning the care, welfare and development of their children …

(d) parents should agree about the future parenting of the children; and

(c) children have the right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

The emphasis on responsibilities being shared equally by both parents was introduced in large part by the *Family Law Reform Act 1995* (Cth), which made significant amendments to the *Family Law Act 1975* (Cth) with respect to children. Further amendments made by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) emphasised the child's right to meaningful family relationships and care, rather than either parent's 'right' to have the child live with them.

Figure 12.4 The *Family Law Reform Act 1995* introduced plans for child welfare and living arrangements that can be negotiated between two parents.

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The Family Law Reform Act 1995 (Cth) introduced parenting plans, which are written agreements voluntarily agreed to by parents. In contrast to court orders assigning custody to a parent, parents are encouraged to create such plans themselves. The plans can deal with any aspect of a child's care and welfare, such as the child's living arrangements, the amount of time the child will spend with each parent, how the child's educational, cultural and religious needs will be handled, and what process will be used to make changes to the plan or resolve disagreements. If the parents cannot agree, they will be issued with a parenting order, which is a court-imposed decision. In some cases – such as those involving domestic violence – parents may apply for parenting orders without first attending family dispute resolution.

In those instances where there is reasonable grounds to believe that the child has been subject to abuse or family violence, the presumption of 'equal shared parental responsibility' does not apply. The priority for the Family Court is the protection of the child rather than the maintenance of a meaningful relationship with an abusive parent. To this end, the Family Court may take into account any aspects which may adversely affect the future welfare of the child, including the parent's criminal actions, drunkenness, illicit drug use or mental stability.

The law allows parents to raise their children as they see fit, within general guidelines. Parental responsibilities to a child are not specifically defined in the legislation, but would include:

- providing adequate food and shelter
- providing access to education
- providing discipline
- protecting the child from harm and ensuring that they are not exposed to illegal activities.

Consequences of parental neglect under state laws

Parents who fail in their duty to their child may face any of a number of consequences. These offences, and their consequences, are provided for in state and territory legislation. Ongoing failure by a parent to provide the basic requirements for proper development (food, shelter, hygiene, medical and dental care, adequate supervision and emotional security) may result in criminal prosecution for **neglect** of the child. Neglect is a criminal offence under both the *Children and Young Persons (Care and Protection) Act 1998* (NSW) (s 228), which carries fines of up to $22 000, and the *Crimes Act 1900* (NSW) (s 43A), which provides for a jail term of up to five years. Family and Community Services (FaCS) is the main New South Wales department responsible for implementing the laws under the *Children and Young Persons (Care and Protection) Act 1998.* If child abuse or neglect is suspected, FaCS may initiate a Joint Investigation Response Team (JIRT). JIRTs are comprised of Community Services, police and New South Wales health professionals. The main aim of JIRTs is to provide a timely and coordinated intervention in instances where child neglect or abuse is suspected or is proven. JIRTs may investigate claims of abuse or neglect, provide care and support services, or refer the individual to crisis counselling. In some cases, FaCS will apply to the Children's Court of NSW for an order (for example, for supervision of the family relationship through visits, support services, or transfer of parental responsibilities, perhaps to another member of the child's family or foster care). Foster care is usually temporary and involves a couple taking on the parental responsibility of caring for and controlling the child. One alternative to foster care is for children to live in 'group homes' under adult supervision, such as under the care of a youth worker and child counsellors.

neglect
ongoing failure by a parent to provide a child with the basic requirements for proper growth and development, such as food, shelter, medical care, hygiene and supervision

New legislation passed in 2014 (*Child Protection Legislation Amendment Act 2014* (NSW)) focuses on the safety and wellbeing of a child or young person by providing them a secure environment in accordance with 'permanent placement principles' (s 10A). This requires child protection authorities to investigate whether putting a vulnerable child up for adoption is preferable to placing the child in temporary foster care. The aim of the laws is to provide children a more stable home environment, which they would not otherwise experience if they were moved from one foster home to another.

In addition, the new laws allow authorities to seize children once they are born if it is proven that the birth mother had a history of drug or alcohol

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abuse during the pregnancy (*Child Protection Legislation Amendment Act 2014* (NSW) s 38A, 'Parent responsibility contract'). Finally, courts now have the power to force parents to undergo treatment to deal with issues, such as alcohol or drug addictions under a 'parent capacity order' (ss 91A–91I).

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) addresses family problems in terms of the child's needs and care. Other state laws, such as the *Children (Protection and Parental Responsibility) Act 1997* (NSW) and the *Children (Criminal Proceedings) Act 1987* (NSW), deal with the prevention of juvenile crime and the criminal processes appropriate to people under 18 years.

Education

The right to an education is one of the objects of the *Education Act 1900* (NSW), and it is also found in the CROC. The *Education Act* imposes on the state the duty to ensure that every child receives an adequate education. Parents cannot refuse their child an education, but they do have the right to choose where their child will be educated. There are provisions for the parent to educate the child at home (if government consent has been granted) or by distance education, as long as the child is educated according to curricula approved by the state Board of Studies. Failure to enrol a child in a school or to give the child access to an education is a criminal offence.

Changes to the *Education Act 1900* (NSW) in 2009 make it compulsory for a child to attend an educational facility from the age of six until 17 years of age. Children who intend to leave school and have completed Year 10 but are not yet 17 must be in some form of education, training or employment until they turn 17.

Discipline

Parents have the right to discipline their child by using physical force in order to correct their child's behaviour, but the physical force must be 'reasonable, having regard to the age, health, maturity or other characteristics of the child, [and] the nature of the alleged misbehaviour or other circumstances' (*Crimes Act 1900* (NSW) s 61AA).

The defence of 'lawful correction' in criminal proceedings against a parent or other person for **assault** is not available if the physical force was not reasonable.

assault
a criminal offence involving the infliction of physical force or the threat of physical force

What is considered reasonable and acceptable discipline can vary from culture to culture, but punishments that will not be considered reasonable by a court in Australia include striking the head or neck of a child, causing pain lasting for more than a short period, shaking a young child and striking a child with a closed fist.

Review 12.4

1. Evaluate the influence of the CROC on family law in Australia.
2. Discuss the concept of 'the best interests of the child' and describe what the courts may consider to be in the 'best interests' of the child.
3. Explain the concept of parents' responsibility or obligations to their children, giving examples.
4. Identify the requirements that must be satisfied before a person can leave school.

Research 12.1

View the *Children (Protection and Parental Responsibility) Act 1997* (NSW) at http://cambridge.edu.au/redirect/?id=6346 and then complete the following tasks.

1. When deciding how to deal with a child under this Act, what factors do the court take into account? (See s 6.)
2. Explain two ways a court might respond to encourage parental responsibility once their child has been found guilty of an offence. (See ss 8 and 9.)
3. Look at Part 3 of the Act, especially ss 18, 19, 20, 21 and 22.
   - **a** Summarise the specific issue or issues that the Act attempts to address in these sections.
   - **b** Do you think this Act is the best way to address these issues? Justify your answer.

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Medical treatment

Parents are responsible for ensuring that appropriate medical and dental care are available for their child. However, consent must be given before a doctor can carry out any treatment. As with any decision carrying risk, a person's consent implies an understanding of what is involved and an acceptance of the risks. For children under 14 years old, the consent of a parent (or guardian) is required, and parents have the right to authorise any such treatment they consider in the child's best interests. For those between 14 and 16, either the child's consent or a parent's consent is required. Medical or dental treatment of young people aged 16 or 17 requires the consent of the young person. These requirements are contained in the *Minors (Property and Contracts) Act 1970* (NSW) (s 49). If the parents refuse medical or dental treatment (for instance, on religious grounds), a court can authorise the treatment.

If the child is over 16 and is intellectually disabled, such that they do not understand the problem and the treatment, then the *Guardianship Act 1987* (NSW) specifies who can give consent. Usually, this will be a 'person responsible', such as a parent.

Autonomy of children

Children are regarded as not yet having developed the cognitive abilities and the capacity to understand the consequences of their actions, and are considered unable to make fully informed decisions. In an effort to protect children, the law makes it illegal for them to engage in certain activities. A child's ability to make their own decisions increases as they get older, and this is reflected in the law regarding children's **autonomy** and rights (see Table 12.2).

autonomy
freedom of the will, self-government; the ability to act without outside interference

As suggested above with respect to consent to medical treatment, some laws distinguish between 'children' and 'young persons'. For example, the *Children and Young Persons (Care and Protection) Act 1987* (NSW) defines a child as a person who is under 16 years, and a young person as one who is aged 16 or 17.

Ex-nuptial children

In the past, ex-nuptial children (they used to be called illegitimate) had no legal status and therefore had no legal rights. Legitimacy was important because it provided a child with certain rights, such as inheritance and maintenance. Legitimacy automatically existed for a child if the child was:

- born during marriage – that is, was a nuptial child
- ex-nuptial, but the parents of the child later married
- adopted.

The *Children (Equality of Status) Act 1976* (NSW) – later replaced by the *Status of Children Act 1996* (NSW) – gave ex-nuptial children the same rights as those born to parents who are married. Later Acts have reinforced the status of ex-nuptial children. All children have the right to be cared for by their parents.

The Act allows a presumption that those who say they are a child's parents are in fact the child's parents (this is called the 'presumption of parentage'); evidence has to be provided to a court to disprove that. Parentage can be established through DNA analysis of a blood sample, or through the parent's voluntary recognition of the child as theirs. If a person making a will wants to exclude any of their children, this must be explicitly stated (for example, by listing only the children the **testator** wants to inherit their property).

testator
a person who makes a will

Review 12.5

1. Explain why consent to medical treatment is necessary, and why age determines legal capacity to give consent.
2. Explain the term 'autonomy' and how it will change the parent–child legal relationship.
3. Explain the term 'presumption of parentage'.

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Table 12.2 Legal autonomy of children in Australia*

Area of responsibility	Explanation
Alcohol and cigarettes	It is illegal for a child under 18 to purchase, possess and/or consume alcohol and cigarettes.
Arrest	The police can only question a child in the presence of an adult. This adult could be the child's parent or guardian.
Civil law	Children can be sued for any damage or injury that they cause. In some situations a child's parents may be held responsible for the damage their child caused.
Contracts	A child can only enter into a contract if an adult acts as guarantor. The contract must be for the benefit of the child.
Criminal responsibility	Children under 10 years old are not criminally responsible for their actions because there is a presumption that they do not have the capacity to understand the difference between right and wrong and so cannot form an intention to commit a criminal act. If the child is aged 10 to 14 years the prosecution must prove that the child understood that their act was illegal (that is, that criminal intent was present). Children aged 14 years or older are considered to be responsible for their criminal actions.
Driving	A child can obtain their learner's permit at 16 years in New South Wales. Once the child turns 17 they can obtain a probationary licence.
Employment	There is no minimum age for starting part-time or casual employment in New South Wales. However, those under 15 who want to leave school and start full-time work must seek permission from the Department of Education and Training. Otherwise, anyone who has completed Year 10 but is under 17 and does not want to stay at school can do an apprenticeship, or work full-time (25 hours per week), or do a combination of approved education or training and paid work (see http://cambridge.edu.au/redirect/?id=6347 on school leaving age).
Evidence	Children can give evidence at any age if they understand the nature and consequences of the oath or affirmation.
Leaving home	There is no minimum age for leaving home in New South Wales. Young people between the ages of 16 and 18 will not normally be forced to return to their parents' home, as long as they have a safe place to go and can support themselves financially.
Marriage	A person under 16 cannot marry. A person between the ages of 16 and 18 can marry only with the court's permission and only in exceptional circumstances.
Sexual intercourse	The legal age for consensual sex is 16. It is an offence to have sexual intercourse with a child under 16.

*The legal definition of a 'child' is any person aged under 14, which is different from a 'minor', which refers to anyone under 18. (For more information regarding children and the law, go to the Lawstuff website at http://cambridge.edu.au/redirect/?id=6348.)

The *Family Provision Act 1982* (NSW) removed the concept of 'illegitimacy' and the *Succession Act 2006* (NSW) permits any child to apply for a family provision order, whether the child is nuptial or ex-nuptial.

Adoption

Adoption is the process of transferring parental rights and responsibilities from the biological parents to the adoptive parents. The aim of adoption law is to ensure that the best and most appropriate parents are found for the child. The needs of the

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adults are secondary to the needs of the child. Adoption re-creates the legal relationship between the child and their parents.

adoption
the legal process of transferring parental rights and responsibilities from the biological parents to the adoptive parents

Legal requirements and process

Adoption is a state responsibility. In New South Wales, adoption is governed by the *Adoption Act 2000* (NSW).

If the birth parents are married or in a de facto relationship, both parents must give consent to give up the child for adoption. In the case of a single mother, only the mother need give consent; the father must have been notified prior to the adoption and given 14 days to respond. Children aged over 12 years must consent to their adoption themselves. A birth mother cannot consent to adoption within three days of the child's birth. Once the birth parent or parents have given consent, there is a 30-day revocation period during which they can change their minds. If the child's parents cannot be found or are incapable of giving informed consent, the court can give consent.

Relinquishing parents can nominate a relative to adopt their child, but all adoption criteria must be met and the adoption can only proceed if the court permits it. Parents who give up their child for adoption can nominate a desired religious upbringing for their child.

relinquishing parent
a parent who nominates their child for adoption

Because adoption laws are primarily concerned with the rights of the child, the law has established strict guidelines as to who can apply to adopt:

- Married couples and those in long-term, stable de facto relationships (including same-sex couples) can apply to adopt.
- Individuals who are not in a relationship can apply as single applicants. (There is no distinction between heterosexual and homosexual applicants.)
- Applicants must be over 21 years of age, but under 51 years of age.
- The prospective male parent must be at least 18 years older than the child and the female parent must be at least 16 years older than the child.
- The applicant must be a person of good repute, be a fit and proper parent, and be able to fulfil the responsibilities of a good and caring parent.

Also, where applicable, the child's culture, language and religion will be taken into account when determining an adoption order.

Prospective parents who meet the criteria above are then placed on a waiting list. The decision as to who will adopt is based on what is in the best interests of the child and whether the child's overall welfare will improve by being adopted by the applicant(s).

Once the birth parents agree to the adoption, the court will make an adoption order, following official notification from the relevant agency or department. An adoption order creates certain legal changes. The Registrar of Births, Deaths and Marriages will issue a new birth certificate in the child's adopted name. The birth certificate will include the family details of the adoptive family, such as the full names and dates of birth of the child's adoptive parents and any other children of the adoptive parents. The birth parents no longer have any rights or obligations concerning the child. The adopting parents have the legal responsibility for the care and wellbeing of the child, who is now legally their child. The adopted child's rights of inheritance to the estate of their biological parents are removed (unless the child is specifically mentioned in a will), and the adopted child will have the automatic right to inherit from the estate of their adoptive parents.

Overseas adoptions

An increasing number of Australian couples are applying to adopt children born overseas. Inter-country adoptions are governed by the Hague *Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption*, and by bilateral agreements between Australia and countries that have not ratified the convention. In response to the growing number of intercountry adoptions, the Attorney-General's Department established in 2015 a new adoption service, Intercountry Adoption Australia. The service includes an informational website providing advice on overseas adoption, links to relevant government sites and a telephone

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Figure 12.5 Australian couples are applying to adopt children born overseas.

advice line for families intending to adopt a child from overseas.

In New South Wales, prospective parents must apply through the Department of Family and Community Services to arrange for an inter-country adoption. They will be offered a child from the other country, and if the parents accept the offer they may lodge an adoption visa application, which is then forwarded to the appropriate overseas welfare agency. The child is then subject to standard migration medical checks. If the child satisfies the health requirements, the adoption will either be finalised overseas in the child's country of origin or the overseas welfare agency will authorise the child to leave so that the adoption can take place in Australia. The child will then be granted permanent residence in Australia. Any intercountry adoption must be in the best interests of the child.

Privately arranged adoption is possible if the adoptive parents can prove they have been living in the overseas country for more than 12 months prior to their application, and if the authorities in the overseas country have approved the departure of the child to Australia. The child must meet migration standards – the Australian Department of Immigration and Border Protection can refuse to grant an entry visa for the child.

Access to information

Previously, all personal information, of both the parent and the child, could only be released by the Reunion and Information Register, and only if both parties placed their information on the Register. This register, maintained by Community Services in New South Wales, is still in operation, but Community Services does not help parties search for each other. The *Adoption Amendment Act 2008* (NSW) gives relinquishing parents and adopted children the right to request personal identifying information from Community Services, which they can then use to contact one another and other family members.

Adopted children may apply to Adoption Information Unit to obtain a 'supply authority', which contains identifying information of the birth parents. This document then allows them to obtain further information from adoption records. Parents who have given up their child for adoption can also ask for a 'supply authority', allowing them to obtain a copy of their child's amended birth certificate (the one prepared after their adoption), which now contains information about the adoptive family.

Parents and children who do not want to be contacted by the other can lodge a 'contact veto'. Alternatively, the contact details of adopted children and relinquishing parents can be placed on the Advance Notice Register, which notifies them if any application for information is made. Even though the relinquishing parents or the adopted child may not wish to be contacted, their information will be released once the party seeking the information has signed an undertaking not to make contact. A party who breaches a contact veto may be subject to a fine

Review 12.6

1. Explain the concept of adoption and discuss how adoption changes the relationship between the child and the relinquishing parents, and the child and their adoptive parents.
2. List the conditions that must be met by prospective adoptive parents. Evaluate these requirements with regards to the child's 'best interest'.
3. Explain why adopted children may want their birth parents' personal information. Critically analyse whether they should have complete access to all information regarding their parents and possible siblings.

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and/or imprisonment. Both relinquishing parents and adopted children who want to make contact with one another can enter their names in the Reunion and Information Register.

12.2 Responses to problems in family relationships

Divorce

Divorce is the legal dissolution (termination) of a marriage. Under s 48 of the *Family Law Act 1975* (Cth), the only ground for divorce is the irretrievable breakdown of the marriage. This means that there is no chance that the parties to the marriage wish to remain in a relationship.

divorce
the legal termination of a marriage by an official court decision

Before 1974, married couples who wanted to divorce had to apply under the *Matrimonial Causes Act 1959* (Cth) on the ground of 'fault' (that is, on the basis that one or both spouses admitted to acting in a way that undermined their marriage). Grounds for divorce under the *Matrimonial Causes Act* included adultery, cruelty (family violence), insanity and desertion.

The *Family Law Act* removed all other grounds for divorce and established the Family Court, which hears all matters related to marriage and divorce. Having just one ground for divorce removes the need to find fault. In order to prove that the relationship has irretrievably broken down, the parties must have been living separately and apart for a period of 12 months. Once divorced, each party is free to marry another person.

The 12-month separation begins when one party tells the other that he or she intends to leave the marriage. It does not matter that only one party to the marriage wishes to end the relationship. The law will not force an individual to stay in a relationship he or she does not want to continue.

The parties can be held to be living separately and apart even if they are still sharing the same house. In this instance, parties must show that they are leading separate lives; for example, they sleep separately, do not socialise with friends together, and no longer share finances.

Although the Act removed fault and established one ground for divorce, it did not intend to encourage divorce. Rather, it was designed to encourage parties to seek an amicable resolution to their problems, including the use of counselling services. The Act allows for one period of reconciliation of up to three months during the period of separation, under s 50 (the 'kiss and make up clause'). If they do not succeed in reviving the marriage during this interval, the separation period resumes, with the total time before and after the reconciliation period counting towards the 12 months.

If the couple seeking to dissolve their marriage have been married for less than two years, they must attend family counselling before they can divorce. Also, if the court feels there is a chance the parties may be reconciled, the court can order marriage counselling.

Legal consequences of separation

Children

If the couple has children, no application for dissolution (divorce) will be approved until the court is satisfied that there are proper arrangements in place for the care of the children. Once this has occurred, the court will order a **decree nisi**, which begins the process of divorce. About one month later, the decree nisi becomes a **decree absolute**, at which time the marriage is legally dissolved.

decree nisi
a Family Court order that is made to signal the intended termination of a marriage

decree absolute
a final decree of the dissolution of marriage

The focus of the law is not on 'parental rights' but on 'parental responsibility'. Parents are responsible for the long-term care of their children and the presumption is that it is in the best interests of the children for both parents to share this responsibility equally. Therefore, irrespective of where the children reside, both parents are still responsible. Parental responsibility will only cease with a court order, the adoption of the children, the children's 18th birthday or the children's marriage. Parents are encouraged to make and voluntarily agree to their own arrangements in relation to the care and responsibility of their children, rather than asking the court to do so.

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Under Part VII of the *Family Law Act 1975* (Cth), any disputes concerning children must be decided in the best interests of the child. The court determines 'best interests' by reference to primary and additional considerations set out in s 60CC. The two primary considerations include the child's right to maintain a meaningful relationship with both parents (s 60CC(2)(a)) and the need to protect the child from harm (s 60CC(2)(b)). Other factors taken into account include factors that may modify the ability of parents to share the parenting of the child equally, such as the views of the child, the nature of the child's relationship with each parent, and where the parent lives.

The presumption that equal shared parental responsibility is in the best interests of the child will not apply 'if there are reasonable grounds to believe that a parent of the child … has engaged in abuse of the child … or in family violence' (s 61DA(2)(a) and (b)). The 2006 amendments to the Act, which introduced shared parental responsibility and other provisions of Part VII (via the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)), have been criticised for not dealing adequately with family violence, exposing children who had previously been victims of parental abuse to the possibility of further abuse. Another criticism centres on the idea that the child's views are not given enough weight. There have also been complaints that the Act does not make clear the distinction between shared parental responsibility and shared care – some parents mistakenly believed that shared parental responsibility entailed 50/50 'custody' of the children.

In 2011, the federal government passed the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). The Act recognises the need to protect children from harm and aims to improve the court's response to family violence by providing better information concerning the existence or risk of family violence, allowing the court to make provisions for the child's safety in future parenting arrangements.

Separating parents are required to attend family dispute resolution before they can apply to the court (subject to certain exceptions) for parenting orders. Any agreement reached at this stage can be drafted into consent orders or a parenting plan. Parenting plans must consider the practicality of children having equal time with both parents, contact with other family members, and the day-to-day care of the children, and ensure that the children maintain their cultural links. Parenting plans are voluntary agreements, and most parents comply with them. If parents cannot reach an agreement, they may apply to the Family Law Courts (the Family Court and the Federal Circuit Court of Australia) to make parenting orders. Section 64B of the *Family Law Act* explains that parenting orders may deal with any matters relating to the care and welfare of a child, such as which parent the child is to live with, the time to be spent with the other parent, and maintenance.

Review 12.7

1. Identify the sole ground for divorce in Australia, and the consequences of there being only one ground.
2. Describe what it means for a couple to be 'living separately and apart'.
3. Contrast 'shared parental responsibility' and 'shared parental care'.
4. Why might 'shared parental responsibility' not be in the 'best interest of the child'?

Figure 12.6 Some shared assets may be sold if a couple separates.

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Property

The *Family Law Act 1975* (Cth) uses a broad definition of 'property'. Property includes homes, bank accounts, companies and partnerships, shares, superannuation and household goods. If the separating couple reach an agreement as to the allocation of property and want to formalise it and make it binding, they can either apply to the Family Court for consent orders or enter into a financial agreement.

If the division of property is fair and equitable, the court will then make the consent orders legally binding. A couple in dispute regarding property allocation can choose to have the matter heard in the Family Court. When determining property allocation under ss 75 and 79 of the *Family Law Act* (or ss 90SF and 90SM for de facto spouses), the court will consider a number of factors, which can include:

- the financial and non-financial contribution to the property by both parties (including contributions made as home-maker and carer for children)
- the age of both parties and the income, property and financial resources of both parties
- the financial commitments of the parties in supporting themselves and a child of another person that the party has a duty to maintain
- whether or not each or either party has the care and control of a child of the marriage who is under 18 years of age
- the ability of each party to maintain a reasonable standard of living
- other contributions, such as any inheritance, and the acquisition, conservation and improvement of any assets (including maintenance of the family home or working for the family business).

The court can, and usually will, order the disputing couple to attend a conference in an attempt to have them determine a fair and equitable allocation of property and an agreeable settlement. If this mediation process is unsuccessful, the Family Court can make an order about the allocation of matrimonial property, which is all property purchased or acquired during the marriage. Superannuation is regarded as an asset and the court takes into account the financial and non-financial contributions made by both parties to superannuation entitlements. Since 2002, separating couples have been able to claim superannuation that each spouse had accumulated during the marriage as part of the matrimonial property.

There is no set formula for the distribution of property. The court aims to be as fair as possible and to achieve an equitable outcome for both parties, taking into account their differing needs and contributions.

Financial agreements

Financial agreements can be made between a couple before their marriage (these were formerly known as 'prenuptial agreements'), during the marriage, or at the end of the marriage (see *Family Law Act 1975* (Cth) ss 90B, 90C and 90D). Financial agreements arose out of individuals' desire to protect their property rights. They can include guidelines for the division of property, debt and other financial concerns if the relationship ends. Such agreements tend to reduce the combative nature of divorce and separation by removing two of the main sources of hostility between parties: money and property.

Financial agreements may prescribe what property is and is not to be included in the settlement, settle questions relating to how property is to be divided after the marriage has ended, or establish who owns what property. Financial agreements can also include provisions as to whether, how and by whom spousal maintenance is to be paid.

In the past, agreements between spouses were not binding, and were just one of the matters that a court could consider when determining a property settlement. Amendments to the *Family Law Act* in 2000 allow the Family Court to recognise them as binding financial agreements. A party can apply to the Family Court to have the agreement set aside, but this can be a costly and time-consuming process.

The grounds on which they can be set aside are set out in s 90K (marriages) and s 90UM (de facto relationships) of the Act.

As discussed earlier in this chapter, property settlements for separating de facto couples are now governed by the *Family Law Act*. De facto couples can also have binding financial agreements, just like married couples, for property settlements if they separate. They can be made before, during or after the breakdown of a relationship (see *Family Law Act 1975* (Cth) ss 90UB, 90UC and 90UD).

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In Court

***C and M* [2006] FamCA 212**

The parties (both aged 29) married in October 2002 after a lengthy engagement. However, after two months they separated. During their engagement the couple had bought land on which they intended to build their home. The land was purchased in the husband's name and he was responsible for paying the mortgage. The couple had been using the wife's credit cards and personal savings for day-to-day expenses and she was now deeply in debt. When the couple separated, the husband transferred the property to himself and his parents, thus preventing his wife from attempting to claim the property. During the period 2002–06 the husband continued to pay the mortgage and his parents provided him with substantial financial support in order to build a home on the land.

The court in the first instance found that both parties had contributed equally to one another's debt. The husband was ordered to pay half his wife's debt, but was awarded 92.5% of the assets. No adjustment under s 75(2) of the *Family Law Act 1975* (Cth) had been made for the husband's higher income or greater earning capacity. On appeal, it was held that the method of calculation of the parties' assets and liabilities effectively left the wife with only 3.8% of the net assets. The court ordered that the wife's share of the 'asset' (the land and house) should reflect her financial contributions to the mortgage repayments (assessed at 20% of the total assets).

However, taking into account the short period of time that the marriage – and hence also the financial contributions – had lasted, the ages of the parties, and the lack of any restrictions on the wife's earning capacity, the court held that there would be no adjustment for disparity of earning capacity.

Review 12.8

1. Describe the factors that are taken into account when deciding the allocation of property after a marriage or de facto relationship has broken down.
2. Outline the major changes that have been made in family law regarding property allocation.
3. Identify and explain the various orders that the Family Court can make.

Legal responses to domestic violence

Domestic violence has become a major social, judicial and economic issue within the Australian community. The Australian Law Reform Commission conducted an inquiry into domestic violence in response to the findings of the National Council to Reduce Violence against Women and their Children, *Time for Action* (2009). The ALRC examined the existing federal and state domestic violence laws. Issues the commission considered included the role of police, bail and the effectiveness of protection orders, the prevalence of domestic violence and child protection.

The *Crimes (Domestic and Personal Violence) Act 2007* (NSW) describes **domestic violence** as personal violence committed against someone with whom the offender has, or has had, a 'domestic relationship' – that is, a marriage, a de facto relationship or another close personal relationship (such as between a parent and child).

domestic violence
any act, whether verbal or physical, of a violent or abusive nature that takes place within a domestic relationship

Domestic violence may include physical violence, sexual assault, economic abuse, emotional or psychological abuse, stalking, damage to property and behaviour that causes a child to be exposed to the effects of domestic violence. It also includes 'threatening behaviour' that coerces, controls or causes the victim to be 'fearful'.

The definition of 'domestic relationship' in the Act is so wide that it incorporates almost every domestic arrangement imaginable. The Act does not stipulate a time limit for these relationships,

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so even if a relationship only existed for a short period in the past, it still qualifies as a domestic relationship for the purpose of the Act. The words 'intimate personal relationship' are not defined, but the section stipulates that the relationship between parties need not be nor have been sexual in nature. The wording of the Act also indicates that those in a 'domestic relationship' would include boyfriends and girlfriends, and those in same-sex relationships.

In enacting the legislation governing domestic violence, the New South Wales Parliament expressly stated that domestic violence in all its forms, including behaviour that extends beyond physical violence and may involve the exploitation of power imbalances and patterns of abuse over many years, is unacceptable. The legislation also recognises that domestic violence is predominantly perpetrated by men against women and children, and that it occurs in all sectors of the community (*Crimes (Domestic and Personal Violence) Act 2007* s 9 (3)).

Domestic violence can include:

- physical violence, such as punching, kicking and shoving
- sexual assault, including coercing the victim to be sexually compliant
- economic abuse, such as controlling the victim's access to money
- threatening behaviours, such as stalking and damaging the victim's property.

There are many reasons why families experience interpersonal problems. Causes of family crises can range from psychological or social problems to financial difficulties. Examples of these problems are listed in Table 12.3.

Violence between spouses

Violence between spouses may, as noted above, take the form of physical, verbal, emotional, financial, psychological and/or sexual abuse, social isolation, or actual or threatened violence or harassment. Males tend to commit more domestic violence than women and the majority of domestic violence victims are women and children. However, men are also victims of domestic violence.

The 2012 *Personal Safety Survey* estimated that 49% of men and 41% of women since the age of 15 have experienced some form of violence. Women are more likely to experience violence in the context of their homes. A significant number of women tend to experience violence perpetrated in the home (62%) compared to men (8%). Even though both men and women experience sexual assault (an estimated 17% of women and 4% of men), women are nearly four times as likely to have been assaulted by a known person than by a stranger.

Domestic Violence NSW, a political lobby group, announced in 2014 that it had launched an online petition calling for zero tolerance of domestic violence. This was in response to the increasing prevalence of domestic violence and the increasing numbers of women being murdered by their spouse or partner. According to the New South Wales

Table 12.3 Causes of family problems

Psychological problems	Social problems	Financial problems
• Lack of self-esteem and poor self-image • Inability to express anger or frustration appropriately • Strong desire to control or dominate others • Cycle of violence: an abused child may become an abusing adult • Mental illness, including depression • Lack of positive male and female role models	• Drug dependency, including alcoholism and addiction to prescribed drugs or illegal substances • Disputes over housework, or other domestic duties • Disputes over child discipline issues • Lack of quality time spent with family members • Cultural or geographic isolation	• Lack of money (due to unemployment, low-paid work or part-time work), making it difficult to pay bills and mortgage or rent • Disputes over how to spend a limited supply of money • Expectation that the children will need to find employment to contribute to the family's finances • Inadequate amount of money for child care

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Figure 12.7 Violence against spouses can take many forms.

Bureau of Crime Statics and Research (BOCSAR), in 2014 there were 29 070 domestic related assaults in New South Wales and 30% of all homicide victims (nearly one woman per week) were killed in domestic-related incidents. The estimated cost to the Australian economy in 2014 was estimated to be $14.4 billion.

In its attempt to curb this alarming statistic, the New South Wales Government has proposed that abusive partners should be listed on a domestic violence register, which would enable concerned individuals to seek information regarding their partner. The prevalence of domestic violence and its growing importance as a social issue has been recognised by authorities. In 2015, the Australian of the Year, Rosie Batty, whose son was beaten to death by his father at cricket training, received the honour for her work in trying to rid the Australian community of domestic violence

Domestic assaults accounted for over half (54.4%) of all assaults. Women are at greater risk of experiencing violence at the hands of someone they know; and of all women assaulted, approximately 73% will experience repeated attacks. Sadly, of women subjected to domestic violence, 61% will have children in their care. It is estimated that family violence costs the community of New South Wales $4.5 billion each year (see http://cambridge.edu.au/redirect/?id=6349).

Victims of domestic violence can press criminal charges, or they can apply to the Local Court for a family violence order or an **Apprehended Violence Order (AVO)** or, more specifically, an **Apprehended Domestic Violence Order (ADVO)**. It may also be possible to apply to the Family Court for an **injunction** for personal protection, but these are often more complex than an ADVO, and they are less easily enforced by local police.

The issuing of an ADVO does not mean the person is charged with a criminal offence. However, if the person **breaches** the order, they may be charged with a criminal offence; if there is sufficient evidence to support a conviction for this offence and any associated offence, police will arrest and charge the person.

Apprehended Violence Order (AVO)
a court order that aims to protect the applicant from violence and other forms of intimidation or abuse by another person

Apprehended Domestic Violence Order (ADVO)
a specific type of AVO issued under Part 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) when the perpetrator of violence is a family member

injunction
a court order directing someone to do something or prohibiting someone from doing something

breach
to fail to obey

Research 12.2

Go to http://cambridge.edu.au/redirect/?id=6352 for information on domestic and family violence and complete the following tasks.

1 a What is domestic violence?
  b What are they types of domestic violence?
2 How does domestic violence affect families and children?
3 What is the Domestic Violence Line and what services does it provide?
4 Discuss the 'Staying Home Leaving Violence' program. Why is this program needed?

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Legal Links

See http://cambridge.edu.au/redirect/?id=6350 for information on domestic violence.

Go to http://cambridge.edu.au/redirect/?id=6351 and click on the Interactive NSW Crime Tool and investigate the latest maps and statistics of crimes, victims and offenders.

Violence involving children

Violence against children

Article 19 of CROC declares that no child should be subjected to violence and it is the responsibility of the state to protect 'the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child' (CROC art 19).

The *Children and Young Persons (Care and Protection) Act 1998* (NSW) covers abuse as well as neglect. Specifically, s 227 prohibits intentional acts resulting or likely to result in physical injury or sexual abuse, emotional or psychological harm, or harm to health or physical development. Children can be included on an adult's AVO or ADVO application, or a separate application, a child protection order, can be made for children by the Children's Court.

A police officer is the only person who can apply for an AVO for children under 16 years of age; those over 16 can apply for their own AVOs. However, a court may grant an AVO for the protection of a child even if the application was not made by a police officer (*Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38(5)). If there is a parenting order in place that allows the offender access to the children, and their safety is at risk, the applicant for an AVO must inform the court of its existence (s 42(1)).

In New South Wales, certain professionals are required by law to report to Community Services if they suspect that a child is at risk of harm (*Children and Young Persons (Care and Protection) Act* (NSW) 1998 ss 24–27). These people include teachers, doctors, school counsellors and anyone who works with children. If a report has been made, Community Services is legally required to investigate. Possible outcomes after notification include the following:

- If the notification concerns a threat of abuse or actual abuse, an AVO is made.
- The police can charge the accused.
- The Family Court can restrict contact by the offender with any children the court feels are at risk.
- Community Services can apply for a variety of care and protection orders, including the removal of the child from a violent environment.

Additional changes to the care and protection of children have been made under the *Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009* (NSW). The Act introduced the concept of 'significant harm', simplified Children's Court processes and established Child Wellbeing Units in government agencies that deal with children, including the Department of Human Services, the Department of Education and Training, NSW Health and the NSW Police Force. Less serious cases reported to Community Services are referred to these Child Wellbeing Units.

Violence by children

Violent acts are not committed solely by adults. However, the law deals with child offenders differently. Laws relating to child offenders reflect the basic philosophy underlying the *UN Convention on the Rights of the Child*: all decisions relating to children should be in the best interests of the child.

Section 5 of the *Children (Criminal Proceedings) Act 1987* (NSW) states that children under the age of 10 cannot be guilty of a criminal offence. The law considers a child under 10 as being unable to understand the consequences of their actions. Children aged between 10 and 14 years are also presumed to be incapable of committing a crime; it is up to the prosecution in a case where the accused is in this age range to rebut the presumption by proving that the child committed the alleged act and that they knew that it was wrong. If this is proved the child can be held criminally liable.

Once a charge is laid, the child or young person will usually face proceedings in the Children's Court, but the *Young Offenders Act 1997* (NSW) does provide alternative options for young offenders. They include warnings and cautions and youth justice conferences. Having the child offender face proceedings in the Children's Court is the last

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resort. The emphasis is on preventing the child from coming into contact with the justice system, by employing a welfare approach through counselling and education, and by encouraging young offenders to take responsibility for their actions, rather than to punish them. The long-term goal is to prevent the child from becoming an offender as an adult.

Review 12.9

1. Identify and explain the various factors that may cause problems within a family.
2. Explain what AVOs and ADVOs are.
3. Outline the legal remedies that are available to victims of domestic violence.
4. Explain how the law deals with juvenile offenders.

Effectiveness of the law in protecting victims of domestic violence

Recent educational campaigns have raised community awareness of domestic violence as an important social issue, and helped the community understand that domestic violence is not a 'private matter', and is not acceptable. Legislative reforms reflect this changing attitude to domestic violence. Domestic violence is recognised as a community problem, not an individual or isolated occurrence, and most people now appreciate that reducing its incidence is in some respects a societal responsibility.

ADVOs have become an important means of reducing the incidence of domestic violence. One advantage of these orders is that they are a quick, inexpensive and accessible form of protection, and they are complemented and supported by the full weight of the criminal law if they are breached. However, it has been argued that only people who are normally law abiding will comply, and that these orders do little to deter persistent offenders. In addition, protection orders can only be effective if they are policed. But it is unfair to state that laws aimed at domestic violence have failed utterly. Rather, these laws have slowly evolved in response to circumstances that legislators or the courts had not considered.

For example, the concept of 'battered wife syndrome', which was originally applied only to women in heterosexual marriages, has been extended to include battered partners in de facto relationships, including same-sex relationships. Also, the automatic presumption in favour of bail was removed after several women were stalked and killed by their partners who had been released on bail, and although gun-related crime is relatively low in Australia, the *Firearms Act 1996* (NSW) offers the additional protection of prohibiting the issue of, or revoking, a gun licence or permit if the individual has been subject to an AVO. The *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* (NSW) allows police to use video evidence when prosecuting perpetrators of domestic violence. Under these amendments, videoed statements and footage of the scene of the alleged crime may be used as evidence in court. It is anticipated that these changes will help in achieving a greater percentage of successful prosecutions by reducing the possibility of the victim withdrawing or changing their statement when the matter goes to court. All of these legislative changes have been in response to community pressure and specific instances of domestic violence.

Several states have introduced mandatory counselling for perpetrators of domestic violence. Criminal penalties apply if they fail to attend. New South Wales does not have such a program. There is little evidence supporting the effectiveness of such programs in reducing domestic violence.

There have been allegations made that ADVOs are too easy to obtain and that women have falsely claimed to be victims of domestic violence when contesting parenting orders. However, claims of domestic violence do not necessarily affect family law proceedings and there is little evidence to support such allegations.

The current approaches in dealing with domestic violence have been heavily criticised. In response, in 2010 the Commonwealth Government launched *Time for Action: The National Council's Plan to Reduce Violence against Women and their Children 2009–21*. The aim of the national plan is to bring together the state and territory governments in order to consolidate and implement strategies aimed at reducing the levels of violence against women and children. The National Plan is made up of four

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Case Study

The New South Wales Domestic Violence Intervention Court Model

Two specialist courts operating in Campbelltown and Wagga Wagga were established in 2005 to hear domestic violence cases. The initial aim of these courts was to improve the criminal justice system response to cases involving domestic violence.

Under this model police and courts adopted a more proactive approach to domestic violence, including improvements in the collection of evidence, better support for victims and the referral of perpetrators to appropriate counselling programs.

A 2012 review of the model by the NSW Bureau of Crime Statistics and Research found that it had met with limited success. There have been improvements in victim support, the management of domestic violence offenders, and a reduction in the time taken to hear domestic violence cases, but there has been no change in the number of alleged offenders being charged or in the number of charged offenders who plead guilty.

three-year plans, each of which will be reviewed at its end. The focus will be on preventing violence, building respectful relationships, gender equality and encouraging behavioural change.

The New South Wales Government announced in 2012 its own response to combat the alarming growth in domestic violence with 'It Stops Here – the NSW Government's Domestic and Family Violence Framework for Reform'. These reforms centre on the welfare of the victim and include new referral pathways, coordinated community services to cater for the needs of victims, and reducing the stress and trauma felt by victims when they are recounting their experiences. The reforms also focus on preventing domestic and family violence and aim to provide support to the perpetrator to end the cycle of violence.

In September 2015, the federal government announced it would spend $100 million on a range of initiatives to combat domestic violence. These include:

- GPS tracking of offenders
- giving mobile phones to victims to help them evade their abusers
- more training for police, social workers and emergency staff in supporting victims
- training for hospital staff to help them recognise signs of domestic violence
- increasing the number of Community Engagement Police Officers in Northern Territory remote Indigenous communities
- expanding the Safer Schools website to provide resources on respectful relationships.

In 2011, the federal government passed *the Family Law Legislation Amendment (Family Violence and other Measures) Act* (Cth). The Act redefined domestic violence and placed more weight on the safety of the child. The priority is no longer 'shared parental responsibility' and the maintenance of a 'meaningful relationship' but rather that the child should be 'protected from harm'. For example, if a parent has been charged with a crime related to child abuse, that parent's access to their child may be limited or access may be granted only if it is supervised. Under these changes 'family violence' would also

Review 12.10

Read the media article on page 357 and complete the following tasks.

1. To what extent was the mother responsible for the death of her son?
2. Explain what the relevant authorities could have done to prevent the child's death.

Research 12.3

Read the article 'Violence, abuse and the limits of shared parental responsibility' (available on the Australian Institute of Family Studies website at http://cambridge.edu.au/redirect/?id=6353) and discuss this statement: 'Parenthood should be dissoluble in certain situations.'

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News

Sydney mother pleads guilty to manslaughter of her son, 7, who had 'plethora of injuries'
Sydney Morning Herald, 31 March 2015

The mother of a 7 year old boy pleaded guilty to manslaughter. The mother had originally claimed that the boy had died of injuries sustained when he had fallen off his pogo stick.

During the post-mortem examination it was discovered that the boy had a 'plethora of injuries'. Injuries sustained by the child included a fractured skull, fractured ribs and bruising consistent with repeated physical abuse.

The mother who had once been described as 'attentive', adopted the extreme religious views of her boyfriend, especially his approach to parenting which centred on severe physical abuse and neglect to make the child 'strong and so he would grow to be a man'.

Over several months the boy was subjected to sustained physical abuse from the woman's boyfriend, including being beaten by a branch while running along a beach, denied adequate food, clothing and shelter. At one stage the child was forced to eat his own faeces.

In March 2013 the mother filmed the man assaulting the boy.

The boy was the youngest of three children. All three children had been withdrawn from school.

The night before the child died he was subjected to 6 hours of physical abuse from the boyfriend, including squatting against a wall and being forced to stand for hours on a coffee tin. Police stated that the mother had failed to seek medical help for the child despite having found the boy unconscious.

The boyfriend had told the woman to lie to the police about the accident.

The woman was charged with consenting to the use of her child to produce child abuse material, possessing and distributing child abuse material, reckless wounding and manslaughter.

Her boyfriend was charged with the boy's murder.

be redefined to include actual or threatened conduct that causes a family member to reasonably fear or be concerned about their safety.

In recognising the need to provide children additional protection, all state and territory governments have endorsed the National Framework for Protecting Australia's Children 2009–2020. This framework aims to provide a long-term national approach to protecting children and tackling the issues surrounding child abuse. However, the main responsibilities for statutory child protection are retained by state and territory governments.

Methods of resolving disputes

Family dispute resolution

Family dispute resolution is defined in s 10F of the *Family Law Act 1975* (Cth) as a non-judicial process in which an independent practitioner helps people affected by a separation or divorce resolve some of their disputes with each other.

Section 60I of the *Family Law Act 1975* (Cth) requires couples who have a dispute about matters that may be dealt with by a court order under Part VII of the Act (involving children) to make a genuine effort to resolve their dispute, using family dispute resolution, before applying for an order. If there is a history of family violence, family dispute resolution may not be appropriate.

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Different forms of dispute resolution are provided by Family Relationship Centres – government-funded community centres that help couples and families at all stages of relationships (see Family Relationships Online at http://cambridge.edu.au/redirect/?id=6354) – but disputing parties can go to private providers of counselling services if they choose. The Family Court and the Federal Circuit Court of Australia (the Family Law Courts) can refer disputing parties to an extensive range of counselling services for both adults and children, and can also order separating couples to attend dispute resolution. Although individuals have to pay for these services, some associated costs may be subsidised by the government, depending on the financial circumstances of the individual parties.

Types of dispute resolution services include:

- reconciliation counselling – for separating couples who are attempting to reconcile
- post-separation parenting programs – for couples whose issues adversely affect their carrying out of parenting responsibilities; the program usually takes the form of family counselling, group lectures and discussions, and teaching techniques to resolve disputes
- mediation – for separating couples who have made an application to the Family Court, mediation involves a neutral, impartial third party (a mediator) helping them identify issues, formulate options, consider alternatives and reach agreement; this service may be used before a court hearing.

Couples are more likely to comply with an agreement that they have had some say in. Individuals also learn additional skills, such as better communication, which may help reduce future conflicts. In addition, dispute resolution is less costly than court proceedings, in terms of both time and money, and less stressful for all parties involved.

Individual counselling is available to any child whose parents are separating. The counsellor (mediator) will meet and discuss with the child their needs, issues, fears and concerns. The counsellor will then present a family report, which will include a summary of the information that the child has given to the counsellor, to the presiding judge. The purpose of this process is to ensure that the needs and welfare of the child are identified and met by any parenting order issued by the Family Court.

Once an agreement has been reached, separating parents enter into a parenting plan or file consent orders with the court. All matters relating to the children of the relationship must be finalised before the divorce is granted. If parties fail to reach an agreement, or if there are issues relating to abuse or family violence, the matter will be heard by a court.

Adjudication

Adjudication is the determination of a matter by a court judgement or ruling. The Federal Circuit Court of Australia and the Family Court can make decisions regarding division of property, and maintenance, and can make any decision that may affect children of a relationship. Divorce is automatic if the parties can show irretrievable breakdown of marriage and the required period of separation. Once the court has made its decision it will impose an order, such as a parenting order, which both parties must comply with. Unlike a parenting plan (agreement), any breach of the court order may result in further court action, financial penalties or other criminal sanctions.

Individuals wishing to divorce can now file an application for divorce online through the Commonwealth Courts Portal (see http://cambridge.edu.au/redirect/?id=6355). A small administrative fee is payable once the application has been made. This fee can be waived in certain circumstances (for those who hold government concession cards or are experiencing financial hardship, for example).

The role of the courts in family law matters

The law is primarily concerned with protecting the rights of family members and ensuring that individuals meet their family obligations. But the law also aims to provide structures and processes that will help disputing parties reach an amicable resolution. For this reason, the Family Court focuses more on reconciliation and on encouraging compliance than on arbitration and the use of sanctions or coercion.

Family Court of Australia and Federal Circuit Court of Australia

Before the establishment of the Family Court in 1975, the state courts would hear matters relating to divorce. The Family Court is a specialised court –

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that is, outside the judicial hierarchy – and it hears matters relating to separation, divorce and other disputes related to marriage. Its jurisdiction is limited to those areas controlled by the *Family Law Act 1975* (Cth), which include property and financial matters, maintenance, and parenting arrangements.

In late 1999, the Federal Magistrates Court, now known as the Federal Circuit Court of Australia, was established to relieve some of the case load of the Federal Court and the Family Court, and to reduce the cost and time required to deal with some federal matters. The Federal Circuit Court of Australia has a similar jurisdiction to the Family Court in that it can hear matters relating to divorce, the division of property, maintenance and children, and it can hear these for both married and de facto couples. It cannot hear any matters related to adoption, applications concerning nullity (that the marriage did not exist in the first place) or the validity of a marriage.

The majority of divorce applications are now heard in the Federal Circuit Court of Australia, and more complex issues, such as the intention of a parent to move interstate or to emigrate, and serious allegations of family violence or child abuse (Magellan cases) are heard in the Family Court. All other issues (such as adoption, inheritance and wills) are heard in the appropriate state court.

Initially, the jurisdiction of the Family Court did not extend to ex-nuptial children. This is because the Commonwealth Parliament's constitutional power to enact legislation only extended to marriage and divorce, and matrimonial issues arising from divorce; therefore only children of a marriage came within the Act. However, all the states except Western Australia referred their power to pass law regarding certain matters relating to children to the Commonwealth in 1986, through Acts such as the *Commonwealth Powers (Family Law – Children) Act 1986* (NSW). In New South Wales, any matter relating to the care and maintenance of a child will now be heard in the Family Court, and the same federal provisions cover all children.

Legal Links

Visit the Family Law Courts website (http://cambridge.edu.au/redirect/?id=6356) to learn more about the family law system in Australia.

Review 12.11

1. Explain the concept and purposes of 'family dispute resolution'.
2. Explain the difference between adjudication and other methods of dispute resolution.
3. Outline and contrast the tasks of the Family Court and the family law jurisdiction of the Federal Circuit Court of Australia.

The Children's Court

The Children's Court is a state court. New South Wales has six permanent Children's Courts, as well as children's magistrates who can conduct hearings in other locations. The President of the Children's Court is also chairperson of the Children's Court Advisory Committee, which provides advice on the rules, practice and procedure of the court.

The Children's Legal Service, which operates through Legal Aid NSW, provides representation for children and young people in both criminal cases and child welfare cases before the Children's Court.

The Children's Court Clinic is part of the Children's Court, and provides independent clinical assessment of children, young people and

Figure 12.8 Albion Street Children's Court in Surry Hills, Sydney

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their families. The clinic provides a report to the Children's Court to help the court make decisions regarding the care and protection of children.

The Children's Court hears cases relating to the care and protection of children under the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Such cases are usually brought by Community Services, a division of Family and Community Services in New South Wales. They are responsible for keeping children and young people safe from harm, and supporting their families.

The Children's Court is a closed court, which means that people not directly involved in the case are not allowed to be present unless the court otherwise orders. Court proceedings are informal and each step is explained to the child. During the hearing the child will be represented by a solicitor. The standard of proof required is that it is 'very highly probable' that the child is in need of care.

If the Children's Court finds that a child is in need of care, it can make a variety of orders, which can be either short term or long term. Community Services may be required to supervise the parents to ensure that they fulfil their parental responsibilities. Alternatively, the court may decide to place the child with a relative, foster family or other appropriate adult. If this decision is reached, the child's parents no longer have control over their child. Contact visits may be permitted to allow the parent(s) and child to maintain a personal relationship, but such visits are closely supervised and regulated. A variety of support services may be provided to both parents and children, including educational, psychological and welfare services. Orders by the Children's Court cease when the child turns 18 years old.

The jurisdiction of the Children's Court also includes crimes committed by people who were under 18 at the time of the alleged offence.

Bringing a child to court for a criminal offence is seen as the last resort. Many have argued that the earlier a child comes into contact with the law, the more likely they are is to commit serious offences upon reaching adulthood. Consequently, the legal system should minimise contact between children and the legal system, in the hope that fewer children will become repeat offenders. This view underlies the objectives set out in s 3 of the *Young Offenders Act 1997* (NSW):

(a) to establish a scheme that provides an alternative process to court proceedings for dealing with children who commit certain offences through the use of youth justice conferences, cautions and warnings, and
(b) to establish a scheme for the purpose of providing an efficient and direct response to the commission by children of certain offences, and
(c) to establish and use youth justice conferences to deal with alleged offenders in a way that:
  (i) enables a community based negotiated response to offences involving all the affected parties, and
  (ii) emphasizes restitution by the offender and the acceptance of responsibility by the offender for their behaviour, and
  (iii) meets the needs of victims and offenders, and
(d) to address the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system through the use of youth justice conferences, cautions and warnings.

The role of non-government organisations (NGOs)

There are a number of NGOs that provide support for families and individuals who may be struggling with personal relationships and other family issues. Many of the better-known organisations are operated by religious groups such as the Salvation Army, or by churches such as Family and Relationship Services Australia (http://cambridge.edu.au/redirect/?id=6357) and Anglicare (http://cambridge.edu.au/redirect/?id=6358).

NGOs that are not associated with religious groups and that provide similar services include Relationships Australia (http://cambridge.edu.au/redirect/?id=6359) and the Smith Family (http://cambridge.edu.au/redirect/?id=6360). Services provided by these organisations include mentoring, support for new parents, counselling and relationship advice, assistance with managing conflict and dealing with violence in the family, emotional support to children of separating parents, mediation, and advice on creating parenting plans. Many of these organisations are dependent on donations and the goodwill of volunteers, and/or have to apply for government funding. Under the 'Keep Them Safe' initiative, the New South Wales Government has committed $750 million to

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Legal Links

A more complete list of community-based family relationship services can be found at Family and Relationship Services Australia (refer to http://cambridge.edu.au/redirect/?id=6361).

expanding the role of NGOs in providing help and support to families in crisis. The aim is to encourage NGOs to take over the provision of services that are currently delivered by the state government.

The role of the media

The media has changed dramatically within the last few years and will continue to change with the development of new communications technologies. The Family Law Courts have embraced new media technologies, placing self-help guides, brochures and forms, and links to other sites on their own websites, and establishing the National Enquiry Centre to answer telephone and email enquiries about general court procedures and individual cases, to provide referrals to legal advice and other services, and to provide forms and publications.

The courts have effectively used new media technologies to provide better information about rights and obligations under family law, as well as additional support services. They are also keenly aware of the need to protect the privacy of individuals affected by the breakdown of a relationship, so they restrict how the media publish court proceedings, thus balancing the provision of information and legal direction with the protection of personal information about separating families.

Research 12.4

Read the report *A Study of the Children's Court of New South Wales: Part of a National Assessment of Australia's Children's Courts 2014* (available at http://cambridge.edu.au/redirect/?id=6362) and critically evaluate the effectiveness of the Children's Court.

Review 12.12

1. Explain how and why children are treated differently from adults in the legal system.
2. Explain the two roles of the Children's Court.
3. The emphasis of the *Young Offenders Act 1997* (NSW) is on providing sentencing alternatives to detention. Outline these various alternatives and discuss why these alternatives are provided.
4. Explain how NGOs support families.

12.3 Contemporary issue: Recognition of same-sex relationships

About the issue

The *Marriage Act 1961* (Cth) and various state statutes give heterosexual couples a number of rights and obligations from which same-sex couples are excluded and, although the *Sex Discrimination Act 1984* (Cth) and state anti-discrimination Acts protect heterosexual de facto couples against discrimination on the basis of marital status, same-sex couples do not enjoy the same protection because their legal marital status remains 'single'.

In 2001, The Netherlands became the first country to recognise same-sex relationships. Since then a number of countries have enacted legislation recognising same-sex marriage. These countries include the United States, England, France, Brazil, Canada and New Zealand. A number of countries have indicated that they intend to create legislation recognising same-sex marriages. Under the as yet un-enacted Relationships Register Amendment (Recognition of Same-sex and Gender-Diverse Relationships) Bill 2014 (NSW) same-sex couples who marry overseas can have their marital status recognised by the NSW Relationships Register for administrative purposes. This means that same-sex couples will be able to register their marriage and declare themselves as 'married' when completing forms. Tasmania (2010) and Queensland (2011) have already passed similar legislation recognising

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same-sex marriage performed overseas. This does not mean that same-sex 'marriages' have any legal standing within Australia. For some same-sex couples, the desire for legal recognition of their relationship does not necessarily mean that they want the right to be married. The removal of institutionalised discrimination and the provision of adequate legal protections may be a more pressing concern.

The Commonwealth Government reaffirmed the traditional concept of marriage as 'the union of a man and a woman' when it passed the *Marriage Amendment Act 2004* (Cth), which amended the definition by adding those words to s 5(1) of the *Marriage Act*. The purpose of the amendment was to clarify that parties to a marriage must be one man and one woman. This means that any same-sex marriage is automatically void in Australia, including the marriage of any same-sex couple who had previously married in a country that granted same-sex marriages legal status. It will not be possible for any same-sex marriage to gain legal standing in Australia until this definition has been amended to allow same-sex marriages. The debate concerning the legalising of same-sex marriages continues.

Changes to the law have been slow and haphazard, but the law is gradually changing. Such changes are to be encouraged if the law is to continue to protect the rights and mutual obligations that are created when two individuals form a relationship. In addition, there are cumulative benefits for our society in protecting any mutually supportive relationship, not least of which is the economic benefit associated with a two-income family (which is more likely than a heterosexual relationship to be without children). This purchasing power has been acknowledged by marketing and sales representatives as they try to attract the 'pink dollar'. It is arguably against society's interests to penalise such relationships.

Legal responses

The law has recognised relationships that exist outside the traditional concept of marriage. Originally these relationships were covered by the *De Facto Relationships Act 1984* (NSW). This Act was later amended by the *Property (Relationships) Legislation Amendment Act 1999* (NSW) and renamed the *Property (Relationships) Act 1984* (NSW). The *Property (Relationships) Act 1984* (NSW) recognises same-sex relationships as having the same legal standing as heterosexual de facto relationships, and provides the same protection.

Between 2000 and 2009, various Australian states and territories introduced a number of law reforms recognising same-sex relationships in specific areas. Under the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth), property and maintenance matters for separating same-sex couples are determined by the Family Court or the Federal Circuit Court of Australia. The Act extends the definition of 'de facto' to include two people who are not married or related by blood and who live together 'on a genuine basis'. The Act does not distinguish between heterosexual and same-sex relationships. Finally, under changes to the *Family Law Act*, all matters related to children, including children of same-sex couples, are heard in the Family Court.

But same-sex relationships were still not recognised as having the same status as a 'marriage' under federal laws. In 2008, following the Australian Human Rights Commission's report *Same-Sex: Same Entitlements*, the Australian Government introduced reforms with the aim of removing discrimination and giving same-sex couples the same entitlements as those presently enjoyed by heterosexual de facto couples. Since 2008, under the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – General Law Reform) Act 2008* (Cth), federal law reforms have removed areas of discrimination from a range of laws and programs by amending or extending definitions such as 'de facto partner', 'child', 'parent', 'couple' and 'family' to include same-sex relationships.

For example, the *Health Insurance Act 1973* (Cth) now allows a same-sex couple and their children to register as a family for Medicare and receive the same entitlements as a heterosexual couple and their children. Additional areas amended have been tax, social security, family law, superannuation, workers' compensation and child support. Same-sex couples will be able to claim the same tax concession as those presently available to married or heterosexual de facto couples. They and their children will be able to claim superannuation benefits, and to receive the same social security and family assistance payments as heterosexual couples.

A major change in state laws concerns the recognition of a same-sex partner as the 'parent' of

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their partner's child. Male partners in a heterosexual marriage or de facto relationship have parental rights and responsibilities towards a child conceived during the relationship – that is, biological parents are regarded as having joint responsibility for the child. However, a partner of the same sex had no legal standing and could not make decisions about the day-to-day care of the child unless the Family Court had so ordered. Children conceived through donor insemination or assisted reproduction had only the mother listed on their birth certificates. The *Miscellaneous Acts Amendment (Same-Sex Relationships) Act 2008* (NSW) granted equal parenting rights for the female partners of mothers, and both are listed as mothers on the child's birth certificate. This change gives children born into same-sex relationships equal rights to inheritance from both parents and protects the rights of both mothers in matters involving the children if the relationship ends.

In September 2010 the New South Wales Parliament passed a law allowing same-sex couples to adopt.

Non-legal responses

Non-legal responses to the reforms have been varied, ranging from complete support to criticisms of the various state and federal governments for not going far enough in granting same-sex couples equal rights, to individuals and groups who are highly critical of any added protection of the rights of same-sex couples. However, it should be noted that there has been a steady shift in public opinion in favour of same-sex marriage. In a Nielsen poll conducted in 2013, 65% of respondents supported same-sex marriage. Seventy-two per cent of respondents supported same-sex marriage in a similar poll conducted by CrosbyTextor in 2014.

The Australian Human Rights Commission (AHRC) has held a number of inquiries into areas of discrimination and human rights violations. AHRC also makes recommendations to the government regarding the removal of institutionalised discrimination and legislation that does not comply with UN human rights treaties. In 2007, the AHRC report *Same-Sex: Same Entitlements* recommended amending federal laws that discriminated against same-sex couples and their children in the area of financial and work-related entitlements and benefits.

Other groups that actively lobby and campaign for the legal rights and social equality of gay and lesbian couples include Australian Marriage Equality (http://cambridge.edu.au/redirect/?id=6363) and the NSW Gay and Lesbian Rights Lobby (http://cambridge.edu.au/redirect/?id=6364). Australian Marriage Equality argues that the legally recognised institution of marriage should not exclude these couples. A different classification sends the message that their relationships are of a lesser standard or character and that the people are second-class citizens. Justice requires changing the law to make marriage available to all Australians who choose it, not classifying same-sex couples as de facto couples or permitting them only to form 'civil unions'. The Gay and Lesbian Rights Lobby has a wide-ranging agenda, including advocacy, lobbying government and the media to address discrimination, hosting consultations, educating the gay and lesbian community on their rights and providing referrals to legal and welfare services.

Some sections of the media have been critical of these changes and have resorted to ridicule. For example, in 2003 two radio program hosts made comments 'capable of inciting severe ridicule of homosexual men' and therefore were held to have breached the vilification provisions of the *Anti-Discrimination Act 1977* (NSW). In 2008, the hosts' appeal was settled, with a public apology on air and a written apology in the *Sydney Morning Herald*.

Figure 12.9 Many believe that same-sex couples deserve equal rights. Our current laws discriminate against same-sex couples wishing to marry.

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In 2012, a Queensland politician was widely criticised in the media for portraying gay marriage in a negative manner in order to undermine his political opponent.

Most of the lobby groups that oppose equal rights for homosexual couples have a religious affiliation: see the Australian Christian Lobby (http://cambridge.edu.au/redirect/?id=6365), for example. Under the current discrimination laws, religious groups continue to be able to discriminate on the basis of sex, sexuality, race, disability and age. This allows these organisations to withhold services to individuals.

Responsiveness of the legal system

In order to change the law, courts have to be willing to act, a significant number of politicians must support legislative reform, and there also needs to be a societal change. Law reform bodies have the task of investigating and recommending changes.

The Anti-Discrimination Board of New South Wales is part of the New South Wales Department of Attorney-General and Justice. It administers the anti-discrimination laws of New South Wales. It handles complaints of discrimination, and also informs the public of how individuals can prevent and deal with discrimination, through consultations, education programs, seminars, talks, community functions and publications. The board's third function is to advise the government and make recommendations. It has made a number of submissions to both the state and federal governments concerning changes to current legislation that are necessary in order to give same-sex couples the same legal rights and protections that are now enjoyed by married couples.

In 2013, there was an attempt to introduce legislation which would have recognised same-sex marriages entered into overseas. These proposed changes followed the introduction of legislation allowing same-sex marriages in New Zealand and would have allowed any Australian same-sex couple marrying in New Zealand having their marriage recognised in Australia.

Although a successful referendum regarding changing the definition of marriage was held in Ireland in May 2015 legalising same-sex marriage, there has been heavy criticism of the outcome, most notably from the Catholic Church. Marriage in Ireland may occur between two people irrespective of their sex. In June 2015, the US Supreme Court ruled that all US states must grant marriage licences to same-sex couples wishing to marry and that marriages that have taken place in states that had already recognised same-sex marriages must also be recognised in all states. This effectively has meant that same-sex marriages are now legal throughout the United States.

However, arguments against the recognition of same-sex relationships continue to exert an influence in the public sphere. The legislative changes to de facto entitlements by the federal government in 2008, while welcomed, sat alongside a continuing refusal to amend the *Marriage Act* to permit same-sex marriage.

Legal Links

For more information about the Irish referendum, see the newspaper article at http://cambridge.edu.au/redirect/?id=6366.

Conclusion

In his speech at the Conference on Legal Recognition of Same-Sex Partnerships in 1999, then High Court Justice Michael Kirby stated:

> As a people committed to equal justice for all under the law, I have confidence that the Australian legal system, and those who make laws in Australia, will, in due course, eradicate unfair discrimination on the basis of sexuality. The scales are dropping rapidly

Review 12.13

1. List the issues surrounding same-sex relationships and discuss the effectiveness of legal and non-legal responses in addressing them.
2. Discuss the changing social attitudes towards same-sex marriage and whether or not the Australian Government has responded to this issue appropriately.

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from our eyes. Injustice and irrational prejudice cannot survive the scrutiny of just men and women.

Both the state and federal governments take note of and continue to respond to issues surrounding discrimination. These issues are not limited to same-sex relationships. Similar recognition, rights and protections for non-traditional and alternative or extended family relationships are also needed.

12.4 Contemporary issue: The changing nature of parental responsibility

About the issue

The concept of parental responsibility has changed. In the past, parents sought 'custody and control' over their children, enforcing their parental rights. Now the courts are less concerned with parental rights and more concerned with parental responsibility. The focus of the law is on ensuring that parents fulfil their legal obligations towards their children.

Parents have joint responsibility for the child (see *Family Law Act 1975* (Cth) ss 61B and 61C). Reforms to parental responsibility were made in 2006 under the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). Shared parental responsibility applies equally to a child born within marriage (nuptial) and to a child born outside of marriage (ex-nuptial). This responsibility is not altered if the parents separate, marry or remarry, unless there is a court order otherwise. Reforms to family law have tended to focus on maintaining positive and supportive family structures even when parents separate. But the law has also focused on ensuring that parents meet their responsibilities towards their children.

Figure 12.10 Shared responsibility as a parent is often difficult, and children may end up spending more time with one parent than the other.

There is a perception that the ideal of shared parental responsibility is frequently not reflected in reality. There are always instances where the child will spend a disproportionate amount of their time with one parent. This could be because of financial or geographic constraints, or issues such as a parent's alcohol abuse or poor health. In more than 60% of parenting plans and orders, children spend more than half of their time with their mother. The main reason for a child to spend no time or less than 30% of their time with a male parent was concern about abuse or family violence and entrenched conflict. For women it was concerns regarding their mental health, and issues surrounding transport or finances, as well as abuse.

A key point to remember is that shared parental responsibility, or shared responsibility for major decision-making, is not the same as shared care (equal time with both parents). However, it can be argued that the 2006 family law changes, which were aimed at encouraging parents to share both responsibility and care more equally, have had some unintended and undesirable consequences. One of these was that more parents mistakenly believe that they are now entitled to 50/50 shared care of their children. Another is that the legislation's emphasis on a child's right to a relationship with both parents has been given more weight than is warranted.

Legal responses

Reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) included two types of considerations to be taken into account by a court in respect of the 'best interests' of the child (*Family Law Act 1975* (Cth) s 60CC). The court will now take into account 'primary' and 'additional' considerations. Primary considerations include the benefit of the child having a positive and meaningful relationship with both parents, and the need to protect the child from abuse and family violence. Additional considerations include

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the child's wishes, the nature of the relationship between the child and the parent, the financial ability of the parent to care for the child and the ability of the parent to provide for the intellectual and emotional needs of the child. Where there is the risk of violence, the court may consider that further contact may not be in the best interests of the child.

Another change involved the notion of the child spending 'substantial and significant time' with each parent, where equal time is not considered to be in the best interests of the child (*Family Law Act* s 65DAA). Some have argued that this provision has not been sufficient to address parents' misperception that both are 'entitled to' time with the child, and that they should both have 'substantial and significant time' even when there are other factors suggesting otherwise.

When more time with children is coupled with reduced child support payments, the motivations for seeking shared care become less clear, and courts may have a harder time reconciling the aim of facilitating the child's relationship with both parents with the actual facts of the particular family situation.

A parent who has been pressured into allowing the other parent more time with the child may be discouraged from raising concerns about family violence, and may think that the court will order shared care anyway.

The federal government's *Time for Action: The National Council's Plan to Reduce Violence Against Women and Their Children 2009–21* identified a range of issues which undermined the effectiveness of the present domestic violence and child protection legislative framework. In response, the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) was passed. Under that Act, courts must now take into consideration evidence of and any findings made in relevant domestic violence order proceedings in determining parenting matters. If there are reasonable grounds to believe that one or both parents have neglected or abused their child, this overrules the presumption of equally shared parental responsibility. Under the 2011 amendment, the priority is to protect children from harm rather than to ensure that children maintain a meaningful relationship with a parent.

Non-legal responses

Community and church-based institutions, as well as nation-wide organisations such as Relationships Australia, can help separating parents negotiate their own parenting agreements and can also provide a range of information and referrals. Counselling, education and skills training not only help parents develop better parenting skills, but may also assist in recognising gender issues that affect relationships with children in negative ways (for example, the attitude that fathers are inherently less competent than mothers in caring for toddlers, or that a good work–life balance is essential for mothers but less important for fathers).

Resolving problematic issues about shared parenting and shared responsibility requires changes in societal attitudes, and these interact with legislative enactments and amendments. Successful shared care was occurring before the 2006 amendments, where the parents involved were willing to cooperate to achieve the best circumstances for their children. Non-legal mechanisms such as women's resource centres, the National Council of Women of Australia and parenting networks for mothers, fathers or both may be of value in furthering this aim. Dads in Distress Support Services provide support for men who are going through a divorce, separation or relationship breakdown. The service provides counselling, a helpline, referrals and advocacy. A second support group, Interrelate, provides 'fathering programs' and aims to help men build and maintain positive relationships with members of their families. It also provides counselling and referrals to other agencies.

Responsiveness of the legal system

Sometimes changes to the law have led to changes in what the community accepts as moral behaviour, and sometimes they reflect these social changes. The obligation to take responsibility for the care and financial support of a child is now, for example, considered one that should be met by both parents.

In addition, views about men and women have expanded to accommodate a much wider range of roles for fathers as well as mothers. A significant number of Australians now believe that fathers

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are equally capable of parenting, just as mothers are equally capable of fulfilling other roles seen as important aspects of a satisfying and productive human life.

In order to ensure that parents meet their responsibilities, the government has enacted a number of laws. Some of the trends that have arisen since the 2006 reforms to the *Family Law Act* suggest that courts – and society – still need to distinguish between families in which shared care is desirable and those in which there are concerns that override this aim. The most obvious legal response would be to change the law to distinguish between equal responsibility and equal time.

Conclusion

The emphasis on children's rights reflects the idea that children are vulnerable members of our society and need greater protection. All decisions must be in the best interests of the child; the interests of their parents or care-givers are secondary. It is important to protect the child's right to maintain a quality relationship with both parents, but the law also needs to ensure that parental responsibility entails more than the child merely spending half their time with each parent.

Review 12.14

1. List the issues surrounding equal parental responsibility and discuss the effectiveness of legal and non-legal responses to these issues.
2. Consider and discuss whether further legislative reforms would be useful to address the problems raised by parents' misunderstanding the idea of shared parental responsibility.

12.5 Contemporary issue: Surrogacy and birth technologies

About the issue

Birth technologies

Under common law, the mother of a child is the woman who gave birth to the child. The father is the man who acknowledges and accepts the responsibility for the child or who is proved to be the father in court. Advances in birth technology mean that it is no longer possible to presume the identity of the biological parents. Birth technologies include:

- artificial insemination – where donated sperm are artificially introduced into the vagina or uterus
- IVF (in vitro fertilisation) – where fertilisation takes place outside the uterus using the sperm of a parent or donor and the ovum of a parent or donor, and the resulting embryo is then implanted in a uterus
- use of genetic manipulation, gene shearing or donated genetic material to alter a foetus in utero.

Birth technology has created many legal issues, from paternity and rights of inheritance to who has care of and control over the child. The father of the child may not necessarily be the 'natural father'. For any child conceived via artificial insemination or in vitro fertilisation, the parents (whether married or not) are considered to be the legal and natural parents of the child and have all the obligations of maintaining and caring for the child. Under the *Status of Children Act 1996* (NSW), these children have the same legal status as children conceived naturally.

The *Status of Children Act* created the notion that 'presumption of paternity' is automatic, and is irrefutable if the couple are married or in a de facto relationship. Under this Act, 'when a woman becomes pregnant by using donor sperm from someone other than her husband, then that man is presumed not to be the father of the child born'. In the case of *B v J* (1996) 21 Fam LR 186, the father refused to pay maintenance, arguing that the child was not his child and that maintenance was the responsibility of the sperm donor because the donor's name appeared on the child's birth certificate. The court rejected

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this argument. Under the 'presumption of paternity' he automatically became the child's father because he was in a relationship with the child's mother, and he therefore had all of the responsibilities and obligations in respect of the maintenance and care of the child, who was born within the relationship. A sperm donor is automatically presumed not to be the father (to have no paternity), and thus is not required to pay maintenance even if his name appears on the child's birth certificate. However, any such presumption about the sperm donor may be altered if he makes a written application, signed by the mother and lodged with the Registry of Births, Deaths and Marriages. If paternity is in dispute, the Act allows the identity of the father to be determined by blood tests.

Surrogacy

Surrogacy involves an agreement between a commissioning couple and a woman, where the woman agrees to bear a child for the commissioning couple and then give the baby to the couple when he or she is born. Under the law, it is usually the woman who gives birth to the child – whether the child is conceived naturally or artificially – who is the mother. Before 2010, even if the birth mother used both donor ova and donor sperm or a donated embryo to achieve the pregnancy, she was still considered the legal and natural mother of the child. The status of the natural mother as the birth mother can be found in the *Status of Children Act 1996* (NSW), the *Family Law Act 1975* (Cth) and the *Marriage Act 1961* (Cth), and under common law. However, under the *Surrogacy Act 2010* (NSW), it is now possible to transfer the parentage of the child from the birth parent to the prospective parent in the surrogacy contract. This will in effect avoid the commissioning parents having to go through a formal adoption process. Any parentage order must be made in the best interests of the child. Under the *Surrogacy Act*, commercial surrogacy remains illegal even when carried out overseas.

Summary

Surrogacy raises many complex social, emotional and parenting issues, including the legal recognition of genetic parents. The law distinguishes between commercial surrogacy and altruistic surrogacy. Commercial surrogacy is an agreement involving a fee or reward paid to the woman who gives birth to the child, and the transfer of custody and parental responsibility for the child to another person, by adoption or agreement, with the child to be treated as the child of that other person. As noted above, commercial surrogacy remains illegal. Altruistic surrogacy, by contrast, is an arrangement in which the surrogate receives no financial payment for the pregnancy or the transfer of the child, though the commissioning parents may pay expenses related to her pregnancy and the birth.

Legal responses

The laws concerning surrogacy in Australia are state or territory based. Until recently, as noted, these laws have been inconsistent and provided inadequate protections and guidance. Some state and territory laws prohibited both altruistic and commercial surrogacy, some allowed altruistic but prohibited commercial surrogacy, and other laws were silent on the issue.

In 2008, the Standing Committee of Attorneys-General, a ministerial council drawn from state and Commonwealth parliaments and including the New Zealand Minister of Justice, agreed that a national model law regulating surrogacy was needed. In 2010, the standing committee released a draft of

Figure 12.11 Surrogacy laws vary from state to state. In recent times, Australian surrogacy laws have created issues involving parents who travel overseas for surrogacy services.

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15 principles for a national surrogacy model which would include the following:

- The informed consent of all parties is essential, along with specialist counselling.
- Court orders should be available to recognise the commissioning parents as the legal parents if that is in the best interests of the child.
- Court orders should not be granted for commercial surrogacy.

In May 2009, the Legislative Council Standing Committee on Law and Justice tabled a report on altruistic surrogacy in New South Wales which aimed to clarify the legal rights and responsibilities of commissioning parents and birth parents, and clarify the rights of children born through surrogacy. Drawing on the recommendations of the national and state committees, the New South Wales Parliament introduced new legislation in 2010 to regulate surrogacy arrangements in New South Wales. The New South Wales Parliament passed the *Surrogacy Act 2010* (NSW), which commenced in early 2011.

Prior to the commencement of the Act, in most cases in New South Wales the *Status of Children Act 1996* (NSW) meant that a child's legal parents were presumed to be the birth parents. This meant that commissioning parents in a surrogacy arrangement, although in practice the parents of the child, would not be recognised as the legal parents and could face difficulties if trying to enrol the child in a school, access certain government benefits or apply for a passport for the child. In addition, where the child was conceived in a stable relationship, the male partner of the surrogate could be assumed to be the father even if he was not the biological parent. This would mean that the child's biological father had no rights in regard to his child. It was also illegal for the surrogate mother to 'give' her child to the commissioning parents, as placing a child with a person who is not a relative for more than 28 days is illegal under the *Children (Care and Protection) Act 1987* (NSW). If, however, one of the commissioning parents was also a biological parent of the child, this would be permitted.

Some aspects of altruistic surrogacy were previously covered by the *Human Tissue Act 1983* (NSW) or as adoption issues under the *Adoption Act 2000* (NSW). There were also a few federal provisions addressing surrogacy issues in the *Family Law Act 1975* (Cth), but these were not adequate to address all of the potential issues surrounding surrogacy. One important case involving commissioning parents attempting to have parentage rights recognised was the case *Re Michael: Surrogacy Arrangements* [2009] FamCA 691. The case was heard under the *Family Law Act* because, as noted above, New South Wales at the time lacked clear state legislation relating to surrogacy. The commissioning parents were attempting to apply to the Family Court to adopt the child under s 60G of the *Family Law Act 1975* (Cth). The essential question was, 'Who are the parents of a child born as a result of a surrogacy agreement?' In this case, the two biological parents (Sharon and Paul) sought an order to adopt their child after the surrogate mother (Lauren) had given birth to Michael. There was no dispute between the parties over who should have custody and responsibility for Michael, but the court had to determine whether Sharon and Paul were Michael's legal parents, in order to decide whether or not they could initiate proceedings to adopt him. However, under the *Family Law Act*, if no orders have been made under state law regarding parentage, the child is deemed to be the child of the woman who gave birth and her partner (s 60H) – in this case, Lauren, the surrogate mother, and her partner Clive, neither of whom contributed genetic material. It was irrelevant that Lauren and Clive did not intend to be the legal parents. Even though Michael's birth certificate named Sharon and Paul as his parents, the court found that the presumption of their parentage based on the birth certificate (s 69R) was rebutted (by s 60H). The court could not make an order for Sharon and Paul's adoption of Michael. However, they could apply to the Supreme Court of New South Wales for an adoption order under the *Adoption Act 2000* (NSW).

The *Surrogacy Act 2010* (NSW) introduced a system of parenting orders where parties can apply to the NSW Supreme Court for an order to transfer full legal parentage of the child from the birth parent in a surrogacy arrangement to the commissioning parent. The new parentage orders grant the commissioning parents full legal capacity to make decisions in the child's interests and aim to provide relief and certainty for all parties involved in surrogacy arrangements.

Under the new system, the commissioning parents must apply for a parentage order between

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30 days and six months after the child's birth. The first 30 days are intended to operate as a cooling-off period for the birth mother, to encourage careful consideration before any consent to the grant of a parentage order. The orders also apply to de facto couples (including same-sex). A parentage order requires that if two people enter into a surrogacy arrangement as intended parents, they must be a couple. Some of the other requirements of the new framework are:

- An order can be made only if it is in the best interests of the child.
- An order cannot be made in relation to a commercial surrogacy.
- The parties must have counselling and legal advice before entering into a surrogacy arrangement to ensure that they fully understand the implications, and the arrangement must be in writing.
- The birth mother must be at least 25 years old before entering the arrangement.
- The consent of the birth parents is required before an order can be made.
- There must have been a 'medical or social need' for the arrangement.

The Act also made certain amendments to other New South Wales legislation to ensure that the parentage orders and the status of the child would be recognised in matters concerning, for example, wills, property, relationship registers and other government entitlements.

While it permits and provides a legal framework for altruistic surrogacy, the New South Wales legislation expressly prohibits arrangements involving commercial surrogacy. The commissioning couple may pay for 'reasonable costs' associated with the pregnancy and birth of the child (*Surrogacy Act 2010* (NSW) s 7). New South Wales residents who procure commercial surrogacies now risk a fine of over $100 000 and/or imprisonment for up to two years.

More and more prospective parents are pursuing surrogacy arrangements overseas. In 2008, there were 423 and in 2012 there were 978. This may be due to two broad factors: one is the difficulty in securing an altruistic surrogacy in New South Wales and the second is that surrogacy is poorly regulated in many countries. This second reason raises issues surrounding the exploitation of women in poor or developing nations and concerns surrounding the welfare of any child born in such arrangements.

The problematic nature of international surrogacy was raised in 2014 when Australian couples who had entered into a surrogacy arrangements refused to take both children when the surrogate mother gave birth to twins. In one instance, 'Baby Gammy', who was born with Down syndrome, was rejected by the commissioning couple who then returned to Australia with his twin sister, leaving the boy with his mother in Thailand. In the second instance, a commissioning couple refused to take both children, instead choosing to take only one and leaving the second child with their Indian surrogate mother. This had occurred in 2012 but only came to light in 2014. There have also been reported cases where parents have discovered that children born to surrogate mothers in India may in fact not be their biological children. The Family Law Council of Australia received a submission from the Department of Immigration and Citizenship (as it was then called) in 2013 which raised numerous issues surrounding the growing number of Australian couples engaging in international surrogacy. These concerns included the legal, ethical and moral issues raised by the lack of a legal framework governing international surrogacy. Some of these issues include:

- The *Australian Citizenship Act 2007* (Cth) does not define 'parent'; this means that a child born in India, which currently allows commercial surrogacy, will be granted Australian citizenship by descent but the child's intending parents may not be considered the child's legal parents.
- There are inconsistent requirements concerning surrogacy and the risk of unauthorised adoptions being described as 'surrogate' to avoid specific immigration requirements.
- There is a growing risk of 'child trafficking' in the guise of 'surrogacy', and the exploitation of young girls and women in developing and poor nations.

Presently an international legal framework governing surrogacy does not exist and in light of the growing number of international surrogacies there is a growing need to devise such a framework. However, such a framework is problematic as surrogacy, whether altruistic or commercial, is a

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Research 12.5

Go to http://cambridge.edu.au/redirect/?id=6367 and read the article 'Should commercial surrogacy be legal in Australia?' Answer the following questions.

1. Discuss whether or not commercial surrogacy should be legalised in Australia.
2. What ethical and legal issues need to be considered?

contentious issue and raises specific moral and legal issues within individual countries which may never be able to be resolved in one international instrument.

Non-legal responses

Various organisations and lobby groups have opposed surrogacy on moral grounds, usually based on religious principles. These concerns centre on the concept of a traditional family, especially because surrogacy may provide an avenue for same-sex couples to have children. These lobby groups have expressed a desire that surrogacy be restricted to infertile heterosexual couples. They have claimed that families with parents of the same sex face difficulties ranging from problems in accompanying one's small child of the opposite sex to a public toilet to social stigma. A slippery-slope argument has also been employed; for example, the Australian Christian Lobby claimed in 2009 that surrogacy 'would pave the way for two men or two women to "order" a baby they are not even genetically connected to', and would deny the child either a male or a female parent and role model.

There has been a growth in commercial surrogacy centres, particularly in India where commercial surrogacy is permitted. Commercial surrogacy has become increasingly popular, particular for women in poorer nations like India who can now earn $5000 to $7000 per child, which may provide their own families enough money to purchase their own homes and a better life. It is estimated that global surrogacy has become a billion dollar industry (see http://cambridge.edu.au/redirect/?id=6368).

Responsiveness of the legal system

The federal government has been slow to pass laws relating to surrogacy issues and the courts are constrained by existing legislation. There remain wide inconsistencies in surrogacy laws between the states and territories. In New South Wales, previous laws were inadequate and people who sought to become parents under surrogacy arrangements were forced to deal with legal schemes that were not designed for those situations.

The *Surrogacy Act 2010* (NSW) encourages parties to a surrogacy arrangement to make sure they thoroughly understand the psychological, social and legal complexity of their decisions and the impact on the child. This new framework is an important development in increasing legal certainty for people who are parties to a surrogacy arrangement because they are otherwise unable to have children, but also in protecting the interests of children who are born into surrogacy arrangements.

Conclusion

Advances in birth technology have created a great need for law reform. When considering the new laws in this area, both parliaments and the courts need to address a multitude of conflicting ethical views. The rapid development of birth technology has challenged long-standing moral and legal conceptions of 'family' and 'parent'. Prior to IVF, the woman who gave birth and her husband or partner were the child's parents. However, the legal definition of 'parent' has now been extended to meet the challenges of new family arrangements and technological advances.

Review 12.15

1. List the issues surrounding surrogacy and discuss the effectiveness of legal and non-legal responses to these issues.
2. Identify the jurisdictional problems in the area of surrogacy.

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12.6 Contemporary issue: Care and protection of children

About the issue

All states and territories, together with the Commonwealth Government, have passed laws regarding family violence, child abuse and child neglect. The focus of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) is on safeguarding the health and wellbeing of children, including protecting them from violence or abuse, and on the mandatory reporting of concerns to Community Services – teachers, doctors, nurses and other professionals must report if they believe there is a risk of harm from family violence or abuse. The amendments to the *Family Law Act 1975* (Cth) by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth), which aimed to ensure that children have a meaningful relationship with both their parents, require the court to consider the child's best interests rather than parental interests. The *Child Protection Legislation Amendment Act 2014* (NSW) amended the *Children and Young Persons (Care and Protection) Act 1998* (NSW), the *Adoption Act 2000* (NSW) and the *Child Protection (Working with Children) Act 2010* (NSW). The aim of the amendments is to improve early intervention services, introduce parental capacity orders and allow adopted children to maintain a connection with their biological parents.

According to the submission of the NSW Ombudsman to the Wood Inquiry (Special Commission of Inquiry into Child Protection Services in NSW) on mandatory reporting, the number of 'at risk of harm' reports made to Community Services has increased steadily and continues to grow. According to the Australian Institute of Health and Welfare report *Child Protection Australia 2014*, in 2012–13 there were 184 216 children suspected of being harmed or at risk of harm from abuse and or neglect nationally. In total there were 272 980 notifications, with 53 666 or 20% of these claims being substantiated; 26 860 or 50% of all substantiated claims of abuse or neglect were in New South Wales and 13 146 children or 32% of substantiated reports were admitted to care or protection orders. Of those children who were admitted into care, 4877 or 43% were under the age of five (AIHW 2014, *Child Protection Australia 2012–13*, Child Welfare Series 58, Cat. no. CWS 49, Canberra: AIHW).

Legal responses

The *Family Law Act 1975* (Cth) defines 'family violence' as any action or threat of violence by one family

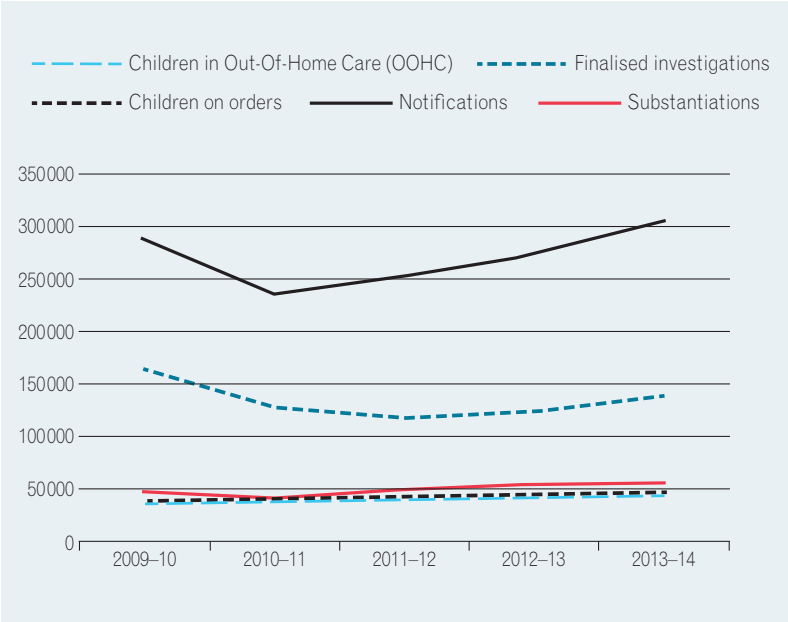

Figure 12.12 Total number of notifications, investigations and substantiations across Australia from 2009–10 to 2013–14, and total number of children on orders and in out-of-home care at 30 June 2010 to 2014

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member against another, including witnessing that action or threat, that causes fear or apprehension about personal safety. The 2006 amendments to the *Family Law Act 1975* (Cth) endeavoured to ensure that children are protected from both direct harm and harm resulting from exposure to family violence. The presumption of equal shared parental responsibility does not apply if there is a risk of child abuse or family violence (*Family Law Act 1975* (Cth) s 61DA).

If there is evidence of family violence, the court may order that the child's contact with the offending parent is restricted or that the contact takes place within a controlled environment, such as with a social worker present. In this instance the concept of 'shared parental responsibility' does not apply. If relevant authorities consider that the child or young person is in urgent need of protection, Community Services can apply to the Children's Court for an Emergency Care and Protection Order.

In cases where there is evidence that family violence has occurred, family dispute resolution may be inappropriate. The court will hear cases that raise family violence issues quickly so that it can take appropriate action to protect vulnerable family members.

The Family Court can order relevant state and territory agencies to provide information regarding allegations of family violence.

When Community Services NSW receives a 'risk of harm' report involving allegations of physical or sexual abuse, neglect or other criminal conduct regarding a child, a caseworker makes an assessment to determine the extent of the risk. Almost two-thirds of all reports are referred to a Community Services centre or a JIRT for further assessment and investigation. Members of this team include Community Services representatives, police and representatives from the NSW Health. Once the

Figure 12.13 Graffiti in Lisbon depicting a priest chasing two children in criticism of the child abuse scandals of the church

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report has been made, the response team will speak to the young victim and act to protect the child if the child is in immediate danger.

If police decide that there is evidence of a crime, the suspect will be charged, the child will be assigned a caseworker, and the child will receive medical attention if needed. The response teams were established to improve interagency collaboration between NSW Health, the police and Community Services, and to provide counselling and trauma support for victims.

Reporting reduces the amount of administrative work for a caseworker and reduces the call load on Helpline, thus allowing caseworkers to focus on assessment. According to the NSW Family and Community Services *Annual Statistical Report 2012/13*, there were fewer calls to Helpline in 2012–13 compared to 2011–12. In 2012–13 Helpline received fewer calls (134 486) compared to 2011–12 (145 425), but there was a slight increase in faxes (8582 in 20132–13 compared to 8282 in 2011–12). Reporting of child abuse or neglect via eReports continues to increase. In 2010–11 there were 7480, in 2011–12 eReports increased to 11 953 and in 2012–13 eReports increased further to 13 524. The fall in calls to Helpline may largely be due to a new efficiency strategy introduced in 2012 where Helpline Community Service Officers (CSOs) now answer calls from non-mandatory reporters, thereby reducing the total number of calls answered by Helpline.

Non-legal responses

Churches and organisations such as the Salvation Army have traditionally provided extensive support and educational services to children in need. These services include childcare centres, counselling services (for example, for addiction and bereavement), and emergency housing and youth support programs. Although these groups have provided necessary help and support to children and families in crisis, some groups have also been heavily criticised for their lack of action in dealing with accusations of child abuse made against their own members.

Clergy members of various churches have been accused and found guilty of serious misconduct and child abuse. Some church organisations have been heavily criticised for their lack of support for victims of abuse at the hands of the clergy and some churches have been accused of protecting known child sex offenders within their ranks.

In response, the Anglican Church established a Professional Standards Unit that investigates complaints involving clergy and ancillary staff. In 2002, the Anglican Church made a public apology for the misconduct of clergy and staff and reaffirmed the church's condemnation of such behaviours. In 1996, the Catholic Church established the Melbourne Response to investigate claims of clergy abusing young children. This has been heavily criticised as inadequate, with the average compensation paid to victims of systemic church abuse being $50 000.

Victims of abuse have been encouraged to contact the relevant church authorities to lodge a complaint. All major religious bodies which have contact with children and young people have established internal procedures for investigating abuse claims. As part of this process, each has established counselling services for abuse victims and compensation funds to pay future claims made by victims.

There are also a number of initiatives to provide support for families and children in crisis. These include:

- Child Abuse Prevention Service (CAPS) (http://cambridge.edu.au/redirect/?id=6369) – aims to alleviate child abuse by educating the community about child abuse issues and providing counselling and ongoing support for victims and perpetrators
- Child Protection and Family Crisis Service – provides 24-hour telephone counselling
- the Benevolent Society (http://cambridge.edu.au/redirect/?id=6370) – offers programs supporting families to overcome stresses that lead to abuse and neglect; services include counselling, home visits, access to child health professionals, play groups, social groups for parents, art therapy and links to local services
- Families NSW – a state government initiative which aims to make parenting easier by helping parents become better parents.

Various local municipal councils also offer programs providing help and support for children and young people.

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Responsiveness of the legal system

Criticisms of child protection in New South Wales have been made about Community Services, the police, the courts and community groups. A review of the New South Wales child protection system began in 2006. A Children's Commissioner was established to monitor state programs to eradicate child abuse and strengthen existing child protection. The review also proposed that a national framework for child protection should be established. No such framework yet exists.

The legal system has been accused of acting too slowly to protect child victims of abuse and there are claims that existing mechanisms to protect children are inadequate. An increasing number of people under 18 have been placed on care and protection orders. The Australian Institute of Health and Welfare in 2014 reported that nationally more than 135 000 children were receiving child protection services (investigation, care and protection orders and/or out-of-home care), During 2012–13, there were 51 997 children on care and protection orders. While some would argue that this indicates that people, once they are aware of their rights, will seek ADVOs to protect themselves and their children from harm, it also indicates that support and counselling services provided to perpetrators have been less than successful in modifying their abusive behaviours.

Sadly, in 2012, 88 children who had been previously reported to Community Services as being at risk of harm died at the hands of their abusive parent or carer. Many of the victims were less than five years old. Hampered by dwindling financial resources and staff cuts, Community Services has been unable to provide adequate protection and support for families and victims of child abuse.

Keep Them Safe: A Shared Approach to Child Wellbeing was a report from the 2008 New South Wales government inquiry into Child Protection Services. The report highlighted the importance of the wellbeing of all children and aimed to provide appropriate support to families to reduce the growing number of families requiring statutory child prevention.

The federal government has recognised child abuse and neglect as major issues and is seeking to create a national framework for protecting children. This will necessitate the coordination of government and NGOs, the creation of uniform child protection laws, and a focus on early intervention and prevention strategies to protect children from abuse and reduce the harmful effects that abuse has on children.

In January 2013, a Royal Commission was set up to investigate institutional responses to child sexual abuse. The six-member Royal Commission, with the Honourable Justice Peter McClellan serving as Chair, has held numerous formal public hearings to hear evidence of institutionalised child sexual abuse. The focus of these hearings has been on how various institutions, such as the Catholic Church, the YMCA, Salvation Army and various private educational facilities, have responded to allegations of child sexual abuse. The commission also heard evidence from survivors of child sex abuse of their experience of the 'Towards Healing' process. This process was established by the Catholic Church after the Wood Royal Commission and is largely a 'pastoral response' intended to encourage victims and survivors to enter into a pastoral relationship rather than an adversarial one with the church. This process has been criticised extensively as being inadequate in meeting the emotional and financial needs of victims and their families.

Conclusion

Children are vulnerable members of our society and as such they deserve, and are in greater need of, higher levels of protection than adults. The legal system has strengthened legislation surrounding the care and protection of children. Neglect and the abuse of children are now considered serious crimes.

Review 12.16

List the issues surrounding the care and protection of children and discuss the effectiveness of legal and non-legal responses in addressing them.

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Chapter summary

- The concept of family includes nuclear, extended, blended and single-parent families, and the main function of the family is the care and protection of its members.
- Marriage is the 'voluntary union for life of one man and one woman, to the exclusion of all others'. A valid marriage is between one man and one woman, who must be adults and not closely related.
- Marriage imposes legal rights and obligations on both husband and wife. These include matters relating to maintenance, property and wills.
- The Australian Government has the power and authority to make laws governing marriage and divorce. However, state laws regulate de facto and other domestic relationships, including adoption.
- Parents have legal and moral obligations to their children. Children have the right to the care and protection of their parents, and the right to education, medical treatment and inheritance. Recent reforms to the *Family Law Act* centre on shared parental responsibility.
- The *UN Convention on the Rights of the Child* (CROC) recognised the need for the universal protection of children's rights. The convention has influenced family law within Australia.
- There is only one ground for divorce in Australia: irretrievable breakdown of marriage.
- The spouses must live separately and apart for 12 months before a divorce order will be granted. A divorce will not be granted if there are any outstanding issues related to any children of the relationship.
- In property settlements, courts will consider financial and non-financial contributions, age, income, childcare factors and other specific characteristics of the parties.
- Binding financial agreements can be made before, during or after a marriage.
- A main focus of family law is the protection of children. Many of the amendments made to legislation centre on enforcing parental responsibility and ensuring that decisions concerning children are made in the best interests of the children.
- The law also aims to provide dispute resolution structures and processes that will help parties reach an amicable termination of their relationship. The court focuses more on reconciliation and on encouraging compliance than on enforcement through the use of sanctions.
- Legal responses to domestic violence include AVOs/ADVOs, injunctions and criminal charges.
- A number of countries around the world have recognised same-sex marriage.
- Advances in birth technology have raised a number of new ethical and legal issues. The concept of parentage has expanded. Surrogacy remains a problematic area within family law.

Chapter summary questions

Multiple-choice questions

1 Marriage in Australian society:

A can only be entered into by a person of sound mind and understanding

B is the joining of two people to live together for the remainder of their lives

C is defined in legislation and not in case law

D is based on the idea of romance and can only occur once the couple have become engaged

2 A parenting plan is an agreement between parents covering:

A living arrangements only

B living arrangements and maintenance agreements

C living arrangements, maintenance agreements, religion, culture, education, health and other issues

D living arrangements and maintenance agreements but not religion, culture, education, health and other issues

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3 If an ADVO is breached, police can arrest the offender:
- **A** if there is sufficient evidence to prove that such a breach occurred
- **B** although sufficient evidence is not necessarily required to prove that such a breach occurred
- **C** if they suspect the offender of previous breaches
- **D** but they don't have to investigate claims of domestic violence

4 Family Relationship Centres were established to:
- **A** help people find a partner
- **B** help individuals maintain healthy relationships and encourage good parenting practices
- **C** provide information, referrals and assistance to individuals seeking to have the dominant share of responsibility and care for their children
- **D** provide a forum for disputing parents to negotiate a settlement

5 Individuals who enjoy greater protection of their rights than others include:
- **A** adults, who have more rights because they can earn money
- **B** children, who have rights until they are 18 years of age
- **C** adults, because they are seen as vulnerable members of our community, especially in their dealings with the law and with other adults
- **D** children, because they are seen as vulnerable members of our community, especially in their dealings with the law and with adults

Short-answer questions

1 If a marriage breaks down, should the dependent spouse be entitled to maintenance? Outline and explain the various factors that should be taken into account when determining maintenance issues.

2 Discuss the issues surrounding blended families and explain why a step-parent is not financially responsible for the children of their spouse.

3 Briefly explain how family law has responded to changing social values, such as increased incidence of divorce and the acceptance of de facto and same-sex relationships.

4 Create a table listing in chronological order the legislative and common law changes in family law and their effects.

5 Outline the legal issues surrounding family violence, and evaluate the effectiveness of current family law remedies in achieving just outcomes for all family members.

Extended-response questions

1 Evaluate the effectiveness of existing legislation in protecting individuals from domestic violence.

2 Identify and evaluate the arguments for and against changing the definition of marriage to include same-sex couples. Discuss, with reference to the claim that practical benefits such as superannuation, tax, property rights and medical consent issues are more important than the symbolic social role of marriage.

3 What weight should be given to children's views with respect to disputes about parental responsibility?

4 Discuss the role of the media and NGOs in family law.

5 Identify and critically evaluate current Australian surrogacy laws. Suggest reforms that could be made in this area.

In Section III of the HSC Legal Studies examination you will be expected to complete an extended response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended-response questions can be found at http://cambridge.edu.au/redirect/?id=6371. Refer to these criteria when planning and writing your response.

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Themes and challenges

The role of the law in encouraging cooperation and resolving conflict in regard to family

- An emphasis on mediation and counselling as primary dispute resolution processes has encouraged greater levels of cooperation between separating couples, and the vast majority of family disputes are now resolved without arbitration.
- This has been enhanced by court provision of information via websites and do-it-yourself kits.
- Disputing couples are required to attend compulsory family dispute resolution and family counselling sessions.
- The Family Court has reviewed its own internal processes and made substantial changes to make them less complex.

Issues of compliance and non-compliance

- The Family Law Council (a Commonwealth statutory authority established under s 115 of the *Family Law Act 1975* (Cth) to advise the federal Attorney-General) has recommended that an enforcement agency be established to oversee the enforcement of parenting orders and assist in bringing complaints before the court.
- It is only when parties cannot reach an agreement that the dispute will be heard in the Family Court. Court intervention is seen as a 'last resort' because individuals are more likely to comply with a decision that they negotiated and reached voluntarily. Enforcement of Family Court orders therefore only comes into effect when there is a breach. The court will act to protect individual rights and enforce spousal or parental responsibilities.
- An individual must apply to the court to enforce orders breached by another party. Once the court is satisfied that a breach has occurred, it can impose various sanctions depending on the type, magnitude and number of breaches.
- If the breach was of orders pertaining to children, the court has a range of actions available to it. Remedies available to the court include variation of parenting orders, compulsory attendance at parenting programs, community service orders and, in extreme circumstances, imprisonment (Division 13A of Part VII of the *Family Law Act 1975* (Cth)).
- Although AVOs/ADVOs are designed to provide protection against harm, there are concerns about their effectiveness. Approximately 10% of individuals do not comply with protection orders. AVOs depend on the named individual's voluntary compliance with the order, the active policing of the AVO, and the victim's willingness to report any breaches to the police.

Changes to family law as a response to changing values in the community

- The law reflects community values. Individuals are therefore more likely to obey the law if they believe that the law is essentially enforcing and promoting 'right' behaviours. Family law is concerned with managing human relationships, which is complicated by the multicultural nature of our society. The legal system must balance different cultures, ethical systems, religious values, social and family attitudes, and individual rights in the effort to develop the best processes for society as a whole.
- When children born in Australia to migrant parents adopt the cultural beliefs and practices of their new country, family conflict can result.
- The first major change in family law was the introduction of no-fault divorce. The declining influence of religion, an interest in removing the conflicts and difficulties resulting from blame, and the idea that marriage does not always last 'for life' were social factors that influenced this change, reflected in the *Family Law Act 1975* (Cth), as well as the introduction of the sole ground for divorce – 'irretrievable breakdown of the marriage'.
- Another important change in social attitudes has been in the increasing acceptance of gay and lesbian relationships. Recent law reforms have centred on providing same-sex couples the same rights and obligations as

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de facto heterosexual couples and removing discrimination based on sexuality.

- The concept of responsible parenthood with respect to the care and financial support of a child is considered an important moral obligation that should be met by both parents. The Australian Government has enacted legislation to encourage and enforce parental responsibility through the legal system.
- Many of the changes in the law have revolved around protecting children. The emphasis on children's rights reflects the idea that children are vulnerable members of our society and need greater protection. All decisions regarding children must be in the children's best interests, and the interests of their parents or caregivers are secondary. This change can be seen in the emphasis on parenting plans and parental responsibility, in contrast to 'residence' and 'custody'. The legal system's aim is to protect the child's right to maintain a quality relationship with both parents.
- Although a majority of people in Australia support same-sex marriage, parliament remains hesitant to act on this issue, instead reinforcing the legal definition of marriage as being between one man and one woman.

The role of law reform in achieving just outcomes for family members and society

- Agencies of reform are not limited to parliament and the courts. Law reform may be initiated by interest groups, the Law Reform Commission, international treaty bodies and government departments. Other agents of law reform include lobby or pressure groups attempting to influence members of parliament who will support the group's aims.
- The Australian Human Rights Commission monitors and investigates any breaches of human rights recognised under Australian law. If the commission determines that a breach of human rights has occurred, it can make recommendations for legislative change to Parliament.
- One perennial criticism of the law is that it moves too slowly and does not adjust to changed circumstances fast enough. However, if the law changes too quickly, it may become poor law – too broad or too narrow, contradictory and hard to enforce.
- One of the main criticisms of legislative reform is the recurring problem of time delays between proposing legislative change, drafting and enacting the change. Any unnecessary delay may have enormous consequences; however, passing legislation without due consideration can lead to an unjust outcome.

The effectiveness of legal and non-legal responses in achieving just outcomes for family members

- The legal system acts to protect the values that the whole community holds important. The principles of fairness, justice and equity constitute key values. In addition, our community believes that it is important to protect the disadvantaged, or those who cannot act to preserve their own rights – particularly children.
- Domestic violence continues to be a large societal issue. There have been numerous law reforms concerned with eradicating family violence and protecting its victims. Law reforms include mandatory reporting and changes to the *Bail Act 2013* (NSW). Non-legislative mechanisms include services provided by government and NGOs to assist families with conflict resolution, such as counselling and mediation.
- Changes to the *Surveillance Devices Amendment (Police Body-Worn Video) Act 2014* allow police to videotape evidence and statements taken at the scene of the offence to be used in court. This removes the need for victims to testify in court and shows the immediate impact of domestic violence to the court.
- There are still concerns about the effectiveness of child protection services. Community Services NSW has been inundated with reports of alleged abuse. There is evidence that the laws relating to domestic violence and the protection of children are inadequate, particularly when considering the deaths of children identified as being at risk.

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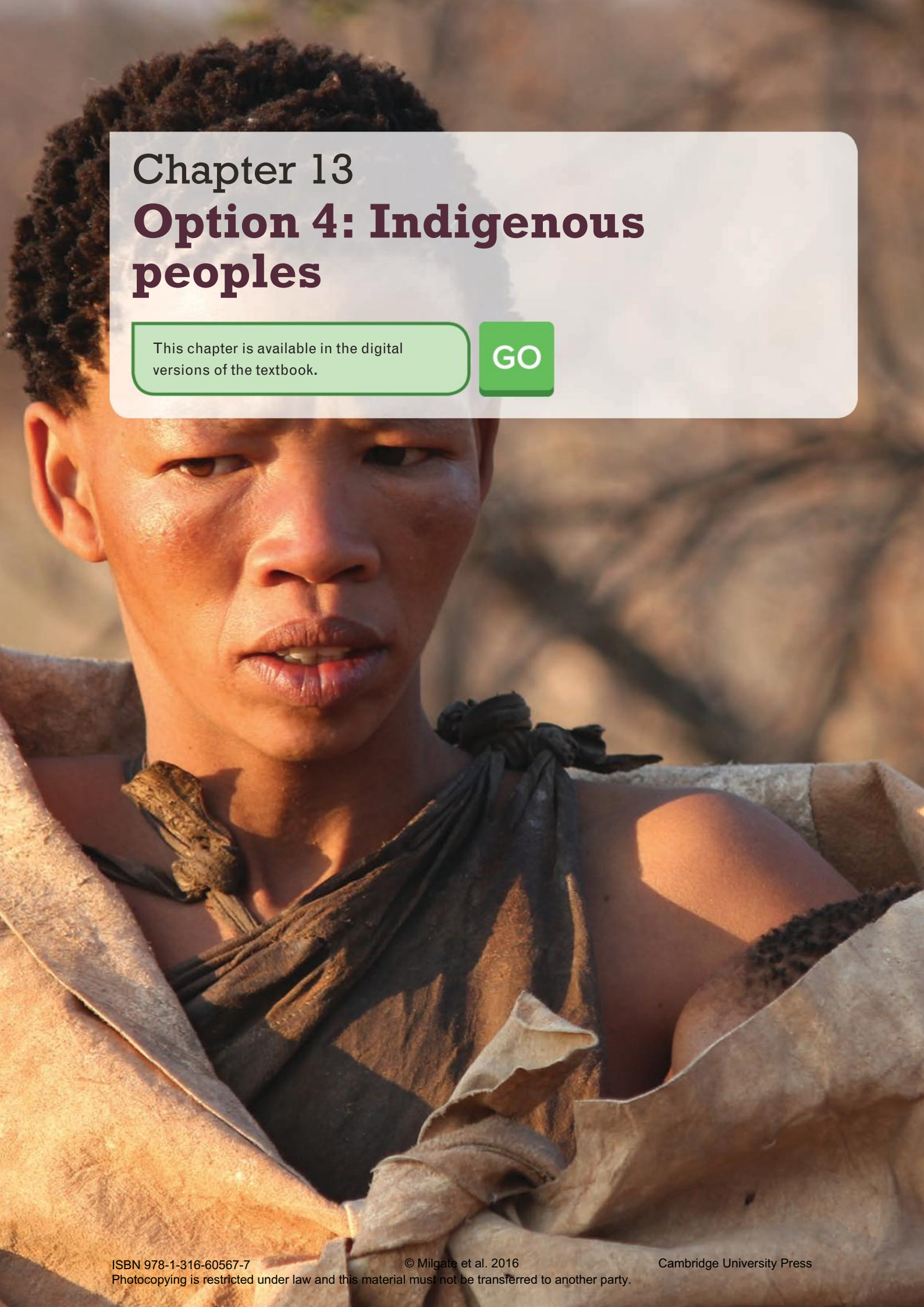

Chapter 13
Option 4: Indigenous peoples

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Chapter 14
Option 5: Shelter

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Chapter 15
Option 6: Workplace

25% of course time

Principal focus

Students will be investigating the workplace, legal rights and responsibilities of workers, the ability of the law in achieving justice and issues that have recently arisen in this area.

Themes and challenges

Themes and challenges to be incorporated throughout this option include:

- how the law resolves conflict and encourages cooperation in the workplace
- dealing with compliance and non-compliance
- how workplace laws reflect changes in values and ethical standards
- how recent law reform recognises rights and enforces responsibilities of workers
- the legal and non-legal responses in achieving effective justice in the workplace.

At the end of this chapter, you will find a summary of the themes and challenges relating to the workplace. The summary draws on key points from the text and links them to each of the themes and challenges. This summary is designed to help you revise for the external examination.

Chapter objectives

In this chapter, students will:

- outline the increasing need for workplace law
- outline where workplace regulations come from
- describe the rights and responsibilities employees and employers have in the workplace
- examine workplace law and the legal framework behind it
- evaluate the effectiveness of dispute resolution processes
- assess regulation of the workplace and the legal system's role
- outline what determines remuneration
- evaluate the effectiveness of legal and non-legal actions in recognising and protecting workplace rights
- identify and investigate some contemporary workplace issues, and evaluate the effectiveness of legal and non-legal responses to these issues.

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Key terms/vocabulary

arbitration
Australian Workplace Agreement (AWA)
Better Off Overall Test (BOOT)
casual employment
codification
conciliation
constitutional corporation
contract for services
contract of service
direct discrimination
discrimination
duress
employment
enterprise
enterprise agreement
enterprise bargaining
equal employment opportunity legislation
express term
freedom of contract
greenfields agreement
guild
implied term
independent contractor
indirect discrimination
industrial action
industrial award
industrial relations
Industrial Revolution
injury management
journeyman
laissez-faire
mediation
outworker
peak body
picket line
regulation
retrenchment
sexual harassment
stand down
strike
trade union
unfair dismissal
vicarious liability
workers' compensation
workplace surveillance
wrongful dismissal

Relevant law

IMPORTANT LEGISLATION

Conciliation and Arbitration Act 1904 (Cth) (repealed)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Workers Compensation Act 1987 (NSW)
Disability Discrimination Act 1992 (Cth)
Superannuation Guarantee (Administration) Act 1992 (Cth)
Industrial Relations Act 1996 (NSW)
Workplace Relations Act 1996 (Cth) (repealed)
Age Discrimination Act 2004 (Cth)
Workplace Relations Amendment (Work Choices) Act 2005 (Cth) (repealed)
Fair Work Act 2009 (Cth)
Work Health and Safety Act 2011 (Cth)
Fair Entitlements Guarantee Act 2012 (Cth)
Workplace Gender Equality Act 2012 (Cth)

SIGNIFICANT CASES

Ex parte H.V. McKay (1907) 2 CAR 1 (Harvester case)
Wilsons & Clyde Coal Co. v English [1938] AC 57
Paris v Stepney Borough Council [1951] AC 367
R v Kirby; Ex parte Boilermakers Society of Australia (1956) 94 CLR 254
Equal Pay for Equal Work Case (1969) 127 CAR 1142
Equal Pay for Work of Equal Value Case (1972) 147 CAR 172
Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd (2000) 175 ALR 173
Hollis v Vabu Pty Ltd (2001) 207 CLR 21
Russell v Trustees of the Roman Catholic Church [2007] NSWSC 104
Commonwealth Bank of Australia v Barker [2014] HCA 32

Legal oddity

The Fair Work Commission determined that an employee was fairly dismissed for swearing at his supervisor. The dismissal was valid given that the employee had previously been warned. Although it was accepted by the employer that swearing in the workplace was commonplace, the employer distinguished general swearing from swearing at a particular person. In this case, the employee took issue with having to undertake some manual handling within a confined space which caused him physical pain. He took this issue up with his supervisor by way of swearing and abuse. As he had already received a formal warning, his employment was terminated.

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15.1 The changing nature of workplace law over time

The main subject matter of workplace law is **employment**. To be employed means to have a particular type of contract with another person (a contract of service), under which the employee receives monetary payment and other benefits in exchange for doing work. It is also possible to have a contract for work that does not involve an employer–employee relationship. The person doing the work in such a situation is usually called an **independent contractor**.

employment
the contractual relationship between an employer and an employee, involving work performed for monetary payment and other benefits

independent contractor
someone who is paid for work done for another person without there being a contract of employment between them; instead, the parties will have a contract for services

Laws about employment have changed over the centuries due to changes in economic conditions, attitudes and technology, and the influence of trade unions. Australian workplace laws were originally based on British industrial laws, but over the past 100 years these laws have been amended to reflect the changing nature and specific demands of the Australian workplace.

The Middle Ages

Our employment law has its roots in English medieval law. The majority of people in feudal England (approximately 800–1400 CE) either worked on the land (farming) or produced clothing, household goods and/or food for their own use. The family could sell any excess production or use it to barter for products that they could not produce. These people did not receive payment for their labour and so were not employed by the local lord, who generally was the owner of the land. They had few rights and little choice but to work for the landowner in exchange for the right to live on the land; however, the lord might provide protection from external threats.

As cities developed, there was greater regulation of the work of artisans and craftsmen. These laws usually aimed to prevent people from making a profit from their own work or having much say in the terms, conditions and price paid for it. Laws were also designed to prevent people from leaving agricultural areas, because labour was scarce – this was due to the toll taken by disease. Statutes enacted throughout the 14th and 15th centuries allowed lords to be sued if they paid their workers more than other lords did, pressed people into work with penalties if they refused, or required parents to put their children to work on lords' estates. In some rural areas of England, gangs of people, often women and children, moved from farm to farm under the direction of a 'gang master', who was paid by farmers seeking a temporary workforce.

Early employment law

The law related to employment in Britain from medieval times through the 18th century was limited, due to the nature and type of employment available. It also favoured the rich and influential members of society, who were more concerned with making profits than with the needs of their employees.

Guilds of craftsmen or merchants were associations of people in a particular trade. Their purpose was primarily to ensure that their products were of good quality. They also regulated conditions

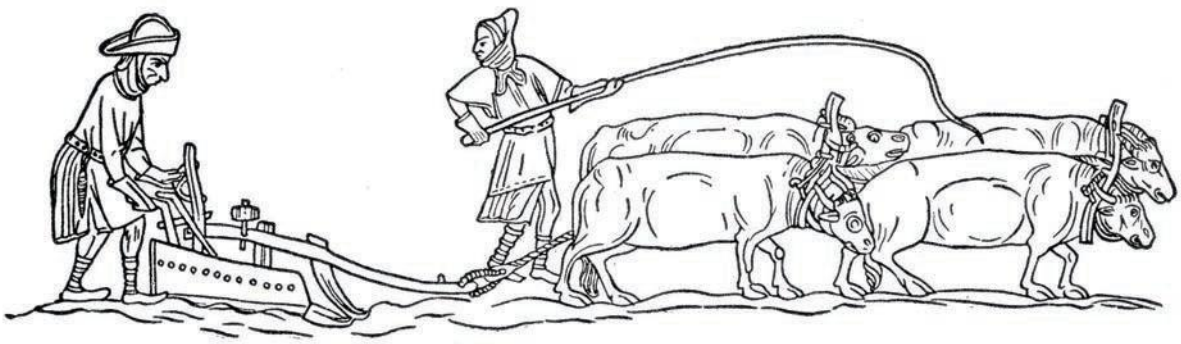

Figure 15.1 Many people in feudal England worked on the land.

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of labour, but generally in the interest of maintaining the quality of the goods, rather than to protect the workers' rights. For example, working on holidays was prohibited to ensure that some craftsmen did not enjoy an advantage over the others by having a larger stock of goods. When conflicts arose between **journeymen** and their masters, laws were passed to regulate the formation of guilds, and perhaps also to ensure that they did not gain too much influence.

guild
a medieval association of craftsmen or merchants

journeyman
dating from the later Middle Ages, a worker who had completed his apprenticeship (period of training) and was then qualified to work for wages for a master

The Industrial Revolution

The **Industrial Revolution** that took place in Britain during the late 18th and early 19th centuries changed the way goods were produced. This affected not only how people worked but also where they lived. The bulk of the working population turned from agriculture to industry.

Industrial Revolution
the rapid development of industry in the 18th and 19th centuries, characterised by changes in manufacturing, agriculture and transport

With the increased use of machines, employees became specialised or skilled in only a few aspects of the production of an item. Clothing factories no longer required highly skilled weavers; machines could do this faster and more cheaply than any individual. People who had earned money by working at home producing small amounts of manufactured items, such as cloth, were now employed in the new factories and mills. Employee–employer relationships also changed. Employees' wages were paid out of the sale of goods produced, and the factory owners received the profit.

The changing nature of employment in Britain during the Industrial Revolution also resulted in changes in labour laws. Factory owners (who were usually wealthy, and had some parliamentary influence) created laws to maintain their profits and to protect their interests and growing economic power. One British statute, the *Combination Act of 1799*, stated that being a member of a **trade union** was grounds for imprisonment. Some early union leaders were hanged for 'sedition' – encouraging people to 'rise up against and overthrow the lawful government'. Unions were legalised in 1832, with the passing of the Reform Act by the British Parliament.

trade union
an organisation of workers created to preserve and further their rights and interests

Review 15.1

1. Describe the social and economic conditions experienced by most people in feudal England.
2. Explain how wealthy and powerful people used the law to their advantage at the expense of workers, and identify the advantages they obtained.
3. Outline how the nature of employment changed during the Industrial Revolution.

Laissez-faire and state intervention

Nineteenth-century employment was based on the concept of **freedom of contract** – individuals' freedom to negotiate the terms of the contracts they enter, without government restrictions. This idea is the foundation of ***laissez-faire*** capitalism, which regards government intervention in economic activity, including employment, as inappropriate. It is based on two assumptions:

- Since individuals are the best judges of their own interests, they should be allowed to bargain freely and create a contract that suits them, without interference.
- The parties have equal bargaining power.

This, of course, is not true, as people will often agree to terms that are not in their best interests in order to get or keep a job. An employer could simply sack a worker they regarded as troublesome and hire someone else.

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freedom of contract
the freedom of individuals to bargain the terms of their own contracts, without regulation by the state

laissez-faire
a French term used to describe economic philosophies that government should not intervene in business

Employers did have to pay a minimum wage to workers, but this amount was very low and hardly enough to pay for food, clothing and shelter. Unions had effectively been banned, so working conditions were bad and people worked long hours. Factories were often poorly ventilated, poorly lit, noisy and extremely dangerous. Employees could work up to 16 hours a day, seven days a week. These working conditions were also experienced by children, some of whom started work in cotton mills or textile factories when they were as young as seven. The Poor Laws were partly to blame for this. These laws were based on 'charitable' efforts to prevent future unemployment and vagrancy by training children to work from a young age. There was no difference between the working conditions for adults and children, but there was a large difference in the wages they received.

These substandard working conditions led to the beginning of state intervention in workplace relations in 19th-century Britain. In 1819, an Act that prohibited the employment of children under nine years old, and limited children's working hours to 12 in a day, was passed. Further legislation expanded these protections: it included prohibiting night work, limiting children's employment underground in mines, requiring ventilation and working equipment in the mines, raising the minimum age for working in textile factories to 10, and eventually (in 1901) an effort to limit the employment of women too soon after they had given birth.

Trade unions

A trade union is an association of wage earners that exists in order to maintain and improve the pay and working conditions of its members. When trade unions began to form in Britain in the late 1700s, the British Government passed the Combination Acts of 1799 and 1800, which outlawed unions. The second of these Acts was repealed in 1824, largely due to the lobbying efforts of the reformer Francis Place, and a new *Combination Act* was passed in 1825. The new Act allowed trade unions to form, but placed severe restrictions on their activities. Their rights were narrowly defined in terms of meeting to bargain over wages and conditions, and they were prohibited from doing anything to 'molest', 'obstruct' or 'intimidate' others. Any trade union that engaged in **industrial action** was punished under criminal law until the 1870s, when the *Trade Union Act* of 1871 was passed, granting trade unions legal status for the first time in England.

Figure 15.2 The formation of trade unions allowed for fairer conditions for workers.

industrial action
any action taken by employees to reduce productivity in the workplace, such as strikes, slowdowns of work, refusal to work overtime, or doing only the minimum required; the purpose is usually to protest unjust workplace policies of the employer

Industrial relations in Australia

Australian craftsmen and other workers began to organise themselves into trade unions in the early 19th century. The first significant union campaign in Australia was the effort to achieve an eight-hour working day, by stonemasons in Sydney in 1855 and Melbourne in 1856. Although the eight-hour day was achieved for only some trades, it was a first in the world.

During the Australian gold rush in the 1850s, many workers left their employers in order to seek gold. At the same time, Australia experienced an influx of immigrants hoping to make their fortunes.

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The subsequent increased demand for goods and services meant that industries could not meet supply unless employers were willing to pay higher wages and improve working conditions to attract individuals back to their jobs. During this period Australian trade unions became increasingly political and gained important rights for workers.

Conciliation and **arbitration** have been at the centre of Australian industrial relations law since 1904, when the Conciliation and Arbitration Court was established by the *Conciliation and Arbitration Act 1904* (Cth). The court could settle disputes by making an award – an order that sets out the workplace terms and conditions for a group of employees – and could also enforce that award. In 1956, the court was replaced by two bodies: the Commonwealth Conciliation and Arbitration Commission and the Commonwealth Industrial Court. This came about as the result of the High Court's decision in *R v Kirby; Ex parte Boilermakers Society of Australia* (1956) 94 CLR 254 that, because of the doctrine of separation of powers, it was unconstitutional for the Conciliation and Arbitration Court to exercise both judicial powers and the non-judicial power of arbitration. In 1977, the Federal Court of Australia took over the functions of the Industrial Court, and in 1988 the Australian Industrial Relations Commission (AIRC) replaced the Conciliation and Arbitration Commission. In 2009, the AIRC was in turn replaced by the Fair Work Ombudsman (FWO) and Fair Work Australia, which has been renamed the Fair Work Commission (FWC).

The FWO is an independent statutory body created by the *Fair Work Act 2009* (Cth). The ombudsman aims to provide information regarding rights and obligations, unfair practices, enforcing workplace laws and enforces compliance with Australia's workplace law, with the aim of creating more productive and cooperative workplaces.

The FWC is also an independent statutory body; it facilitates negotiation of new awards and agreements, approve agreements, regulates industrial action, make and change awards, determines the minimum wage and working conditions for workers in Australia, and hears complaints about bullying and unfair dismissals. The Federal Court or the Fair Work Division of the Federal Circuit Court can hear disputes regarding unfair dismissal and termination if conciliation fails at the FWC. The Fair Work Division of the Federal Circuit Court operates using more informal and efficient procedures, allowing it to hear matters more quickly.

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes a more active role than in mediation, advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for them

arbitration
(industrial relations law) the process of resolving an industrial dispute, often after conciliation has failed, by a legally enforceable order of a court or commission

The New South Wales industrial relations system was established by the *Industrial Arbitration Act 1901* (NSW). The Court of Arbitration, which was created under this Act, heard disputes between unions and employers when voluntary arbitration had failed. The *Industrial Arbitration Act 1912* (NSW) established the Court of Industrial Arbitration, which had powers of conciliation but not arbitration. The *Industrial Arbitration (Amendment) Act 1926* (NSW) replaced the Court of Industrial Arbitration with an Industrial Commission, which heard applications from unions and employers, made awards setting rates of pay and working conditions, and had the power to determine any industrial matter.

As a result of the *Industrial Arbitration (Amendment) Act 1932* (NSW), the Industrial Commission began to focus more on conciliation. The

Review 15.2

1. Define 'freedom of contract' and explain the assumption on which this doctrine is based.
2. Identify some of the circumstances that led to greater workplace regulation by the state in 19th-century Britain.
3. Explain why workers might want to form a trade union rather than negotiate their own contracts of employment.
4. Discuss how the conciliation and arbitration process has changed in Australia.

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commissioner could call a compulsory conference in industrial disputes to obtain an agreement between the parties. In 1988, the state's industrial laws and procedures were comprehensively reviewed (the result was the Niland Report). Following the Niland Report's recommendations, the commission was replaced by the Industrial Relations Commission (IRC) and a separate Industrial Court. Unlike the federal industrial system, the state system does not separate the judicial and administrative functions in relation to the commission's powers. Another important change was the introduction of individual workplace enterprise agreements.

The commission's role is to resolve industrial disputes through conciliation and arbitration, to make industrial awards setting working conditions and wages, to approve enterprise agreements and to hear claims of unfair dismissal.

15.2 Contracts

Types of work contracts

When parties enter into a contract for work to be done, it will generally be either a **contract of service** or a **contract for services**.

contract of service
an employment agreement under which a worker (employee) works for an employer; it imposes certain duties on each party and provides specific rights for the period of employment, which may be for a fixed term or ongoing

contract for services
an agreement between a contractor and a client under which the contractor performs agreed tasks for an agreed fee but is not employed by the other party

Both types of contract are legally binding, and both types may be in written or oral form, although a written contract is more easily enforced because it is easier to prove the existence of a particular term of the contract.

Contract for services

A contract for services (also known as an independent contract for services) arises when a person agrees to do one or more specific tasks for another person, without being employed by them. For example, a plumber agrees to unblock a sink and is paid for the work once it has been successfully done. The plumber is not the employee of the person

Figure 15.3 A written contract is more easily enforced.

they have the contract with, and there is no ongoing legal relationship between the two once the work has been completed. However, there may be a series of contracts between a contractor and a client. For example, a freelance writer may provide articles primarily to one newspaper or magazine, without being employed by that client.

Contract of service

A contract of service (also known as a contract of employment) is an agreement between an employer and an employee for work specified by and under the direction of the employer. It imposes certain duties on each party and provides each with certain rights.

A contract of employment may be for a fixed term or ongoing. Generally, a fixed-term contract cannot be terminated before the end of the specified period, unless the contract provides otherwise. If the contract does not contain such a term, it can only be terminated if one party has breached an essential term. At the end of the specified period of time, if the employer continues to accept an employee's work, the contract may be deemed to have been converted to an indefinite contract.

Whether there is a contract of service between two parties, rather than a contract for services, will depend on all the characteristics of their relationship. The most important factor has traditionally been whether the employer has the right to control the way in which the work is performed (that is, to tell the employee how to perform the tasks). Also, an employer generally provides the equipment or tools necessary for the work to be done; an independent

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In Court

***Hollis v Vabu Pty Ltd* (2001) 207 CLR 21**

Mr Hollis was injured when struck by a courier who was unlawfully riding a bicycle on the footpath. The courier was wearing a jacket with the words 'Crisis Couriers' on it. Crisis Couriers was a business operated by Vabu Pty Ltd. It contracted with bicycle couriers, who were required to be available during certain hours every day, to take the jobs that were allocated to them and to wear the uniforms issued by Vabu. Vabu set the pay rates and there was no room for negotiation. However, the couriers had to provide their own bikes and bear the expense of maintaining them. They received no annual leave or sick leave, were taxed as independent contractors, and had contributions towards Vabu's insurance deducted from their pay.

The High Court held that the couriers were employees rather than independent contractors, and Vabu was therefore vicariously liable for the negligence of the courier who ran into Mr Hollis. The judgement was based on all the facts of the relationship, including the terms of the contract and the work practices imposed. The couriers had little control over how their work was to be performed, the hours or the pay, and the only tool they had to provide was a bicycle, which could be used for other purposes besides courier work. The court noted that a different conclusion might result in a case where the couriers invested more in equipment, and greater specialised skills and training were required in order to do the job.

contractor must usually provide their own tools of trade.

Another factor is the manner of payment. An employee is usually paid a regular salary or wages rather than being paid for each job completed, and the employer will deduct tax and pay superannuation on behalf of the employee. An independent contractor is responsible for their own taxes and must charge fees that will take account of future retirement needs.

Permanent employees (employees who are not casual employees) are entitled to annual leave, sick leave and long service leave. While an independent contractor has the flexibility of arranging their own working hours, they must negotiate both fees and work schedules that will allow time off for holidays, illness, family commitments and so on.

One reason why it is significant whether someone is employed under a contract of service or works under a contract for services is that it is relevant in determining **vicarious liability**. An employer can be held legally responsible for the conduct of an employee as long as the employee was acting 'in the course of employment' – in other words, the employee was carrying out the duties that they were contracted to perform. This is often justified on the basis that the employer gains benefits from the work done by employees, and so should also bear the risk of employees' behaviour at work.

vicarious liability
legal liability of an employer for the wrongful act of another

Review 15.3

1. Distinguish between a contract of service and a contract for services. Provide an example of a type of worker who would enter into a contract for services.
2. What factors are taken into account when determining if the individual is employed under a 'contract for service' or a 'contract of service'? You may refer to *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21.
3. Define 'vicarious liability'. See also *Century Insurance Co v Northern Ireland Road Transport Board* [1942] AC 509.
4. Discuss whether or not an employer should be held vicariously liable for the actions of an employee. Use examples to illustrate.

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Terms of a contract of employment

All contracts of employment contain express and implied terms.

Express terms

Express terms are terms that have been specifically stated and agreed to by both parties at the time the contract is made, either in writing or orally. Express terms in a contract of employment usually cover only the key elements of the employment relationship, such as:

- the position description
- whether the position is ongoing or for a fixed term
- whether it is full-time, part-time or **casual employment**
- hours of work
- where the work is to be done
- leave provisions.

express term
a contractual term that has been specifically stated and agreed to by both parties at the time the contract is made, either in writing or orally

casual employment
employment 'as needed', on an irregular basis, with no set schedule or guarantee of ongoing employment; generally paid at an hourly rate

Employers and employees have a duty to fulfil the express terms in a contract, and each has a right to expect that the other party will do so.

Figure 15.4 Express terms can determine where an employee can complete work.

Implied terms

As well as express terms, there are also terms within an employment contract that are implied. **Implied terms** are not recorded in writing and may not even have been discussed by the parties to the contract. These terms may arise from the common law, from current practice or custom, from specific state or federal legislative requirements, or where it is clear that the parties would have included the term as an express term if they had turned their minds to it. The criteria for when a term can be implied by common law are:

- it must be reasonable and fair
- it must be necessary to ensure that the contract works effectively
- it must be so obvious that it 'goes without saying'
- it must be capable of being expressed clearly
- it must not contradict any express term of the contract.

implied term
a contractual term that has not been included in the formal agreement; a term can be implied by custom or law, or because of the presumed intentions of the parties

In Australia, courts have held that implied terms in a common law employment contract confer certain rights and duties on employers and employees. Where an employee has a duty to do something, the employer has a right to expect it. Similarly, where an employer has a duty or obligation to do something, provide something to employees, or ensure that certain protections are in place, the employee has a right to expect that protection or provision.

Duties of employers

Employers have:

- the duty to provide work for the purposes of the employment contract. Where the employee's pay depends on the amount of work done, the employer must ensure that the work and any necessary materials are available. If the employer cannot achieve this, the employee must still be paid the agreed wage. The employer must also provide work for employees whose skill would diminish without it. For example, a hospital must provide a surgeon with enough surgery to maintain their skills.
- the duty to provide a safe working environment.

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This duty is now largely imposed by and regulated through legislation. A contract of employment with provisions stating that employees must work in conditions that are dangerous cannot be enforced.

- the duty to pay reasonable wages. While the actual amount is set by an award or agreement and is generally written into the contract as an express term, what is 'reasonable' can be determined by the amount of money that is usual for that type of occupation or employment. This duty arises only where there is no express term of the contract about payment.

Duties of employees

Employees have:

- the duty to obey lawful directions given by the employer
- the duty to exercise reasonable care in carrying out the work, and to meet certain standards in their work
- the duty of fidelity (faithfulness or loyalty) to the employer. This includes obligations not to steal from the employer or damage equipment, not to disclose confidential information (for example, not to divulge 'trade secrets' to other companies) or act in a manner designed to undermine the profitability of the company, and not to use the employer's time for their own purposes.

Mutual duties of employers and employees

Within the employment relationship between employer and employee there exists implied duties of mutual trust, confidence and good faith. For example, in *Russell v Trustees of the Roman Catholic Church* [2007] NSWSC 104, the New South Wales Supreme Court held that the employment relationship gives rise to parties' obligation to exercise their rights reasonably and honestly, with 'prudence, caution and diligence'.

However, the High Court of Australia in 2014 found that contracts of employment do not automatically include a 'mutual duty of trust and confidence'. In *Commonwealth Bank of Australia v Barker* [2014] HCA 32, the plaintiff, Barker, had been informed by the bank that he was to be made redundant. He was granted one month to explore redeployment within the bank. Barker did not receive important office emails offering redeployment opportunities as his email account had been terminated. In his appeal, Barker argued that the bank had breached its implied duty to maintain trust and confidence in him by withdrawing his email. He also argued that the bank had failed to inform him of redeployment opportunities within the bank.

The High Court decision means that employees faced with redundancy and denied an opportunity for redeployment will not be in a position to sue for damages as a result of the employer's breach of 'implied duty of trust and confidence'. It does not mean that employees and employers are free to not 'trust' or have no 'confidence' in one another. In Australia there exists an extensive range of legislation that protects the rights of employees and employers. These include work, health and safety and unfair dismissal legislation.

Review 15.4

1. Define and explain express terms and implied terms.
2. Identify the rights of employers and employees that come from implied terms.
3. Do employees have an automatic right to redeployment?

15.3 Awards, agreements and statutory conditions

An **industrial award** is an order of an industrial commission, tribunal or arbitrator that is made to settle a dispute. Today the term usually refers to a legally binding document, approved by an industrial commission, which sets out the minimum terms and conditions for employees in a particular industry or occupation, or who are employed by particular employers.

industrial award
a standard set of wages and working conditions for employees in a particular industry or occupation, or those who are employed by particular employers

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In Court

***Ex parte H.V. McKay* (1907) 2 CAR 1**

An Act designed to provide better pay to workers had created an excise tax on locally made machinery, which could be waived if the manufacturer's workers were paid 'fair and reasonable' wages. H.V. McKay, a Melbourne manufacturer and owner of the Harvester Company, applied to the Conciliation and Arbitration Court to waive the excise tax. McKay's company was not known for fair and reasonable treatment of its employees, and the union the workers belonged to opposed the application. Justice Henry Bourne Higgins ruled that McKay was obliged to pay his employees a 'fair and reasonable wage', and defined this as an amount sufficient to 'support the wage earner in reasonable and frugal comfort'. He took evidence as to the cost of housing, food and clothing in Melbourne for a man with a non-working wife and two children, and used that to establish the cost of living. This decision was the first time an industrial tribunal set wage levels for workers, rather than allowing them to be set by individual employers. The decision applied to more than 1000 workers at the Harvester Company, working in a variety of jobs. It is regarded as a momentous judgement that paved the way for workers' entitlement to a basic living wage for their work.

Industrial awards

By 1920, there were 96 federal awards in force, and all the states, as well as the Commonwealth, had adopted systems of conciliation and arbitration. The AIRC, which eventually took the place of earlier conciliation and arbitration bodies, created federal awards that covered a wide range of industries. There were also state Industrial Relations Commissions, which created state awards.

Federal awards were created due to interstate industrial disputes, but disputes taking place within a state were governed by state awards. In 1996, Victoria became the first state to refer its industrial powers to the Commonwealth. It abolished state awards and created a limited number of statutory entitlements, leaving employees to negotiate all other terms and conditions with their employers.

The *Workplace Relations Act 1996* (Cth) aimed to simplify and streamline awards. It contained a list of only 20 'allowable award matters', and any terms or conditions that were not among the allowable matters would not be enforced. The allowable matters included hours of work, rest breaks, rates of pay, annual leave, parental leave, personal carer's leave, penalty rates and dispute settling procedures. Obviously, the fewer the number of matters that can be contained in an award, the weaker the 'safety net' is.

The 2006 amendments to the *Workplace Relations Act 1996* (Cth), called 'WorkChoices', further limited awards throughout Australia. State awards could only apply to unincorporated employers, employers not involved in trade or commerce (such as charities) and state governments in their capacity as employers of state public servants. Transitional provisions allowed federal awards to continue to apply to those already covered by them for three years. No new awards could be made, and federal awards were further simplified and trimmed down by reducing their content to even fewer allowable matters. Some allowable matters (such as notice of termination, jury service, long service leave and superannuation) were removed on the basis that they were covered by other legislation. The 14 protected award conditions could be excluded or modified by an **Australian Workplace Agreement (AWA)**.

Australian Workplace Agreement (AWA)
an individual workplace agreement between an employer and an employee under the *Workplace Relations Act 1996* (Cth); an AWA overrides and takes the place of any award or collective agreement

The *Fair Work Act 2009* (Cth) replaced WorkChoices. In late 2009, all states except Western Australia referred their industrial powers to the Commonwealth, which then created a national workplace relations system. As a result, all employers and their employees (except state governments and their employees) who were previously covered by state industrial relations systems moved to the

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federal Fair Work system in 2010, and existing state awards were replaced by federal 'modern awards'. State awards covering employees of organisations that are not **constitutional corporations** (such as sole traders, partnerships and unincorporated associations) were permitted to remain in force for a transitional period of 12 months from 1 January 2010 before being replaced by modern awards.

constitutional corporation
a corporation to which s 51(xx) of the *Australian Constitution* applies (for example, foreign corporations and companies incorporated under Australian law that engage in financial activities and buying and selling)

Review 15.5

1. Explain why the Harvester decision is significant to Australian workplace law.
2. Define 'industrial awards' and identify their purpose.
3. Describe the reforms made to the industrial relations system in 2009.

Agreements

Enterprise agreements

In 1991, **enterprise bargaining** was introduced as an alternative to awards, and **enterprise agreements** became the primary means of setting wages and conditions. This was seen as a means of creating a more 'flexible' system of industrial regulation as negotiations took place at the individual workplace level: agreements could be tailored to a particular **enterprise**, whereas awards covered a whole industry or occupation, either nation-wide or within a state. The law provided that an enterprise agreement could not be less advantageous to the employees working under it than the relevant award would be.

Figure 15.5 Wages and conditions can be determined through negotiation.

enterprise bargaining
negotiation of an agreement about wages and working conditions by an employer and its employees, or by the trade union representing them

enterprise
a business or company

enterprise agreement
a legally binding agreement between the employees of a corporation, non-profit organisation or government body and their employer, setting the terms and conditions of the employment relationship

There is no distinction between union and non-union agreements under the *Fair Work Act 2009* (Cth). The current process of negotiating an enterprise agreement has been characterised as 'collective bargaining at the enterprise level'. An enterprise agreement will be made between an employer and some or all of its employees. Employers must notify their employees of their right to be represented in the bargaining process, and employees can choose who will represent them. Those who are union members will automatically be represented by their union, unless they choose otherwise.

Individual agreements

The *Workplace Relations Act 1996* (Cth), and especially the WorkChoices amendments, were designed to move workers from collective to individual forms of employment contracts. An employer could make it a condition of hiring someone that the employee signed an AWA; under WorkChoices, this did not constitute **duress**. Employees had no statutory right to collective bargaining, and while an AWA was in operation, it overrode any award or collective agreement. WorkChoices introduced five minimum statutory entitlements, which replaced the 'no disadvantage' test. Both collective agreements and AWAs had to pass this test to ensure that employees would be no worse off under the agreement than under the relevant award.

duress
coercion or pressure used by one party to influence another party

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News

Business rejects Australian unions' push for minimum wage rise

Nick Toscano

Sydney Morning Herald, 27 March 2015

Australian unions will push for a wage rise of $27 a week for the nation's lowest-paid workers, while businesses warn that granting the above-inflation claim will force job cuts.

In a claim to be lodged on Friday, the Australian Council of Trade Unions will press for a substantial pay rise it says will halt rising inequality.

The ACTU calls for the minimum wage to be lifted to $17.58 an hour, or $667.90 a week. That equates to an increase of more than 4 per cent, well above the inflation rate of 2.2 per cent.

The minimum wage case, which will be heard by the FWC, affects the pay of about 1.8 million workers who rely on awards for their pay.

The ACTU submission states Australia had the biggest drop in the minimum wage as a percentage of the average wage between 2003 and 2013.

ACTU secretary Dave Oliver said inequality was ballooning with the minimum wage now at a record low of 43 per cent of the average weekly earnings.

'A $27 per week pay rise for our lowest paid workers is essential if Australia is to avoid creating an underclass of working poor.

'There are already signs that Australia is developing a working poor with financial stress, deprivation and poverty on the rise among low paid workers.'

But employer groups will vigorously oppose the unions' claim. The Australian Industry Group, which argues for a much lower minimum wage rise of $10.25 a week, says the ACTU's proposal was 'unrealistic, unsustainable and would be unfair to those whose jobs prospects it would damage'.

'The best that can be said for the Australian economy in 2015 is that it is underperforming,' Ai Group chief executive Innes Willox said.

'Underemployment is trending higher ... as of February 2015, the unemployment rate was 6.3 per cent and the number of active jobseekers had reached 781 600, the highest such number since April 1997.'

Mr Willox said the Australian minimum wage was among the highest in the world and any further rise 'beyond a modest amount' would damage Australia's competitiveness.

The Australian Chamber of Commerce and Industry – the nation's biggest business lobby – said the ACTU's proposed wage rise was 'unsustainable'.

'Such a steep increase would make it harder for employers to afford low-skill workers and young people in entry-level positions,' ACCI chief Kate Carnell said.

'[It] may prompt some employers to let go of existing staff or reduce unprofitable hours.'

Ms Carnell said ACCI's submission, to be lodged with the commission on Friday, would call for a 'cautious and restrained' minimum wage rise.

Randolph Guinan, 57, of Faulkner, has earned the minimum wage as a cleaner at the Melbourne Arts Centre and Hamer Hall for 18 years.

He is hoping for a pay rise this year that could help ease the financial strain he faces as his family's sole breadwinner.

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News

'I have two daughters and it does get tight sometimes, it gets difficult,' he said.

'We always have to budget things ... we have our good days and bad days.'

The ACTU will also make a claim for the first time to try and claw back superannuation increases for minimum-wage workers after the Abbott government put a freeze on employer contributions.

With the Coalition halting compulsory super increases until 2021, the ACTU will ask the commission to increase contributions by 0.5 per cent to 10 per cent for workers on award minimum wages.

Mr Willox said the trade unions' claim was 'nothing less than irresponsible'.

Read more at http://cambridge.edu.au/redirect/?id=6382.

Individual agreements were abolished when the *Fair Work Act 2009* (Cth) came into effect. From 2009, existing individual and collective workplace agreements were replaced by 'enterprise agreements'. The *Fair Work Act* lists three types of enterprise agreement:

- single-enterprise agreement – made between a single employer and their employees
- multi-enterprise agreement – made between two or more employers and their employees
- greenfields agreement – an enterprise agreement made between a new enterprise of the employer and prospective employees (that is, the agreement is made between the employer and a union prior to individuals being employed).

An enterprise agreement must contain an expiry date, dispute settlement procedures, allowance for individual flexibility arrangements, and a requirement for all parties to enter into consultation about changes to the workplace. Since 2014, agreements cannot require employees to contribute to a 'default' superannuation fund unless certain safeguards are met. The 'no-disadvantage test' was replaced by the **Better Off Overall Test (BOOT)** in assessing enterprise agreements.

better off overall test (BOOT)
a criterion for the Fair Work Commission's approval of an enterprise agreement, requiring that employees are better off overall than under the relevant modern award

Review 15.6

1. Define and contrast collective agreements and individual agreements.
2. Explain the difference between agreements and awards.
3. Discuss how the BOOT would enable employees to make a more flexible agreement with their employer.

Review 15.7

Read the media article on page 394 and complete the following tasks.

1. Why is it necessary to increase the minimum pay?
2. What arguments could be put forward to support raising the minimum hourly wage rate?

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Statutory framework

Federal legislation

The main features of the *Fair Work Act 2009* (Cth) are:

- a legislative safety net of 10 National Employment Standards (NES)
- new 'modern awards'
- new enterprise bargaining arrangements
- improved mechanisms to protect industrial rights, including protection against discrimination and unfair dismissal
- the creation of national industrial relations organisations: FWC and the FWO.

National Employment Standards

The 10 National Employment Standards (NES) are set out in the *Fair Work Act*. They set minimum standards for employees' pay and conditions.

All awards, agreements and contracts of full time employment (minimum of 38 hours of work) between employers and employees in the national industrial system must meet these minimum standards. They include maximum hours of work, flexible working arrangements for parents, leave entitlements (such as sick leave, parental and annual leave), and termination and redundancy pay. They also include a requirement that employers must give a 'Fair Work Information Statement' to all new employees. The statement contains information about NES, modern awards, individual flexibility arrangements, termination of employment and the role of the FWC.

The NES also cover casual employees, who are entitled to unpaid compassionate and carer's leave, community service leave and a 'Fair Work Information Statement'. If the employee has been employed as a casual for a substantial period of time, the employee may be entitled to long service and parental leave, and the right to request more flexible work arrangements.

Modern awards

The second half of the 'safety net' is the modern award. Modern awards were created to establish a single set of minimum conditions for people working in the same industries or jobs across Australia. The process of 'modernisation' of previous awards involved updating them to reflect current work environments, and in many cases their coverage was broadened. They can be made and varied by the FWC; the awards that applied prior to the *Fair Work Act* were replaced by modern awards.

Modern awards can contain terms setting out minimum pay (including overtime and penalty rates), annual wage or salary, leave and leave loading, superannuation, redundancy, and procedures regarding consultation and dispute settlement processes. All modern awards must also have a 'flexibility term', which allows employees and employers to negotiate changes to the award to accommodate individual workplace circumstances.

If an employee's take-home pay has been reduced by modernisation of an award, an application to increase it to previous levels can be made to the FWC by the employee or by the union they belong to. A take-home pay order can be made to ensure that the person earns no less while remaining in the same job. However, such an order will not be made if the FWC finds that the workers under the award have been adequately compensated in other ways for the reduction.

Modern awards generally cover employees in jobs that have historically been covered by awards. For example, the terms of more senior positions have traditionally been contained in other instruments. Employers can exclude employees earning a guaranteed income of more than $108 300 per year (indexed annually) from modern award coverage.

Modern awards are reviewed by the FWC every four years, and minimum wage provisions are reviewed annually.

Enterprise agreements under the *Fair Work Act 2009* (Cth)

Enterprise agreements may include a broader range of matters than modern awards. Like awards,

Research 15.1

Use the internet to research the FWC's role in creating fair workplaces through the National Workplace Relations Systems, including 'aspects of a fair workplace' and the internal resolution of disputes.

Reference http://cambridge.edu.au/redirect/?id=6383.

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agreements must provide entitlements at least as favourable as the NES (for example, a minimum four weeks' paid leave per year).

Enterprise agreements between an employer and its employees must be approved by a majority of employees before being submitted to the FWC for approval. Once the parties are satisfied with the draft agreement, the employer must ensure that the employees have been informed of its terms and their consequences, and of the time, place and procedure for voting. A ballot is then held to approve the agreement.

An enterprise agreement, made with or without union involvement, may apply to workers in a specific workplace (single-enterprise agreements) or at an industry level (multi-enterprise agreements). A single-enterprise agreement requires a majority of employees to endorse it, and a multi-enterprise agreement requires a majority of employees of at least one of the employers to do so. The FWC can help certain low-paid employees and their employers negotiate a multi-enterprise agreement, if it is in the public interest to do so. These include people working in child care, aged care, community services, cleaning and security, who have often lacked the bargaining power to negotiate for better wages and conditions at the single-enterprise level.

A third type of enterprise agreement is a **greenfields agreement**, which covers future employees of a new enterprise to be established by one or more employers. The agreement is made when it has been endorsed by each employer and by the trade union or unions that cover the prospective employees.

greenfields agreement
an agreement created to cover prospective employees of a new enterprise

Once the agreement has been approved by the parties, it is then submitted to the commission. The agreement must meet certain conditions to be approved by the FWC. These include:

- The parties have come to a genuine agreement.
- The agreement has a specified expiry date, not more than four years after approval.
- The agreement contains a dispute settlement procedure, a flexibility term, and a term outlining the consultation procedure to be undertaken by the employer upon deciding to make a major change to the enterprise that affects employees.
- The agreement passes the BOOT test: each employee covered will be better off overall than they would be under the relevant modern award. BOOT replaced the 'no disadvantage' test.

New South Wales arrangements

New South Wales enterprise agreements were introduced under the *Industrial Relations Act 1996* (NSW). As a result of the state's referral of its industrial powers to the Commonwealth in 2009, through s 9B of the *Industrial Relations (Commonwealth Powers) Act 2009* (NSW), that Act no longer applies to private sector employers and employees in New South Wales; since January 2010, all employees of sole traders and partnerships, and employees of constitutional corporations, have been covered by the federal industrial relations system.

However, the referral of powers does not include the powers regarding state and local government employers. Section 9A of the *Industrial Relations Act 1996* (NSW) declares those employers not to be national system employers. The awards and collective agreements in place in the various departments and agencies in state and local government continue to apply.

This means that the New South Wales IRC continues to have jurisdiction in relation to the

Figure 15.6 The New South Wales IRC still has jurisdiction in relation to the employment terms and conditions of state and local government employees.

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employment terms and conditions of state and local government employees. For the IRC to approve an enterprise agreement for those employees, requirements similar to those contained in the *Fair Work Act 2009* (Cth) operate: a majority of employees must vote for the agreement, the agreement must comply with relevant state legislation (laws relating to workplace health and safety, anti-discrimination and **workplace surveillance**, for example), and it must pass the 'no net detriment' test (s 35(1)(b)).

workplace surveillance
an employer's use of technology such as cameras, computers and tracking devices to monitor employees

The 'no net detriment' test is similar to BOOT. The agreement must not put employees at a disadvantage compared with the state or federal awards that would otherwise apply. This means that employees cannot make an agreement that removes or reduces award conditions. For example, they cannot make an agreement that provides lower pay or fewer annual leave days than are provided by the relevant award. The IRC must also ensure that the parties understand the effect of the agreement and that no duress was involved in signing it.

Review 15.8

1. Describe the changes made to the industrial statutory framework under the *Fair Work Act 2009* (Cth).
2. Discuss the legislative powers retained by New South Wales after referral of industrial powers to the Commonwealth.
3. Explain the aim of BOOT and the 'no net detriment' test. Why is it necessary to have these two tests?

15.4 Regulation of the workplace

Industrial relations: the state and federal framework

Commonwealth and state powers

Section 51(xxxv) of the *Australian Constitution* gives the Commonwealth Government the power to make laws with respect to 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one state'. This means that the Commonwealth Government cannot use legislation to regulate industrial relations directly; it is limited to creating machinery for settling interstate industrial disputes.

As Commonwealth legislative power is limited to interstate disputes, a large proportion of disputes still need to be settled at state level. This is why the states have historically shared industrial relations power with the Commonwealth, and why there were separate industrial law systems in place.

Section 5 of the *Constitution Act 1902* (NSW) gives the New South Wales Parliament the power to make laws for the 'peace, welfare and good government' of the state. The New South Wales Government therefore has the power to pass legislation that aims to improve the welfare of employees and employers (such as awards) and to establish procedures for the resolution of industrial disputes.

As both federal and state governments can create law in the same area, conflicts sometimes occur. If conflict does occur, federal laws will prevail (*Australian Constitution* s 109). This situation has created confusion, and some employers have found it difficult to determine which award or agreement applied to their workplace. This has often had to be resolved in court.

The federal government has continued to extend its ability to legislate in areas that were traditionally considered part of state jurisdiction, in order to remove some of the cost, inefficiencies and inconsistencies of two systems of industrial relations laws and dispute resolution structures; the states have cooperated by relinquishing much of their industrial relations power to the federal government.

Industrial relations

Industrial relations is a term used to refer to the relationship between employers, employees, the government and trade unions. These four groups are the major stakeholders in the industrial relations process, but it would be reasonable to argue that everyone is a stakeholder, because any industrial change or dispute could have an impact on everyone in the community.

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industrial relations
the relationship between employers, employees, the government and trade unions

The New South Wales IRC and Fair Work Australia were established to help resolve such disputes. *The Fair Work Act 2009* (Cth) created Fair Work Australia (a national tribunal that replaced the AIRC and which has been renamed the FWC), the Australian Fair Pay Commission (which set minimum wages and is no longer operating) and the Workplace Authority (which approved collective agreements made before 1 July 2009 and assessed them using the 'no disadvantage' test). An industrial dispute can concern various matters, including unfair dismissal, discrimination or workplace health and safety.

The *Fair Work Act* also created the FWO, an independent statutory body. The FWO investigates complaints and ensures compliance with Commonwealth legislation. The FWO provides information regarding pay, leave and other entitlements.

When employers and employees are in dispute they may engage in industrial action. Employers, as part of their industrial action, may lock out their employees (keep them from entering their workplace) until they agree to certain terms. They may **stand down** their employees, or refuse to pay them. Employees may choose to go on **strike**, do only the bare minimum required ('work to rule'), reduce their productivity ('go slow') or form a **picket line**. All of these employee actions aim to exert pressure on the employer to agree to the employees' demands.

stand down
to suspend an employee from the workplace without pay, usually temporarily

strike
employees' organised withdrawal of labour

picket line
a line of striking union members forming a boundary outside or near their place of employment, which they ask others not to cross

When employers and employees enter into negotiations to create a new enterprise agreement they can engage in protected industrial action. Protected industrial action is a lawful action, and can be taken when an existing agreement has expired, the industrial action is in support of a new enterprise agreement and the other party has been given the required notice, or when parties who are undertaking the enterprise bargaining are genuinely attempting to reach an agreement. The action can be legally stopped if it involves injury to people, damage to property, or the unlawful taking or use of property. Protected industrial action is not available to employers unless they are taking action in response to employees' industrial action (*Fair Work Act 2009* (Cth) s 410 and s 411).

The FWC can stop an unprotected action. Action is unprotected if the bargaining period has been suspended, if it does not comply with FWC orders or if it is taken in support of claims that cannot be lawfully included in an agreement. If parties continue with the unprotected action they may face severe legal consequences, which are enforceable by the courts.

The FWC can stop or suspend protected action if it threatens to harm the economy or threatens the safety of individuals, or if it believes that the parties would benefit from a cooling-off period (*Fair Work Act 2009* (Cth) s 418 and s 419). The Minister for Employment can also terminate protected industrial action on the grounds that it threatens people's safety or threatens the economy.

The FWC acts to ensure that the bargaining process complies with industrial laws. In order to start a claim in support of a new enterprise agreement after an existing agreement has passed its expiry date, employees must first obtain an order from the commission allowing them to proceed.

Figure 15.7 Striking workers may engage in public actions to advertise their grievances.

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A protected action ballot must be held to endorse industrial action.

Disputes under modern awards and enterprise agreements will be resolved according to the dispute resolution procedures contained in the award or agreement.

Review 15.9

1. Explain Australia's system of workplace law as it arose under the *Australian Constitution*.
2. Outline the purpose of industrial action on the part of employees or an employer.
3. Identify the conditions for industrial action that are protected under the *Fair Work Act 2009* (Cth).
4. Why would the FWC act to stop either a protected or unprotected action?

Negotiations between employers and employees

Negotiations that take place between employees and employers about the type of work and working conditions are known as workplace bargaining. When all employees within the workplace are united on a series of workplace issues, they can negotiate with their employer from a position of strength, and are therefore better able to achieve their desired results. Enterprise agreements reached through collective bargaining by employees or their union representatives often contain conditions that are more generous than the conditions in awards.

When an individual employee is hired, the employer will usually present a contract of employment to be signed by both parties, specifying working hours, pay rates, leave entitlements, and so on. The terms of the contract cannot be less favourable than the wage rates or conditions set out in the modern award for that occupation or the applicable enterprise agreement (if the workplace has an enterprise agreement). The employer should tell the employee which award or agreement they will be working under. Most, but not all, employees are covered by a modern award. However, no employment contract can provide for entitlements less favourable than the NES.

'Award/agreement free employees' (those who are not covered by either a modern award or an enterprise agreement) may make agreements that vary the operation of the NES about a limited number of matters, summarised by the FWO as:

- averaging of hours of work
- the cashing out or taking of paid annual leave
- the substitution of public holidays
- extra annual leave in exchange for forgoing an equivalent amount of pay
- extra personal/carer's leave in exchange for forgoing an equivalent amount of pay.

The FWC makes minimum wage orders for employees who are not covered by a modern award.

Dispute resolution mechanisms

Industrial disputes can arise over issues such as working conditions, pay and entitlements, and discrimination. Mechanisms used to resolve disputes centre on mediation and other consensual forms of resolution. If disputes cannot be resolved, the matter will move to arbitration.

Under both the *Fair Work Act 2009* (Cth) and the *Industrial Relations Act 1996* (NSW), all awards and agreements must contain dispute resolution procedures (the New South Wales legislation exempts businesses employing fewer than 20 people from this requirement).

Dispute resolution processes aim to help disputing parties come to a peaceful and mutually

Figure 15.8 Mechanisms used to resolve disputes centre on mediation and other consensual forms of resolution.

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beneficial agreement through consent or agreement, not through arbitration. Consensual forms of dispute resolution include conciliation and **mediation**. These can take place between an individual employee and their employer or could involve a group of employees negotiating with their employer.

mediation
a form of alternative dispute resolution in which a neutral third party assists the disputing parties in reaching an agreement

Conciliation and mediation are favoured over arbitration for a number of reasons. Arbitration can be extremely costly and time-consuming, and can involve direct confrontation between the employee and employer. This may lead to increased antagonism. By contrast, in mediation both parties are encouraged to put forward their claims and concerns, suggest solutions, and discuss proposed terms and conditions. This allows the parties to see themselves as an integral part of the dispute-settling process rather than as observers. Parties in a workplace dispute may feel less inclined to honour an agreement that they feel has been imposed upon them by an outside third party than one in which they have been participants. Mediation allows disputing parties to exercise their rights and take a key role in the process. On the other hand, sometimes parties who have been involved in a long-running dispute find it easier to accept a solution imposed by an impartial outsider than to compromise with each other.

The effectiveness of consensual forms of dispute resolution depends on the nature of the relationship between the parties. If the relationship is built on mutual respect, then consensual forms of dispute resolution will be more successful than arbitration.

Consensual forms of dispute resolution are less costly to all parties concerned. Some of the costs associated with the supervision and enforcement of parties' obligations will also be reduced, as parties are more likely to comply with an agreement that they negotiated.

Under the *Fair Work Act*, when a dispute first arises, parties are to follow the dispute resolution procedures as outlined in their award or agreement. The initial discussion will usually be between the employer and employees within the workplace.

The Fair Work Commission (FWC)

The FWC is an independent body which has a wide range of powers: dispute resolution, enterprise bargaining, industrial action, determining the safety net for minimum wages and employment conditions, termination of employment and any other industrial matters. When parties to a dispute cannot resolve the dispute, they may take the matter to FWC. The role of FWC is in each case determined by the dispute resolution procedures set down in the relevant agreement or award. Generally a FWC representative will first discuss the issues in dispute with both parties and encourage them to come to a consensual agreement through mediation or conciliation; they may also make a recommendation.

The FWC can also assist with disputes arising under the general protections provisions of the *Fair Work Act*, and with disputes arising during a bargaining process.

The Fair Work Ombudsman (FWO)

The FWO has jurisdiction to deal with complaints about pay and entitlements, employers breaching the law, and discrimination. Again, the person making the complaint must be covered by the national system. The FWO strives to resolve disputes through consensual processes in the workplace. The ombudsman is supported by Fair Work Inspectors, whose role is to investigate complaints by starting with fact-finding, then assisting in voluntary resolution and then, where necessary, proceeding to a full investigation and mediation. If investigation reveals that a party has broken the law, the inspector can give the party notice to remedy the breach, and if the party fails to do so, the matter may go to court. The Ombudsman may consider that breaches of an award or other illegal conduct are so substantial that its findings may be referred to the Director of Public Prosecutions (DPP). However, investigations by the Ombudsman are not criminal investigations,

Legal Links

See http://cambridge.edu.au/redirect/?id=6384 for media releases about current workplace investigations by Fair Work Inspectors.

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and evidence presented by the Ombudsman to the DPP cannot be used in any criminal action. The DPP would have to undertake its own criminal investigations.

New South Wales Industrial Relations Commission (IRC)

The New South Wales IRC investigates alleged breaches of state industrial legislation, awards and enterprise agreements. It will first order a compulsory conference between the parties, then conciliation. It will only use arbitration to deal with an industrial dispute if conciliation is unsuccessful. Its orders are binding.

Research 15.2

1. Go to http://cambridge.edu.au/redirect/?id=6385.
   - **a** Discuss the dispute resolution procedures outlined.
   - **b** Apply the sample disciplinary procedure to the 'Best employment practice – case studies' provided.
2. Using the internet, research the latest hearings and findings of the Royal Commission into Trade Union Governance and Corruption about one trade union as reported by the media.

Review 15.10

1. Explain why there is an emphasis on consensual forms of dispute resolution rather than arbitration.
2. Summarise the functions and powers of the various federal and state bodies that can help parties to settle industrial disputes.

Roles

Courts and tribunals

Courts and tribunals still play a significant role in the resolution of industrial disputes. The use of a court as the final arbitrator lends weight to the decision, and parties that do not comply will face the legal consequences of that. Courts provide certainty by establishing legal principles, clarifying legal questions, and identifying and resolving industrial issues as they emerge, ensuring that the law continues to reflect community standards and meets the changing requirements of the federal or state industrial system.

The Fair Work Commission (FWC)

The FWC is the federal industrial relations tribunal. It can resolve disputes including those arising in the course of enterprise bargaining and industrial action, and can adjudicate matters involving breaches of the law.

Federal Court and Federal Circuit Court

The Industrial Relations Court of Australia was established in 1993 as a superior court equal in status to the Federal and Family Courts. The *Workplace Relations Act 1996* (Cth) (now repealed) transferred the jurisdiction of the Industrial Relations Court to the Federal Court of Australia. The Industrial Relations Court continued to exist at law as a court administered by the Federal Court until 2006.

The *Fair Work Act 2009* (Cth) created a Fair Work Division of the Federal Magistrates' Court (now the

Figure 15.9 Small claims matters (under $20 000) can be settled in the Federal Circuit Court.

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Federal Circuit Court) and a Fair Work Division of the Federal Court. This change has made some aspects of industrial dispute settlement at the federal level more combative and adversarial. For example, when a union takes illegal industrial action despite being ordered by FWC to cease the action, the employer may take the matter directly to the Federal Magistrates' Court.

The *Fair Work Act* also provides for certain matters to be heard as small claim matters (not more than $20 000) in the Federal Circuit Court (*Fair Work Act 2009* s 548). This allows employees to pursue the recovery of unpaid entitlements or compensation. These proceedings are relatively informal: a party may not be represented by a lawyer without the court's permission, the court is not bound by the rules that normally control the admissibility of evidence in legal proceedings, and it can investigate the matter as it sees fit. The small claims tribunal minimises costs and is less intimidating for many people.

Industrial Court of New South Wales

The Industrial Court of New South Wales exercises the judicial function of the New South Wales IRC. It has the same status as the state Supreme Court, and has an appellate jurisdiction (to hear appeals from decisions of lower courts on industrial matters). It has exclusive jurisdiction with respect to industrial matters – in other words, it is the only court that can arbitrate industrial disputes. The types of matters it hears include:

- unfair contracts claims
- offences under the *Industrial Relations Act 1996* (NSW)
- proceedings for breaches of awards and agreements, including underpayment of entitlements
- superannuation appeals
- unfair dismissal claims

Review 15.11

1. Briefly outline the role of courts and tribunals in governing industrial relations.
2. Explain the judicial role of the FWC and the New South Wales IRC and how they act to protect employee entitlements.

- criminal prosecution of workplace health and safety offences under the *Work Health and Safety Act 2011* (NSW), which replaced the *Occupational Health and Safety Act 2000* (NSW).

Government organisations

New South Wales Industrial Relations Commission (IRC)

The role of the New South Wales IRC is not limited to hearing disputes. It also establishes employment conditions and wages by making industrial awards and approving enterprise agreements for those employees in the state system.

In its administrative role, the IRC can:

- review awards and enterprise agreements, ensuring that they comply with the 'no net detriment' test and contain no discriminatory provisions
- revise awards to comply with legislation that has been enacted
- register and regulate employer associations and employee organisations (such as trade unions), including through proceedings for enforcement of rules and challenges to the validity of rules.

The New South Wales IRC plays a significant role in supervising enterprise agreements for state and local government employees in New South Wales. In addition to ensuring that agreements meet the 'no net detriment' test, it must also consider the appropriateness of the negotiation process. The IRC has to ensure that the parties understand the effect of an agreement and that no duress was involved in the signing of the agreement.

The Fair Work Commission (FWC)

The role of the FWC is to oversee the federal industrial relations system. In addition to its judicial functions, it has an administrative role and can:

- vary awards
- make minimum wage orders
- review and approve enterprise agreements for all workplaces in the federal system, ensuring that they meet the BOOT test
- assist with the modification of agreements when a business is transferred or a new business is created
- provide assistance and advice about the industrial relations laws, through its telephone helpline.

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The Fair Work Ombudsman (FWO)

Section 682(1)(a) of the *Fair Work Act 2009* (Cth) states that the functions of the FWO are to promote 'harmonious, productive and cooperative workplace relations' and to ensure compliance with the Act, awards, agreements and orders. It does this by providing education, advice and assistance to employees, employers, **outworkers** and registered organisations of employees and of employers. The Ombudsman publishes information on the federal industrial relations system, and has offices throughout Australia as well as an online advisory service. The FWO encourages employees and employers to take the initiative and try to resolve complaints themselves.

outworker
an employee who works at home or another place besides the premises of their employer, or an independent contractor in the textile, clothing or footwear industry who works at home or at other premises

The Ombudsman has the power to investigate and enforce breaches of the Act and of awards, agreements and orders. For example, Fair Work Inspectors can inspect and copy documents at an employer's premises.

The Ombudsman can represent employees or outworkers in proceedings before a court or the FWC.

Research 15.3

Go to the FWC website at http://cambridge.edu.au/redirect/?id=6383 and complete the following tasks.

1. Find the National Minimum Wage Orders.
2. Investigate how the FWO can help employees and young employees starting work for the first time.

Trade unions

Trade unions are employee organisations. A group of people has greater bargaining power than individuals, and unions have been instrumental in achieving better workplace safety, superannuation, a 38-hour working week, penalty rates, rest breaks and other benefits for employees.

A union usually represents employees from similar occupations or industries. The union may discuss working conditions, awards and enterprise agreements with employers. All employees have the right to join a union if they wish and many occupations and industries have their own union. One such union is the Electrical Trades Union (ETU). Other unions represent a broad range of employees within diverse work places. For example, the Construction, Forestry, Mining and Energy Union (CFMEU) represents people working in the building, timber, mining and energy production industries. The Australian Workers Union (AWU) was formed to represent the interests of shearers and miners, but later expanded into manufacturing and today covers employees in aviation, food processing and retail areas as well as its traditional industries.

Unions may act together in pursuit of a common goal. The *NSW State Wage Case* of 2009 ([2009] NSWIRComm 120) is one such example. In this case, Unions NSW applied to the New South Wales IRC for a general wage increase in awards. Unions NSW is the state's **peak body** for unions, and is made up of more than 67 unions.

peak body
an association made up of a number of organisations that have similar interests and aims; it sets policy and coordinates common activities for its member organisations

The Australian Council of Trade Unions (ACTU) is the national peak body for all Australian unions. It was formed in 1927. The ACTU represents Australian labour organisations internationally, advocating and articulating positions on human rights and other issues. The ACTU has been influential in campaigns to further the rights of workers within Australia.

Unions may act as lobby groups to exert pressure for legislative and government policy reforms. The ACTU continues to lobby for better parental leave for both fathers and mothers; prioritises superannuation and ensures that employee contributions go to funds that are low-fees, non-profit and which deliver good returns; and campaigns for increased protection for overseas workers employed under temporary work visas (457 visas).

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Employer associations

Employer associations are composed of employers in the same or related industries. Employer associations can represent their members during the negotiation of a new enterprise agreement. Associations may also present a case to the relevant industrial relations commission or court in support of their members' interests. Employer associations include the Australian Chamber of Commerce and Industry, the Chamber of Commerce (NSW), the Business Council of Australia (BCA) and Master Builders Australia.

Non-government organisations (NGOs)

Non-government organisations (NGOs) may provide training and education to raise awareness of issues involving industrial relations, employment conditions and workplace safety. They may also engage in research and make submissions to government and other appropriate bodies on these issues. Some may undertake political campaigns to pressure the government.

An NGO may have been established by statute and/or may receive government funding, but nonetheless is not affiliated with any government and excludes government representatives from its membership and governance. A national NGO may endure through many changes of government.

Australian Human Rights Commission (AHRC)

The Australian Human Rights Commission (AHRC) is an independent statutory organisation established in 1986 to act as the human rights 'watchdog'. It administers federal anti-discrimination statutes – *Age Discrimination Act 2004* (Cth), *Disability Discrimination Act* 1992 (Cth), *Sex Discrimination Act 1984* (Cth) and *Racial Discrimination Act 1975* (Cth) – and has powers under the *Fair Work Act 2009* (Cth) to make submissions to the FWC in relation to reviews of modern awards and enterprise agreements. If a provision of an award or agreement requires a person to do something that is illegal under one of the anti-discrimination Acts, the FWC must vary the award or agreement.

The AHRC can accept complaints about discrimination in the workplace, and generally will conciliate, although it can also refer matters to the Fair Work Division of the Federal Court.

Other NGOs

Safe Work Australia is an independent statutory body whose main aims are to promote safer workplaces and improve workplace health and safety.

The Human Rights Council of Australia is a private organisation that monitors and publicises the performance of governments, and provides links between Australian human rights activists and those in other countries. It works to promote the development of Australian policy in human rights, which includes workplace issues such as discrimination and safety.

The National Women's Justice Coalition promotes women's equality before the law, through education and lobbying.

The International Labour Organization (ILO), an agency of the UN, aims to encourage member nations to undertake common action in the protection of workers' rights around the world. It drafts and oversees international labour standards, and seeks to promote compliance with these standards.

Legal Links

To find out more about Safe Work Australia, go to http://cambridge.edu.au/redirect/?id=6386.

The media

The role of the media and associated technologies has changed over the past decade. New and innovative communications technologies have meant that all stakeholders within the workplace are better informed and better placed to gather support for their cause with both the public and the government. Employer associations and trade unions use the internet extensively to inform the public about current claims and negotiations. Unions, in particular, use the internet to survey employees regarding hours of work and workplace conditions, and have used the information as the basis for test cases. The IRC and the FWC have also effectively used these technologies to inform employees and employers about their rights and obligations under workplace law, and to provide additional support services.

Use of the internet as a method of communication and a source of information within the workplace has

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given rise to various issues. One issue is the extent to which an employer can and should be allowed to monitor and/or regulate employees' use of the internet while at work.

If employers don't monitor email and internet traffic, they may be at risk. In the case of **sexual harassment**, if the employer has not taken reasonable steps to prevent offensive material being distributed, they may be held liable. A second issue is the growing number of employers who regularly check employees' and prospective employees' Facebook pages, and how this information can influence employee–employers relationships. Releasing inappropriate or ill-conceived statements via social media may adversely affect the career of the individual.

sexual harassment
unwelcome and uninvited behaviour of a sexual nature, which is likely to intimidate, humiliate or offend the person it is directed to

Employees using the internet at work for private correspondence and web browsing may not be aware that their activity may not be protected from scrutiny by their employer. There is no common law right to privacy in Australia. The federal Office of the Privacy Commissioner has developed guidelines for employers, so that they can ensure that their staff understand the employer's expectations and what is permitted at work, and what will be done with any personal information collected as a result of monitoring. Finally, the use of workplace electronic communication for purposes related to trade union aims has been addressed in at least one Federal Court case. In *Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd* (2000) 175 ALR 173, a union bulletin had been circulated by email. Ansett did not like the contents of the bulletin and sacked the union delegate for using the workplace email server to distribute union material. The Federal Court held that the dismissal was unlawful. Her use of email to distribute the material was considered 'reasonable', given her role in the union and because Ansett had 'impliedly permitted' it by permitting a union working group to be established at the work site. In addition, the court held that a union should be entitled to provide information on the outcome of a meeting to its members.

Review 15.12

1. Briefly outline the role of government organisations, unions, industry groups and NGOs in industrial relations.
2. Critically evaluate the role of the media in industrial relations.
3. Discuss whether employers should be able to monitor their employees' social media.
4. Do employers have the right to penalise employees for what they may release via the internet?

Remuneration

Remuneration means an employee's salary package, which can include pay, superannuation, share offers, educational expenses, and car and rental assistance. The remuneration package must satisfy the NES as to minimum award rates of pay and entitlements. It may also include an 'incentive package' that is based on the employee's performance.

Many employers now bundle a variety of services and benefits as part of a salary package in order to attract and retain staff. This means the employee receives the benefit as part of their salary, rather than a higher salary on which income tax would be payable. The financial advantage for employees is that although they may sacrifice part of their salary, this is more than made up by the tax benefit.

Figure 15.10 A salary package may include benefits such as a car.

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Superannuation Guarantee Scheme

The Superannuation Guarantee Scheme was established in the early 1990s under the *Superannuation Guarantee (Administration) Act 1992* (Cth). Its main aim is to ensure that employees, on retirement, will have adequate funds to support them. The scheme relies on the employer contributing a sum equivalent to a percentage of the employee's annual salary to a fund where it will be preserved (that is, it cannot be touched by either the employer or the employee) until the employee retires and has reached 'preservation age' (this is determined by the year of birth). The employee can also make personal contributions to their own superannuation fund, and these contributions can be accessed before retirement but will be subject to tax.

15.5 Contemporary issue: Discrimination

About the issue

The ideal of equality implies that all people should be treated equally before the law. The notion of equality in workplace law centres on equality of opportunity.

The ILO first articulated and advocated equal opportunity and the adoption of anti-discriminatory work practices as a basic workers' right in 1919. The preamble of the Constitution of the ILO states its general intention to eradicate working conditions which cause 'injustice, hardship and privation to large numbers of people'. This general aim is reflected in Australian anti-discrimination, equal opportunity and human rights legislation.

Discrimination is the unfavourable treatment of a person or group relative to the way others are treated. It may take the form of **direct discrimination** or **indirect discrimination**. In the context of the workplace, it is unlawful to discriminate between employees on the basis of gender, race, pregnancy, national or ethnic origin, marital status or sexual orientation, for example.

discrimination
unfavourable treatment of a person or group relative to the way others are treated

direct discrimination
a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of gender, race, national or ethnic origin, age, sexuality, etc.

indirect discrimination
a practice or policy that appears to be neutral or fair because it treats everyone in the same way, but which adversely affects people with a particular characteristic

Legal responses

The *Anti-Discrimination Act 1977* (NSW) initially prohibited discrimination only on the grounds of race, gender and marital status. Over the following years a number of additional grounds have been added and the Act has been modified, albeit in a piecemeal fashion. Although it was found that the Act had been successful in changing community attitudes and behaviour, the New South Wales IRC argued that it needed to be extended to include new grounds for discrimination in order to remain relevant and up to date. One change has been the inclusion of discrimination against an individual who is the carer of another person (children, adults with disabilities or members of one's immediate family). Another area of law reform is the removal of age barriers. It is illegal to sexually harass a volunteer during their voluntary work, but volunteers may not enjoy the same protection under the *Anti-Discrimination Act* as employees, as they are not considered 'paid employees'. This is an area which is in need of review.

Discrimination is illegal in New South Wales under the state and federal Acts listed in Table 15.1. The Acts cover different grounds for discrimination. In the workplace, employers must treat all employees, and anyone applying for a job, fairly – that is, on the

Table 15.1 Discrimination laws

Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Disability Discrimination Act 1992 (Cth)
Industrial Relations Act 1996 (NSW)
Age Discrimination Act 2004 (Cth)
Fair Work Act 2009 (Cth)
Workplace Gender Equality Act 2012 (Cth)

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basis of their individual merit, skills and suitability for the job, not on the basis of irrelevant personal characteristics.

Unfortunately, these Acts do not make discrimination illegal. Rather, they provide that workplaces have to develop appropriate programs to ensure the absence of discrimination and take positive steps to promote equal employment opportunity for members of disadvantaged groups. The major difficulty in ensuring that employers comply with the legislation is the lack of an enforcement provision. Publicising the name of a workplace that fails to comply is one punishment available, as is excluding the employer from obtaining government contracts.

Areas covered by the Acts

Racism

A person cannot be treated differently because of their membership of a particular race or cultural group. This is prohibited by the *Racial Discrimination Act 1975* (Cth) and the *Anti-Discrimination Act 1977* (NSW).

Sexism

A person cannot be treated differently simply because she is a woman or he is a man. This form of discrimination, which includes sexual harassment and discrimination due to pregnancy, is illegal under the *Sex Discrimination Act 1984* (Cth) and the *Anti-Discrimination Act 1977* (NSW).

Discrimination on the basis of sexual orientation

Both the *Anti-Discrimination Act 1977* (NSW) and the *Fair Work Act 2009* (Cth) make it illegal to treat someone less favourably because they are gay, lesbian or bisexual. The *Anti-Discrimination Act* also makes it illegal to discriminate against someone because they have a relative or associate who is gay, lesbian or bisexual.

Disability discrimination

Under both the *Disability Discrimination Act 1992* (Cth) and the *Anti-Discrimination Act 1977* (NSW), it is illegal to discriminate against someone on the grounds of their disability. This includes intellectual, physical, sensory, psychiatric and learning disabilities. These Acts also prohibit discrimination against someone because they have HIV/AIDS or is associated with someone who has HIV/AIDS.

Age discrimination

It is illegal to discriminate on the basis of age under the *Age Discrimination Act 2004* (Cth) and the *Anti-Discrimination Act 1977* (NSW). This legislation also makes it illegal to force an employee to retire because of their age. There are specific types of employment that are excluded from that due to the nature of the employment: judges and aircraft pilots, for example.

Equal employment opportunity

Equal employment opportunity legislation was found in the former Part 9A of the *Anti-Discrimination Act 1977* (NSW) and in the *Equal Opportunity for Women in the Workplace Act 1999* (Cth) (EOWW Act). Part 9A of the *Anti-Discrimination Act* (which dealt with equal opportunity in government employment) was repealed by the *Government Sector Employment Act 2013* (NSW). The EOWW Act was renamed the *Workplace Gender Equality Act 2012* (Cth) by the *Equal Opportunity for Women in the Workplace Amendment Act 2012* (Cth); it now includes all employees in the workplace. The Act specifically focuses on equal remuneration between women and men, and aims to improve women's ability to participate in the workplace. The Act also recognises that the caring responsibilities of both men and women are central to gender equality in the workplace.

equal employment opportunity legislation
laws requiring employers to ensure that people are not subjected to discrimination and to eliminate factors that restrict groups' equality of opportunity in the workplace

Equal pay for equal work

Two test cases, the *Equal Pay for Equal Work Case* (1969) 127 CAR 1142 and the *Equal Pay for Work of Equal Value Case* (1972) 147 CAR 172, established certain principles with respect to wages for women. In the first, the court held that women doing the same work as men should receive the same pay. In the second, it held that different jobs of the same worth warrant the same minimum wage. This decision was intended to address the difference between men's and women's pay resulting from the preponderance of men in some jobs and women in others.

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The 'worth' of a job has no legal definition. However, one significant reason for the difference in pay between work traditionally regarded as 'men's work' and that regarded as 'women's work' is the greater value placed on some types of work. One way to determine whether two different jobs are of equal value or worth might be to ask whether there are equal levels of skill required or responsibility attached, under the same or comparable conditions.

The average weekly earnings of women remain far less than men. In 2013, the gender pay gap was 17.1%, with men earning an average of $1532 per week compared to women who earnt an average of $1270. In 2014, the gender pay gap worsened. The average wage for men was $1587 per week compared to women whose earnings were $1289, or pay gap of 18.1% (*Workplace Gender Equality Agency Gender Pay Gap Statistics* – see http://cambridge.edu.au/redirect/?id=6387 for more information).

Legal Links

See http://cambridge.edu.au/redirect/?id=6383 for a 2015 ABC News report about the 2014 gender pay gap statistics.

In the *Equal Remuneration Case* (2012), the FWC found that the predominantly female workforce in social and community services was paid less for work of comparable value done in state and local government agencies. This implies that industries that are traditionally designated as 'female' will continue to be paid less than those industries which society considers as 'male'. However, this gender pay inequity is also found within the same industry. In 2014, the highest gender pay gap could be found in the Financial and Insurance Services industry (29.6%), while the pay gap in the Accommodation and Food services industry was 9%.

In a discussion paper released by the ANZ Bank in 2015 (*Barriers to Achieving Financial Gender Equity*), it was noted that women's workforce participation had increased by 25% but that women in 2015 were paid on average 18.8% less than men. Over the working life of women they would be earning substantially less than their male counterparts and this would continue to have a detrimental impact on their superannuation.

Non-legal responses

Numerous independent bodies and NGOs are involved in investigating and researching discrimination issues, and in making recommendations to government or providing policy advice to relevant departments. These organisations usually concentrate their efforts in particular areas. The NSW Council of Social Services (NCOSS) and the Federation of Ethnic Communities' Councils of Australia (FECCA) are examples. Each seeks to represent the interests of disadvantaged people and modify government policy to support social justice issues. National Disability Services, the peak body for non-profit organisations that provide services to the disabled and the disadvantaged, is another organisation involved in this kind of work. The Workplace Gender Equality Agency continually lobbies for pay equity through its publications and has nominated an 'Equal Pay Day', which occurs on different days each year. 'Equal Pay Day' is calculated on the number of extra days that the average woman must work to receive the same pay as a man.

Other organisations, such as Amnesty International, regularly campaign for the recognition of human rights and the removal of discriminatory practices. These bodies do not have the legal authority to make or amend laws; rather, their role tends to be limited to investigating complaints and/or making recommendations to government.

Figure 15.11 Equal Pay Day demonstrations in Berlin on 20 March 2015

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Responsiveness of the legal system

To a certain extent the law has responded to the need to protect individuals and groups from discriminatory practices. Changing social attitudes and human rights movements of the 1960s, such as the feminist and civil rights movements, provided the initial impetus to create legislation protecting rights. Later Australia became a party to several United Nations (UN) conventions, including the *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW) and the *Convention on the Elimination of Racial Discrimination* (CERD). As such, Australia was obligated to create domestic legislation in line with these conventions.

Legislatures have responded to a number of recommendations which pointed out that loopholes still existed with respect to protection from discriminatory practices. The *Anti-Discrimination Amendment (Carers Responsibilities) Act 2000* (NSW) amended the *Anti-Discrimination Act 1977* (NSW) to prohibit direct or indirect discrimination in employment because of an employee's responsibilities as a carer for children, adults with disabilities, or other (immediate) family members.

The courts and various tribunals have also responded to protect individual rights in this area. In *Mayer v Australian Nuclear Science and Technology Organisation* [2003] FMCA 209, the complainant wanted to work part-time after returning from maternity leave. She was unable to return to work on a full-time basis because she now had to care for her child. Mayer was told that her position was only available as a full-time position and she was dismissed. The company's refusal to allow her to work part-time was found to be indirect sex discrimination, on the basis that it is still often women who bear the brunt of child care in a family.

Although the legal system has acted to remove discriminatory practices within the workplace, it has not been entirely successful. For example, more than 30 years after the *Equal Pay for Equal Work Case* and the passing of numerous Acts making discriminatory pay practices illegal, there are still pay and promotional disparities between men and women. In addition, those who have family or carer responsibilities continue to face inequities in the workplace, such as lack of professional development and promotion and overtime opportunities.

There exist some minimum protections contained within the *Fair Work Act* (s 65) and enterprise agreements. Under the NES and other work arrangements, employees can negotiate with their employer more flexible work arrangements such as changes to hours of work for a parent or care giver.

In 2011, the Commonwealth government passed the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth). This act strengthened existing laws regarding sexual harassment in the workplace, including the use of new technologies in harassing individuals. The Commonwealth government announced in 2012 that it intended to consolidate anti-discrimination laws under the Human Rights and Anti-Discrimination Bill 2012 (Cth). This bill is yet to be passed.

In a highly publicised case (*Rich v Price Waterhouse Coopers 2014*), Christina Rich claimed that the 'boys' club culture' that existed within the accounting firm Price Waterhouse Coopers limited her promotional prospects, undervalued her work and openly discriminated against women. Ms Rich and Price Waterhouse Coopers settled out of court for a substantial amount.

In 2012, the Australian Human Rights Commission conducted a telephone survey ('Working without Fear') to investigate the nature and extent of sexual harassment in the workplace. Responses to the survey indicate that sexual harassment in the workplace continues to be a major issue, with 25% of working women and 16% of men claiming to have been sexually harassed in the past five years. The commission also noted in the report that when individuals had made a complaint they were in turn subjected to 'negative consequences', namely victimisation.

In 2011, the Commonwealth government amended both the *Age Discrimination Act* (the creation of an Age Discrimination Commissioner) and the *Sex Discrimination Act*, which strengthened the rights of employees in the areas of family responsibilities and

Legal Links

Go to http://cambridge.edu.au/redirect/?id=6389 to read more about law reform issues surrounding age barriers to work.

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sexual harassment through the use of social media. In one of the first cases alleging age discrimination, *Fair Work Ombudsman v Theravanish Investments Pty Ltd and Ors* [2014] FCCA (2 April 2014), a worker who had been terminated from his employment because he had turned 65 was successful in suing his employer.

Conclusion

The various discrimination laws were introduced in response to changing social attitudes and values. Recent workplace reforms have centred on removing discriminatory practices involving work–family issues and age discrimination, and introducing family-friendly initiatives in the workplace. However, there is a need for further workplace reforms in the area of parental leave.

Review 15.13

1. Define 'discrimination'.
2. Discrimination can occur on many grounds. Reflect on the different forms of discrimination and how the law protects employees.
3. Explain the concepts of 'equal opportunity' and 'equal pay for equal work'.
4. 'Equal pay for equal work has never really existed.' Discuss this statement, providing examples to support your discussion.
5. Why does sexual harassment remain a major issue within the workplace?

15.6 Contemporary issue: Safety

About the issue

A safe workplace includes safe equipment, safe work systems and appropriate training procedures. If there is a dispute, a court will decide what constitutes 'safe'; the court's decision is usually determined by the relevant legislation and the individual facts of the case. Therefore, workplace safety is a variable concept. What is safe in an office workplace will differ very much from what is safe on a naval destroyer carrying nuclear weapons.

Table 15.2 Deaths resulting from work-related traumatic injury

Year	Number of worker fatalities
2012	212
2013	186
2014	184

Source: Safe Work Australia, http://cambridge.edu.au/redirect/?id=6390

Table 15.3 Incidence rate of serious injuries

Year	Serious injuries per 1000 employees
2000–01	16.3
2006–07	13.6
2012–13	11.1

Source: Safe Work Australia, http://cambridge.edu.au/redirect/?id=6392

According to Safe Work Australia, in 2012–13 there were nearly 118 000 serious injuries (these were accepted compensation claims and involved at least one week absence for work). The following year, 531 800 workers were injured at work (see http://cambridge.edu.au/redirect/?id=6391).

Since 2001 the incidence rate of serious injuries per 1000 employees has steadily fallen (see Table 15.3).

For employers there is an enormous loss of production and profit; for the worker there is the financial cost of medical treatment and lost wages and the emotional 'costs' associated with a serious illness or injury; for the government and the community there are additional costs to the health and welfare system, skills and productivity losses. Safe Work Australia estimated that the cost of workplace injuries, disease and death in 2012–13 was $60.6 billion or nearly 5% of Australia's GDP. One issue of growing concern is the increase in stress-related or mental health claims. In 2008–09, there was a total of 7970 claims; in 2011–12 this had risen to 8045 and is expected to increase in the future.

Work health and safety (WHS) is a matter that now falls within federal jurisdiction and is primarily governed by federal legislation.

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Legal responses

The legal system has responded to workplace safety concerns through development of the common law duty of care in relation to employer negligence, and through legislative reforms.

Common law duty of care

Employee rights concerning safety were originally protected under the common law. Employers had an implied duty of care to their employees, to safeguard their health and safety. A breach of the duty of care resulting in injury to an employee in the course of performing their duties amounts to the tort of negligence. The employer is negligent if it fails to:

- employ competent staff and provide proper supervision, which includes maintaining the skill levels of employees
- provide a safe working environment and equipment
- provide a safe means of access to the workplace
- ensure a safe system of conducting work.

Authority for these principles is found in the English case *Wilsons & Clyde Coal Co. v English* [1938] AC 57.

Employers' obligations to their employees are enforceable in tort. If someone owes a duty of care to another person, and their action or omission (failure to act) causes foreseeable loss or injury to that person, compensation in the form of damages may be payable to the victim. Medical bills, lost wages and the cost of retraining are some examples of compensable losses.

In order to prove negligence, the plaintiff (the injured party) must prove three elements:

- that a relationship existed between the parties (that is, the employer owed the employee a duty of care)
- that there was a breach of that duty of care in that the employer did not provide a safe working environment (for example, the employer failed to provide adequate training or did not install a safety guard on a machine)
- that the plaintiff suffered damage as a result of the breach (that is, the worker was injured or suffered a loss).

Employers' duty of care includes a duty not to expose employees to unreasonable hazards, such as toxic chemicals, dust or disease-causing agents.

In certain instances, workers may find it difficult to establish that they were owed a duty of care. In today's workplace, the dividing line between an employment relationship and a contract for services is not always clear. For example, a business may contract with a hire company, which in turn engages workers. The business might argue that it had no contract of any kind with the workers, and that liability for their safety rests with the hire company. In another example, an employee might be responsible for their hours or work and the manner in which the job is performed. The employer might argue that the 'control test' points to an independent contract for services, not a contract of service, and therefore there is no duty of care owed to the worker and no liability for loss suffered. In such cases, the court would need to look at other

In Court

***Paris v Stepney Borough Council* [1951] AC 367**

In this UK case, Mr Paris was already blind in one eye when he began working for the council as a motor mechanic. It was not the practice to provide safety goggles to employees. Paris was hammering at a rusty bolt when a shard of rust flew off and lodged in his good eye, resulting in total blindness. It was held that the potential seriousness of the harm to Paris was much greater than for an employee with sight in both eyes, and therefore the standard of the duty of care owed to him was higher. Knowing his unique circumstances, the council should have provided him with safety goggles. The duty owed by the employer to the individual employee must take into account the employee's circumstances, and therefore the standard of care owed may be greater.

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aspects of the parties' relationship, such as whether the employee uses a business structure under which invoices are issued (the 'economic reality' test).

Statutory duties of employers

Statutory duties are found in a number of Acts. In New South Wales, the principal Act governing workplace safety was the *Occupational Health and Safety Act 2000* (NSW). This was replaced by the *Work Health and Safety Act 2011* (Cth). It contains general requirements which must be met at all places of work in New South Wales. It covers employees, contractors and self-employed people.

There is also associated legislation with other legal requirements about WHS. This may be specific to an occupation, such as the *Health Practitioner Regulation National Law* (NSW). This also includes statutes governing **workers' compensation** and **injury management**. Injury management programs that employers may be required to institute cover treatment, rehabilitation and retraining, to facilitate the employee's return to work.

workers' compensation
a compulsory insurance scheme paid into by employers to compensate, through financial payments, employees injured at work; claims do not require proof of fault

injury management
a program developed for an injured worker that includes all aspects of their treatment, rehabilitation and retraining, and that is aimed at facilitating their return to work

Some of the statutes providing for employer compensation for a worker's injury or death are:

- *Workers Compensation Act 1987* (NSW)
- *Workplace Injury Management and Workers Compensation Act 1998* (NSW)
- *Workers Compensation (Bushfire, Emergency and Rescue Services) Act 1987* (NSW)
- *Workers Compensation (Dust Diseases) Act 1942* (NSW).

Provisions for workers' compensation have become mandatory in all workplaces, and employers who do not comply are subject to large fines. Workers' compensation in New South Wales is governed by the *Workers Compensation Act 1987* (NSW). This Act introduced the WorkCover scheme of workplace injury insurance. The WorkCover premiums paid by an employer cover the costs of the compensation provided to employees if they are hurt or become ill because of their job. WorkCover NSW is a statutory body that administers the scheme and also investigates and monitors WHS issues. Under the *Workplace Injury Management and Workers Compensation Act 1998* (NSW), another role of WorkCover is to oversee the development of appropriate injury management programs. All employers are required to take out a WorkCover policy if their annual payroll is $7500 or more. Even if an employer is exempt, they must provide assistance to an injured employee to manage their injury and support the injured employee when they return to work.

Development of statutory duties

Workplace safety in New South Wales was originally covered by individual Acts that were confined to specific industries. These included:

- *Employers Liability Act 1880* (NSW) – this Act gave 'workmen' who were injured in specific work situations or by fellow employees the right to sue the employer for damages. The Act only referred to workmen who were manual labourers; other types of workers were excluded.
- *Factories and Shops Act 1912* (NSW) – this Act required employers to follow specific work procedures or risk criminal penalties. The Act was written in general terms and was limited to factory settings, excluding the services industries.

In the early 1970s, Lord Robens was tasked with inquiring into WHS issues in the United Kingdom. The Robens Report, published in 1972, concluded that not only were there serious problems in the safety legislation at that time, but there was also a certain degree of worker apathy towards safety, and this was one of the primary causes of workplace accidents. The Robens Report considered that workers and management should work together to meet and improve the WHS standards prescribed in legislation. The aims included giving workers a greater responsibility for their own safety, and making employers subject to statutory duties to consult with employees about WHS measures. These recommendations formed the basis for legislative reform in the area of workplace safety in both England and Australia.

Within a decade of the publication of the Robens Report, workplace safety in New South Wales was

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also being scrutinised. In 1981, the New South Wales Government established a commission of inquiry into WHS, chaired by NSW Industrial Magistrate T.G. Williams. The Williams Report pointed out that New South Wales workplace safety legislation was inadequate and did not do enough to prevent workplace accidents. The report recommended that any new legislation must include specific employer and employee duties and rights. In addition, it stated that there had to be greater cooperation between employers and employees in order to improve workplace safety. The report introduced the notion of individual workplace safety committees. More importantly, it recognised that workplace safety was the responsibility not just of the employer but of everyone within the workplace.

Figure 15.12 In 2012–13 there were nearly 118 000 serious workplace injuries.

Employees' role in workplace safety

The Williams Report recommended the **codification** of common law in order to provide uniform workplace practices across all industries. A few years later, the *Occupational Health and Safety Act 1983* (NSW) was passed, codifying much of the law that had evolved through the courts. Later reforms and amendments to the 1983 Act resulted in the *Occupational Health and Safety Act 2000* (NSW).

codification
the spelling out of obligations in legislation

The *Occupational Health and Safety Act 2000* (NSW) introduced employees' obligations to take reasonable care for the health and safety of people at their workplace and those who may be affected by their acts or omissions, and broadened employers' duty of care to those who are not their employees but are visitors to the workplace. Under this Act, employers, employees and the self-employed are all obliged to take reasonable care to ensure the health and safety of those in the workplace.

The object of the *Work Health and Safety Act 2011* (Cth) was to create a nationally consistent framework to ensure the health and safety of workers and workplaces.

These statutory duties reflect the common law duty of employees to work with due skill and care. Part 5 of the Act makes it mandatory for individuals and employers to consult with one another. To help facilitate this process, workers may elect a health and safety representative or create a committee. The role of the committee and/or representative is to consult with the employer about risks to health and safety, and participate in decisions about appropriate measures to be taken. Failure to consult can result in fines of $20 000 per individual or $100 000 for a body corporate.

The committee can investigate any matter that may be a risk to health and safety in the workplace. A WHS entry permit holder has the legal authority to enter a workplace to investigate a suspected contravention of the Act. They can issue an improvement notice (ss 90–102). If the individual who has been issued a notice fails to comply within the specified period they may incur a fine of $50 000 (individual) or $250 000 (body corporate) (see s 193). Inspectors from the WorkCover Authority of New South Wales can also visit workplaces and are authorised to investigate a wide range of safety-related activities. Their powers include prohibiting any further work, copying and retaining documents, seizing evidence and imposing on-the-spot fines for any breaches discovered (ss 156–190).

Non-legal responses

The ACTU continues to play a major role in lobbying governments to strengthen workers' rights to a safe workplace. The ACTU national WHS campaign 'Speak Up' aims to educate employees regarding health and safety issues; to better inform workers about their rights, the role of the union in representing them and the role of WHS representatives; and to

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encourage workers to voice their concerns about health and safety issues in the workplace.

Safe Work Australia is an independent statutory body established in 2009 to improve WHS and workers' compensation throughout Australia. It provides advice to the government concerning WHS issues. Safe Work drafted the Model Work Health and Safety Act in 2012 in an attempt to 'harmonise' work, health and safety legislation around Australia. To date, not all states and territories have enacted the Act and WHS legislation remains within both federal and state jurisdictions.

Responsiveness of the legal system

The introduction of reforms to WHS legislation and the emphasis on preventive measures (such as educating employees and employers, making them more aware of workplace issues and imposing a mutual responsibility on employers and employees for workplace safety) have reduced the number of claims and the severity of workplace injuries.

The government has enacted reforms to WHS laws to satisfy the expectations of the community that businesses and individuals responsible for causing injuries and or deaths in the workplace will be prosecuted and that these prosecutions would also act as a deterrent. In response to these expectations, the *Work Health and Safety Act 2011* (Cth) sets out a wide variety of penalties ranging from corporate and individual fines, to terms of imprisonment, to 'adverse publicity order' which may require the offender to 'publicise, in the way specified in the order, the offence, its consequences, the penalty imposed and any other related matter' (s 236). The Act can also impose heavy penalties for non-compliance of orders and provides the regulator with sweeping powers to investigate possible breaches under the Act. It is the combination of the regulator's investigation and prosecution powers which has perhaps acted as a deterrent.

In addition, encouraging both employees and employers to be responsible for making their own workplace safe has resulted in a reduction in workplace injuries. By focusing on educating employees and employers on workplace safety, the importance of self-regulation and changing workplace culture to one which accepts that safety in the workplace is everyone's responsibility has been perhaps the *Work Health and Safety Act*'s greatest achievement.

However, there are times when the legal response is inadequate in protecting victims and their rights. The legal system has acted to make companies more accountable for damages to employees in the course of their employment. There have been very few prosecutions for safety breaches and very few prosecutions have resulted in the personal maximum penalty of $300 000 and $1.5 million for the company being imposed (see s 32).

With the increasing number of asbestos victims, court claims and growing public pressure, the government enacted the *James Hardie (Civil Penalty Compensation Release) Act 2005* (NSW). The Act required Hardie to establish a compensation fund which would provide monetary compensation for future asbestos victims. The Act attempted to protect future victims' rights to compensation by creating a $4.5 billion fund, and included provisions to stop Hardie from restructuring its operations to distance itself from its manufacturing and mining divisions, thereby avoiding liability.

Unfortunately, the Act failed to properly protect victims' rights. Hardie was able to move its parent company to The Netherlands, separating itself from its Australian subsidiaries and its obligation to establish a compensation fund. It was only after intense media coverage and public outcry that Hardie shareholders approved the compensation, and the Asbestos Injury Compensation Fund (ACIF) was established in 2007.

Under the 2005 Act, James Hardie is obliged to place 35% of its operating cash flow into the ACIF to fund future compensation payouts to asbestos victims. To date, James Hardie has contributed $718.1 million to the ACIF, a sum below the requirements set out in the Act. Current compensation claims now exceed $2 billion. Despite the intense media coverage, legal battles and government intervention, the ACIF has proved to be unable to adequately compensate asbestos victims (see http://cambridge.edu.au/redirect/?id=6393).

Conclusion

Workplace deaths and injuries have tragic consequences for victims and their families. In addition, economic losses from work-related deaths, injuries and disease impose a heavy burden on the

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Australian economy. The total cost of workplace injury and disease is estimated at over $60 billion each year. The cooperation of governments, unions and employer associations has thus far proven to be the most effective means of reducing the number of deaths, injuries and illnesses, although it has been argued that a greater willingness to impose statutory **regulation** of business is needed.

regulation
a form of subordinate legislation, made up of a set of rules made under an Act on the legislature's delegated authority (that is, by the executive, which is composed of ministers and their departments), providing the technical and administrative detail required by the Act

Review 15.14

1. Explain, in detail, what is meant by safety in the workplace. Use examples to illustrate your answer.
2. Describe the elements that must be proved to establish negligence.
3. Define and explain the role of workers' compensation and injury management.
4. Outline the history of the development of work, health and safety legislation.
5. Discuss the development of employers' statutory duties in relation to work health and safety.

15.7 Contemporary issue: Termination of employment

About the issue

Termination of employment may occur as a result of the employee leaving a job of their own accord, or the employer asking the employee to leave. It can occur in a number of ways:

- resignation
- retirement
- dismissal
- retrenchment.

Legal responses

Resignation

When an employee wishes to leave a job, they can resign. The procedure to follow when resigning and the conditions imposed on resignation are usually contained in an enterprise agreement or award, or in the contract of service. Usually a person intending to resign must give notice (that is, inform the employer of their intention to leave the job). The employee may be required to give two to four weeks' notice, or an amount of time that is seen as reasonable. Notice is usually in writing, but it does not have to be. An employee who does not give reasonable notice may be in breach of the contract of employment and could be sued by the employer.

Constructive dismissal occurs when a worker resigns because conditions at work leave them no alternative but to do so. It may be conduct of the employer that is designed to force the employee to resign. For example, a worker may resign as a result of sexual harassment at work, which the employer has failed to act upon and halt. Constructive dismissal may entitle the employee to sue the employer for **wrongful dismissal** or **unfair dismissal**.

wrongful dismissal
termination of employment that constitutes a breach of the employment contract, an award or a statute

unfair dismissal
under the *Fair Work Act 2009* (Cth), termination of employment for reasons that are 'harsh, unjust or unreasonable', as found by the Fair Work Commission

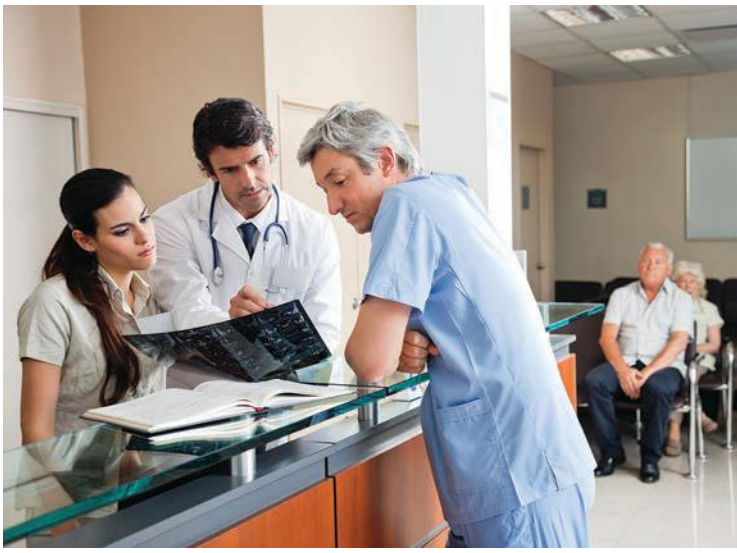

Figure 15.13 Many Australians now work past their retirement ages, usually as part-time or casual employees.

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Retirement

A person retires when they voluntarily leave a job, usually due to age or health issues. Over the last few years the Australian Government has attempted to encourage individuals to continue working by removing the statutory retirement age for many areas of employment. Some areas of employment do have mandatory retirement ages: judges (70 years of age) and aircraft pilots (65 years), for example. Many Australians now choose to continue to work into their sixties, moving from full-time to part-time or casual employment.

Dismissal

Dismissal with notice

An employer can dismiss an employee with notice, provided the dismissal is not discriminatory, unjust, harsh or unreasonable. If the FWC is asked to look at a dismissal, it must take into account whether the employer had a valid reason, related to the employee's ability or behaviour, including WHS considerations, and whether the employee was advised of that reason.

The period of notice of dismissal that must be given is usually in the contract of employment, award or enterprise agreement. For casual workers the period of notice may be one hour; for other workers it may be two weeks or more. An employer may choose to pay an employee who is dismissed for the period of notice of the dismissal.

Dismissal without notice

Dismissal without notice is also referred to as summary dismissal or instant dismissal. Under common law, an employer can summarily dismiss an employee under any of the following circumstances:

- the employee is extremely incompetent
- the employee has committed an act of serious misconduct
- the employee has acted in a certain way, despite being warned not to do so.

In the last example, the number of warnings required varies according to the usual practice of the employer, and the seriousness of the conduct. Each time a warning is given (usually in writing), the employer is required to make it clear that the employee's action was unacceptable, and to provide counselling for the worker. The counselling should include an explanation of what is expected of the employee, and assistance in the form of retraining or additional training.

Under s 388 of the *Fair Work Act 2009* (Cth), businesses employing fewer than 15 employees are covered by the *Small Business Fair Dismissal Code*. Summary dismissal or dismissal without notice may be considered fair if the employee committed fraud, theft or violence. Under the code, all other dismissals may be considered fair if the employee was warned and given the opportunity to respond to the warning and correct the problem.

Unfair dismissal

If a dismissal is harsh, unjust or unreasonable, the employee can file a claim of unfair dismissal with the FWC (or the New South Wales IRC if they are a state or local government employee in New South Wales). Remedies available under the *Fair Work Act 2009* (Cth) include reinstatement, in which the employee is re-employed. Monetary compensation may also be sought.

Unlawful termination (adverse action involving dismissal)

Unlawful termination of an individual's employment may result in the employee making an adverse action complaint.

Section 772 of the *Fair Work Act 2009* (Cth) prohibits dismissal of an employee on the following grounds:

- temporary absence from work due to certain illnesses or injuries
- trade union membership or participation
- non-membership of a union
- acting as, or seeking office as, an employee representative
- filing a complaint or action against an employer involving alleged violation of laws
- race, gender, sexual orientation, age, disability, marital status, carer's responsibilities, pregnancy, religion, political opinion or national origin
- absence from work during parental or maternity leave
- temporary absence from work for the purpose of voluntary emergency service.

If a private conference between employer and employee, initiated by FWC, is unsuccessful in resolving the matter, the employee can apply to the FWO or the Federal Court.

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Retrenchment

Retrenchment occurs when an employee loses their job because there is no longer a job for that employee to do. When the job that person used to do disappears, the employee becomes redundant. Redundancy has become a major area of dispute, as the real reason for the loss of jobs in an economic downturn may be the need to reduce costs.

retrenchment
the loss of a job because there is no longer a job for the employee to do

There is protection for redundant employees in both federal and state legislation. Section 119 of the *Fair Work Act 2009* (Cth) sets out minimum rates of redundancy pay.

Section 14 of the *Employment Protection Act 1982* (NSW) gives the NSW IRC wide-ranging powers where state or local government employees are retrenched.

In the late 1990s, over 3000 Australian workers lost an estimated $30 million of their entitlements, along with their jobs, because their employers went bankrupt and had insufficient capital to pay the employees their entitlements. Unions agitated strongly for both the state and federal governments to establish some means to protect worker entitlements. Today, when a firm is facing bankruptcy, employee entitlements are one of the first obligations that must be protected. Employees who have lost their jobs as a result of their employers' bankruptcy prior to 2012 may apply to the General Employee Entitlement and Redundancy Scheme (GEERS) for basic entitlements such as unpaid wages, annual leave and long service leave, and up to 16 weeks' redundancy entitlement. Workers who have lost their jobs due to their employers entering into liquidation or bankruptcy after 2012 must apply to the Fair Entitlements Guarantee (FEG). The FEG created under the *Fair Entitlements Guarantee Act 2012* (Cth) provides a 'safety net' scheme for workers who have been made redundant and establishes maximum entitlements for workers. Under the FEG workers are entitled to up to 13 weeks of unpaid wages, unpaid annual and long service leave, payment in lieu of notice (to terminate employment) of up to five weeks, and redundancy pay (a maximum of four weeks per full year of service). Employees who wish to lodge a claim can do so online (FEG Online Services).

The *Corporations Law Amendment (Employee Entitlements) Act 2000* (Cth) was passed to make it illegal for companies to alter corporate structures, their accounts or their procedures in a way that would allow them to avoid paying their workers' entitlements.

In 1984, the AIRC handed down a decision regarding redundancy. This decision is referred to as the *Termination, Change and Redundancy Case* (1984) 8 IR 34. Employers of more than 15 workers must consult with staff if the introduction of new technology will reduce the number of workers needed and thus lead to redundancies. The AIRC decided that there should be a minimum redundancy 'package'. A redundancy package may include monetary compensation, assistance in finding other employment, retraining and counselling. It also held that, in addition to the usual period of notice of dismissal, a worker should be given four weeks' notice that they will be retrenched. Retrenched workers may be given one paid day of leave during each week of notice in order to look for another job. Employees who are over 45 and have worked for the employer for two or more years can be given one week's extra notice as well as the four weeks' retrenchment notice. Allowing for this extra notice for those aged over 45 years was considered necessary because those individuals may find it more difficult to secure another job.

The FWO has now taken over the role of investigating complaints regarding unpaid employment entitlements. If the disputes cannot be resolved, the worker can make an application for the recovery of the unpaid entitlement.

Industry-specific employee redundancy entitlements are contained within the relevant awards and enterprise agreements. Redundancy payments in the specific awards and agreements reflect the number of years worked and current salary. The amount owed depends on the length of service – the minimum amount is four weeks' pay (equivalent to one year of service) and, depending on the individual agreement, the maximum payment could be as much as 60 weeks (recognising up to 20 years of service) (see *Pernod Ricard Winemakers Pty Ltd* [2015] FWCA 2923 regarding redundancy entitlements).

Businesses employing 15 or fewer employees are excluded from redundancy legislation, meaning they do not have to provide redundancy payments.

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There have been suggestions that larger workplaces should also be excluded from making redundancy payments, due to the financial burdens such payments place on employers.

Non-legal responses

Industry interest groups lobby governments to influence policy direction or legislation, other groups act on behalf of their members to promote the objectives of their group, and yet other groups are motivated by concerns for the general welfare of workers and their families and the protection of workers' rights.

Groups that lobby on behalf of their members include the ACTU and the major industry associations representing employers' interests, such as the Australian Chamber of Commerce and Industry. One role that all kinds of groups perform is presenting arguments in test cases that may affect legal entitlements and obligations of employees and employers. Other groups, such as the Equal Opportunity for Women in the Workplace Agency, work with employers to advance the interests of particular groups of workers and to address inequities in legal entitlements.

NGOs such as the Salvation Army provide training and education opportunities as well as counselling and welfare support to those struggling to find employment.

Responsiveness of the legal system

A number of factors influence the ways in which the law responds to issues involving dismissal and redundancy. These include:

- Australia's obligations under international treaties
- public opinion
- pressures arising from global and national economic circumstances
- the government of the day, its labour policies and its affiliations.

Under WorkChoices, people working in a business employing fewer than 100 employees could be dismissed for no reason. Those working in larger businesses could also be dismissed on grounds of 'operational reasons'. The *Fair Work Act 2009* (Cth) abolished these provisions and introduced some safeguards for employees of small businesses. The government continues to create and amend legislation to protect the rights of employees and employers, adapting to the changing needs of industry, workers and the community while satisfying Australia's international obligations.

Conclusion

Recently, a change of government and legislative reform have been major means of changing the law relating to dismissal. Achieving protection for employees against retrenchment continues to challenge trade unions and other advocates of workers' rights, as the global economy and the power of domestic and multinational corporations raise formidable hurdles.

Review 15.15

1. List and explain the various ways in which employment can be terminated. Identify which of these would be considered voluntary.
2. Under common law an employer can dismiss an employee. Outline the procedure that must be followed and list the grounds available for dismissal.
3. Discuss whether or not an employer should have the right to summary dismissal of an employee.
4. Reflect on how the *Fair Entitlements Guarantee Act 2012* (Cth) protects the rights of redundant employees and whether this protection has been adequate.
5. Go to the FWO website and find a registered agreement from two separate industries. How do these two agreements differ?

15.8 Contemporary issue: Leave

About the issue

Leave is a fundamental right of employees, and can be found within ILO conventions and UN treaties. Minimum leave entitlements are included in all

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Figure 15.14 Community service leave allows an employee to take time off work while contributing to the community.

modern awards and enterprise agreements and are protected under both state and federal legislation.

The types of leave available include:

- annual leave – a period of paid holiday time to which an employee is entitled each year
- long service leave – an additional period of holiday time, provided in recognition of a long period of service to an employer
- personal leave – time off while ill or required to provide care to a member of one's immediate family
- community service leave – time off work for the purpose of voluntary emergency management activity, such as service with a firefighting or rescue organisation, and for jury service
- parental (maternity and paternity), family and adoption leave.

De facto couples, which includes same-sex couples, are also entitled to minimum statutory entitlements to various kinds of leave, including carer's, compassionate and parental leave.

Legal responses

Annual and personal leave

Under the NES, employees are entitled to four weeks' paid annual leave, 10 days' paid personal carer's leave and two days' unpaid compassionate leave or carer's leave. Annual and personal leave can accumulate, but many companies discourage employees from accumulating large amounts of annual leave. Part-time employees have the same entitlements but accumulate them on a pro rata basis.

Long service leave

Long service leave for employees in New South Wales (even individuals employed under federal regulations) is governed by the *Long Service Leave Act 1955* (NSW). Two months' long service leave is available after 10 years' continuous service with the same employer. For each subsequent five years completed, the employee is entitled to an additional one month's leave. Long service leave is paid according to the individual's normal wage prior to leave, excluding penalty and overtime rates. Leave can be taken prior to completing 10 years' service. If the employee leaves their job prior to taking long service leave, they will receive payment for the untaken leave.

Parental leave

The NES contains minimum parental leave provisions; this includes same-sex couples. Parental leave can be taken for up to 52 weeks (unpaid) by either parent.

The AIRC's decision in the *Maternity Leave Test Case* (1979) 218 CAR 120 of 1979 established employed mothers' right to 52 weeks' unpaid maternity leave. In 1985, the AIRC extended this right to adoptive mothers, and in 1990 to fathers. Although unpaid parental leave could be found in awards, it was not until 1988, with the passing of the *Industrial Relations Act 1988* (Cth), that it was included in legislation. In 2005, the AIRC *Family Provisions Test Case* [2005] AIRC 692 established the right to request an extension of leave and to return to work on a part-time basis. This was later extended to part-time and casual employees (like all other workers, they must have been continuously employed for more than 12 months to qualify for parental leave).

Unpaid parental leave was one of the five minimum statutory entitlements of employees under WorkChoices, but the 'return to work' guarantee was removed. A woman's return to work became dependent on her employer's decision. The NES established under the *Fair Work Act 2009* (Cth) retained the WorkChoices provisions for parental leave, but re-established the right to return to work. At the end of the period of leave, an employee is

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Figure 15.15 Parental leave can be taken by either parent.

entitled to return to the position held prior to leave. If the position no longer exists, the employee has the right to be employed in a similar position, with the same status and pay.

Generally, only one parent may be on leave, but there is provision for both parents to be on concurrent leave for a period of up to eight weeks (each period must be at least two weeks). For parents who are adopting, the primary carer is entitled to 52 weeks' unpaid leave and two days' pre-adoption leave.

The *Paid Parental Leave Act 2010* (Cth) created the federal Paid Parental Leave (PPL) scheme, which commenced in 2011. The scheme provides eligible parents up to 18 weeks of paid leave capped at the federal minimum wage – currently $656.90 per week. To be eligible, the primary carer of the child must be in paid employment and earn less than $150 000 per year. From July 2016, parents who are eligible for paid parental leave from their employer may also apply for paid parental leave under the federal government's PPL scheme, but the amount will be reduced. If a parent returns to work before taking all of their PPL entitlement, the unused part may be transferred to another person (usually the other parent) if they meet eligibility requirements. The scheme also covers the self-employed, contractors and casual employees.

The federal government amended this Act further to clarify several issues, including paid parental leave in the case of a stillbirth or child's death and allowing employees to undertake paid work for short periods of time while on unpaid parental leave.

Non-legal responses

The idea of paid parental leave is not new. In 2001, the Australian Human Rights Commission (then officially titled the Human Rights and Equal Opportunity Commission) released a discussion paper, *Valuing Parenthood*. The paper argued that women's general health and wellbeing were adversely affected by the economic instability resulting after the birth of a child. The ILO (*Convention 183*) and the *UN Convention on the Elimination of All Forms of Discrimination Against Women* also promoted paid leave to help women return to the workforce after childbirth. The ACTU has, for the past 35 years, lobbied Australian governments to provide greater assistance in the form of parental leave.

The *Family Provisions Test Case* prompted the Commonwealth Government to include new leave provisions in awards. These included parental leave, flexible working hours, emergency family leave and personal or carer's leave. Again, the ACTU had argued for these inclusions over a significant period. Industry groups had opposed elements of the ACTU case. Industry groups suggested that the financial burden of childbirth should be with the government, arguing that the lack of appropriate and affordable childcare facilities, rather than a lack of paid time off, is a real cause of women not returning to work. While an award clause was introduced giving employees the right to request that their employers allow them to extend the one year's unpaid parental leave to a second 12 months, or return to work part-time, an employer had the right to refuse on 'reasonable' grounds, which included cost, lack of adequate replacement staff during the leave period, the effect of the leave on 'efficiency', and the effect on customer service.

Responsiveness of the legal system

The connection between work and family has become an increasingly important issue. More than five million Australians have responsibilities for the care of someone else. The economic need or personal choice of both parents to work and an increase in the number of single-parent families means that, in a majority of families, all the adults are employed. The workplace has had to become more flexible to meet the demands of a changing workforce. The number of people in casual employment has also

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meant that their need for leave entitlements cannot be dismissed.

The Australian Parliament has tried – and continues to try – to meet these needs through legislation that provides greater entitlements for working families. While it must also respond to the concerns of the business community, the progress made by other countries suggests that the global economy not only should but also can accommodate the social necessities of working people.

Although annual and long service leave have been available to employees for many years, Australia has lagged behind the rest of the world in providing support for working parents. Despite public criticism, the federal government refused to ratify the ILO's *Maternity Protection Convention* of 2000, which recommended 14 weeks' paid leave. The government argued that paid maternity leave should be decided on an individual basis between the employee and the employer.

The World Health Organization recommends a minimum of 16 weeks; the ILO now encourages governments to provide 18 weeks. However, even though Australia has moved to 18 weeks paid at the minimum wage, it still lags behind other OECD countries. France (16–26 weeks), Germany (14 weeks) and Norway (18 weeks) provide for maternity leave paid at 100% of the employee's wage. In contrast, the rate payable in Australia is the current federal minimum weekly wage: $656.90 or approximately 41% of the average weekly wage.

Periods of paternity leave are still much shorter than for maternity leave worldwide. On average, OECD countries provide 17 weeks' paid maternity leave (paid at 77% of the average weekly wage) and nine weeks' paternity leave (paid at 64% of the average weekly wage or four weeks paid at 100% of the weekly wage). Paternity leave in Australia is limited to two weeks' paid leave. Some countries have parental leave systems that incorporate a father-specific leave entitlement, rather than having it as a separate right. France and Spain allow both parents to stay at home (unpaid leave) until their child's third birthday, and return to their previous jobs or comparable ones (see http://cambridge.edu.au/redirect/?id=6394).

Conclusion

Issues relating to leave, such as demographic changes, will continue to be driving forces for law reform. In the future the government may have to consider extending leave and creating more flexible workplaces, as more Australians age and increasingly need the support of their families. Changes to parental leave that focus only on mothers have raised issues of equity, as many families want fathers to have an equal role in caring for their children. The capping of leave payments under PPL at the federal minimum wage is a second issue of concern that will require resolution.

Review 15.16

1. List and explain the different forms of leave available.
2. Why has leave become an important issue?
3. To what extent should the government provide support to working parents?
4. Discuss whether or not employers should be expected to contribute to the PPL scheme and provide parents with additional financial support.

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Chapter summary

- Workplace law regulates the relationship between employees and employers, ensuring that the rights of workers are protected and that both employees and employers comply with their obligations.
- Labour laws began to develop during the Industrial Revolution in Britain, and government intervention in employment began to replace *laissez-faire* policies, which assumed that parties negotiating an employment contract had equal bargaining power.
- Conciliation and arbitration have been at the centre of Australian industrial relations law since 1904.
- The *Australian Constitution* gives the federal parliament the power to make laws to settle interstate industrial disputes, but broader industrial powers were shared with the states until they all (apart from Western Australia) referred their powers to the Commonwealth between 1996 and 2009.
- A contract of employment is a contract of service between an employer and employee which provides specific rights and imposes specific duties on both parties. By contrast, a contract for services is an agreement to do work for an agreed fee, but the worker is not employed by the other party.
- All contracts of employment contain both express and implied terms. Examples of implied terms include an employer's duty to provide a safe working environment, and an employee's duty to obey lawful directions of the employer.
- Australia's industrial relations framework includes industrial awards and enterprise agreements. The federal system covers most employees in Australia, but New South Wales retains legislative powers relating to state and local government employees.
- In their judicial role, the FWC and the New South Wales IRC hear disputes, resolving issues through a process of negotiation and conciliation to achieve a consensual solution. These bodies also have the administrative functions of setting conditions and wages and approving enterprise agreements.
- The FWO can investigate and enforce the Act, awards or agreements. It also provides education, advice and assistance.
- The NES are 10 minimum standards for employees' pay and entitlements. All awards, agreements and contracts of employment must meet these standards.
- Trade unions represent workers' interests and work to achieve better conditions and pay.
- Work health and safety is regulated by the *Work Health and Safety Act 2011* (Cth). Workers' compensation is a compulsory insurance scheme to compensate employees injured at work.

Questions

Multiple-choice questions

1 Under the Part 5 of the *Work Health and Safety Act 2011* (Cth), an employer has the duty to consult with their employees allowing them to contribute to the making of decisions that affect their:

A health, safety and welfare at work
B children's health, safety and welfare
C health, safety and welfare at home as well as at work
D childcare arrangements

2 Non-voluntary termination of employment includes:

A unfair dismissal, retirement and long service leave
B resignation, redundancy and dismissal
C resignation, retrenchment and retirement
D summary dismissal, retrenchment and dismissal with notice

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3 A valid enterprise agreement requires:
   A equal bargaining power between the parties
   B trade union representation for employees
   C approval by the FWC upon completion
   D a greenfields clause to cover employees commuting to work from rural areas

4 In order not to be found negligent, an employer must:
   A hire only competent staff who require no training or supervision
   B provide all employees with safe transport to work
   C provide a safe working environment and equipment
   D require employees to provide their own equipment and a certificate of safety

5 Protected industrial action is available:
   A during negotiations for an enterprise agreement, if it does not threaten individuals' personal safety
   B only after negotiations for an enterprise agreement have concluded
   C only to employees who are not members of a union
   D only if conciliation has failed

Chapter summary questions

1 Why is there an emphasis on consensual forms of dispute resolution rather than arbitration?
2 Discuss the advantages of being employed under a contract of service rather than having a contract for services. Use appropriate examples to support your discussion.
3 Explain the importance of injury management programs.
4 Evaluate the effectiveness of the law in protecting and enforcing the rights of employees and employers.
5 Assess the effectiveness of the law in responding to contemporary issues.
6 Assess the effectiveness of legal and non-legal measures in resolving disputes within the workplace.

Extended-response questions

1 Critically analyse the interaction between legislative changes and changes in social attitudes with reference to parental leave.
2 Discuss the tension between the rights of employees and the needs of Australian businesses and how governments have addressed these competing concerns.
3 Outline the role that trade unions have played in obtaining entitlements for workers, and discuss the question of whether unions are still relevant in today's economy. Justify your answer.
4 Reflect on how changing community standards and values have influenced workplace laws.
5 Explain why legislation is necessary to protect people's health and safety at work, providing examples. How does technology give rise to the need for legislative change?

GO

In Section III of the HSC Legal Studies examination you will be expected to complete an extended-response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000–1200 words in length (approximately six to eight examination writing booklet pages). Marking criteria for extended-response questions can be found at http://cambridge.edu.au/redirect/?id=6395. Refer to these criteria when planning and writing your response.

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Themes and challenges

The role of the law in encouraging cooperation and resolving conflict in the workplace

- Legislation at both state and federal level has created industrial relations processes with the aim of minimising conflict within the workplace as well as encouraging cooperation between employers and employees.
- Enterprise agreements encourage employers and employees to negotiate satisfactory work arrangements on an individual workplace level.
- Work Health and Safety (WHS) legislation also emphasises employees' duty to take reasonable care for the health and safety of others in their workplace, and their participation in maintaining a safe work environment through representation on WHS committees.
- Employees and employers are encouraged to resolve disputes about pay and conditions through negotiation and conciliation. All modern awards and enterprise agreements contain dispute resolution procedures, which must be followed before taking the matter further. It is only when discussions break down that the dispute will go to arbitration.
- The FWO is able to investigate complaints within the workplace and make an order resolving the conflict.
- The FWC and the New South Wales IRC have a judicial role in settling disputes. The Federal Court and the Federal Magistrates' Court have industrial divisions that hear workplace disputes and appeals.

Issues of compliance and non-compliance

- Effective industrial laws require that governing bodies be given the resources and authority to enforce compliance. Enforcement also includes the availability of penalties that will deter non-compliance. Criminal sanctions are sometimes more effective than the imposition of a fine.
- In order to remove ambiguity and ensure enforceability, employee and employer rights and duties have been clearly defined in legislation, as well as the penalties that can be imposed for any breaches of the law. For example, under the Part 5 of the *Work Health and Safety Act 2011* (Cth), an employer has the duty to consult with employees to enable them to contribute to the making of decisions affecting their health, safety and welfare at work. Failing to do so results in heavy fines.
- Mutual obligations and employees' active involvement in maintaining safety at work have been shown to be a way to increase compliance with WHS legislation.
- Inspectors under the *Work Health and Safety Act 2011* (Cth) have wide powers to enter workplace, conduct investigations and collect evidence. Non-compliance may result in heavy fines for the individual and the firm.

Laws relating to the workplace as a reflection of changing values and ethical standards

- All legislation is subject to review, including the opportunity for members of the public to comment on proposed amendments. This enables legislation to reflect current social values, attitudes and issues.
- A national review into model WHS laws concluded in 2010. The model laws created uniform WHS laws in all Australian jurisdictions. The process of review and public comment, including publication of discussion papers and establishment of reference groups, aimed to provide all interested parties with the opportunity to have a voice in the drafting, and to ensure that existing WHS laws are not undermined. The ACTU has expressed concerns in this respect.
- Various employer groups, including the Business Council of Australia, have been critical of elements of the government's Fair Work reforms, arguing that the new laws unfairly favour unions. Some advocates of workers' rights have argued that the laws do not go far enough.
- Reforms to parental and paid maternity leave have been influenced by international reforms and changing community standards.

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The role of law reform in recognising rights and enforcing responsibilities in the workplace

- The law needs to reflect prevailing community standards and expectations. Laws that are in conflict with current attitudes are less likely to be effective. Individuals may engage in civil disobedience, openly opposing the laws, or may simply ignore the laws. To determine the best means of ensuring that laws reflect community standards and expectations, legislators may call for public submissions before debating issues in parliament. They are, in the end, accountable to the electorate for the laws that are passed.
- Those responsible for law reform aim to balance the needs of all stakeholders while ensuring that the law is consistent with Australia's international obligations.
- While the laws passed may reflect the views of the majority, this does not mean that the rights of minority groups are secondary. Numerous laws have been passed protecting individual rights; this is seen as necessary for the protection of the entire community. For example, laws that make discrimination illegal protect the rights of all employees.
- The General Employee Entitlement and Redundancy Scheme (GEERS) was established to protect workers' entitlements in the event that their employer became bankrupt. This has been replaced by the Fair Entitlements Guarantee.
- The protection of individual rights with respect to occupational health and safety can be seen in laws prohibiting smoking in the workplace.
- The Paid Parental Leave scheme recognises that employees need financial support when they interrupt their careers to have children.
- Well-drafted legislation clearly sets out the rights and duties of employees and employers, and provides for a process of resolving disputes.
- Work, health and safety laws recognise that a safe workplace is the responsibility of employees and employers.

The effectiveness of legal and non-legal responses in achieving justice in the workplace

- Employers' associations, as well as groups representing workers' interests, lobby governments to influence legislation. Non-legal responses to industrial relations issues include the activities of unions. The peak body for unions in Australia, the ACTU, has argued for an increase in the minimum wage, equal pay for women and the eradication of discriminatory practices in the workplace.
- Other groups, such as Equal Opportunity for Women in the Workplace Agency, act to influence policy and industrial laws in the promotion of the rights of particular groups. However, women still earn substantially less than men. One of the reasons is that they comprise a large proportion of casual and part-time employees and as a consequence do not have the same employment protections as full-time employees.
- NGOs include social welfare groups such as the Salvation Army. They may help individuals find employment and provide training, counselling and welfare support to people seeking jobs.
- NGOs play a varied role within state and federal industrial relations. NGOs such as the Australian Human Rights Commission can investigate discrimination complaints. If the complaint cannot be resolved, the matter may go to court. While the commission does not have the authority to enforce its rulings – for example, by imposing a fine or order – its findings can be used in a court or a tribunal in support of the complainant's case.
- The internet and the easy access to computers and personal communication devices have encouraged various organisation to create websites that educate and inform employees and employers concerning their rights and obligations.

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- The ILO aims to encourage member nations to undertake common action in the protection of workers' rights around the world.
- Numerous independent and non-government organisations are involved in investigating and researching issues relating to discrimination, pay inequities and substandard conditions (for example, for outworkers). They may make recommendations to government or provide policy advice to relevant government departments. However, the power of these groups is limited. How effective they are in changing government policy is difficult to determine.

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Chapter 16
Option 7: World order

25% of course time

Principal focus

By referring to current issues and examples, students will be investigating the ways in which legal and non-legal measures can effectively resolve conflict between states as well as promote peace.

Themes and challenges

Themes and challenges to be incorporated throughout this option include:

- how the legal system encourages world cooperation and resolves conflict
- dealing with compliance and non-compliance
- how changing ethical standards and values affect world order
- promoting and maintaining world order through international law reform
- effectively promoting and maintaining world order through legal and non-legal measures.

At the end of this chapter, you will find a summary of the themes and challenges relating to world order. The summary draws on key points from the text and links them to each of the themes and challenges. This summary is designed to help you revise for the external examination.

Chapter objectives

In this chapter, students will:

- discuss the concept of 'world order' and the various points of view on this issue
- outline the evolving nature of world order in both the Western and non-Western world
- describe the need for world order, its benefits and the threats to it, from various perspectives
- identify key treaties that underpin international law
- describe the various mechanisms by which international law is created and enforced
- explain the role of international law in encouraging cooperation and resolving conflict
- describe key international and non-government organisations that contribute to world order
- describe and explain the interaction between international law and domestic law, particularly in relation to Australia
- locate authoritative information from a variety of sources and effectively analyse and synthesise that information
- examine the role of sovereignty in assisting and impeding the resolution of world order issues, and how the concept of sovereignty has changed in the last century
- identify and investigate contemporary issues involving world order and evaluate the effectiveness of legal and non-legal responses to these issues.

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Key terms/vocabulary

Cold War
collective security
communal violence
convention
crimes against humanity
dictatorial
dominion
ethnic cleansing
genocide
globalisation
hegemony
humanitarian intervention
interdependence
intergovernmental organisation (IGO)
international humanitarian
jus cogens
law
mass atrocity crimes (mass atrocities)
militia
multilateralism
non-government organisation (NGO)
peacekeeping
Permanent Five
state sovereignty
supranational organisation
terrorism
unilateral
war crime
world order

Relevant law

IMPORTANT LEGISLATION

Treaty of Westphalia (1648)
Charter of the United Nations (1945)
Universal Declaration of Human Rights (1948)
UN Convention on the Prevention and Punishment of the Crime of Genocide (1948)
Geneva Conventions (1949)
UN Convention Relating to the Status of Refugees (1951)
Treaty of Rome (1957)
Limited Nuclear Test Ban Treaty (1963)
Treaty on the Non-Proliferation of Nuclear Weapons (also called Nuclear Non-Proliferation Treaty) (1968)
Anti-Ballistic Missile Treaty (1972)
UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment (1984)
Treaty on European Union (Maastricht Treaty) (1992)
Comprehensive Test Ban Treaty (1996)
Rome Statute of the International Criminal Court (1998)

SIGNIFICANT CASES

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America), Merits [1986] ICJ Rep 14
Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996 [1996] ICJ Rep 1996
Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v United Kingdom) [2015] ICJ No. 2015/16

Legal oddity

By 2016, we could have been forgiven in thinking that the world has learnt from previous historical events on how not to be at war. Increasing globalisation, better media coverage and an understanding of basic human rights should all be catalysts for retaining world order. Yet, in 2016, the Syrian Centre for Policy Research projected that Syrian war deaths were more than 400000. Over half of Syria's 22 million citizens are internal or international refugees. It was the civil war and not the ISIS phenomenon that was responsible for approximately 90% of these displacements and deaths, and the assaults of Assad militaries are thought to be accountable for over three-quarters of them. World order appears to still be a long way off.

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16.1 The nature of world order

The term '**world order**' refers to the way in which global events are influenced by major actors in the world. Until the 1990s, commentators on world affairs called their discipline 'international relations'. Since the advent of **globalisation** the term 'international relations' – relations between countries – is no longer broad enough to describe the world. To understand the world today, it is necessary to look at more than just the activities of states; it is also necessary to look at international organisations, international corporations, non-state actors such as dissident groups and other non-traditional parties in the international arena.

world order
the activities and relationships between the world's states, and other significant non-state global actors, that occur within a legal, political and economic framework; an international set of arrangements for promoting stability and peace

globalisation
the ongoing integration of regional economies, societies and cultures brought about by the removal of restrictions on international trade, and advances in travel and mass communication

Although outdated now, the term 'new world order' originated in the early 1990s in the wake of the optimism at the end of the **Cold War**. Many world leaders hoped that the end of communism and the Cold War would mark the beginning of a new era in which states would act collectively to address global problems that were beyond the capability of any of them to solve individually. Both former US President George Bush (Snr) and former President Mikhail Gorbachev of the USSR used the phrase to define the emerging spirit of cooperation between the superpowers, which they hoped would continue.

Figure 16.1 USSR President Mikhail Gorbachev (right) and US President Ronald Reagan (left) in 1986. These two men helped to end the nuclear arms race and end the Cold War.

Cold War
the state of hostility, without actual warfare, between the USSR and its satellites and the United States and its allies in the Western world, which lasted from just after World War II until about 1991

As 'world order' implies a certain level of peace and stability, world order issues are those that relate to promoting peace and resolving conflicts between states. The importance of world order as a goal can be seen in the dramatic growth and development of international law over the past 70 years. A major aim of this chapter is to explore the role of international law in promoting world order. Another is to examine how states work together to promote peace and stability.

It is also important to consider the relationships between political and economic issues. Not only are global peace and security prerequisites for economic stability and social progress for every nation on Earth, whether rich or poor, but material disadvantage and inequities have also historically led to conflict both within and between states and regions.

The need for world order

Interdependence and global threats

Because of increasing globalisation and the resultant greater interdependence between nations, we have all become reliant not just on good governance in individual countries, but also on a healthy global economic, political and social order. The need for world order has never been greater. As the Syrian refugee crisis of 2015 demonstrated, a major upheaval in one country can have a destablising ripple effect in the region and around the world. This feature of the globalised world has not promoted stability, but instead has made the world more vulnerable. A global financial crisis (such as in 2008), a terrorist attack within a state's borders, a regional conventional war, an outbreak of illness in a single area, or **mass**

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Figure 16.2 In 2014 ISIS emerged from the chaos in Iraq and created the so-called 'Islamic State'. ISIS violated all rules of war and embarked on a campaign of deliberately committing atrocities in the territory that they captured and promoting terrorist acts in their name around the world.

atrocity crimes (mass atrocities) committed by a dictatorial regime can flow on immediately and affect the rest the world. We are all potentially vulnerable if things go terribly wrong on another part of the planet, as the threats of nuclear war and climate change demonstrate.

mass atrocity crimes (mass atrocities)
a broad term for crimes that fall into the categories of genocide, war crimes, 'ethnic cleansing' and crimes against humanity; this is the term favoured by the United Nations, because it avoids making distinctions on the basis of whether the crimes were committed in war or peace, or as part of an intrastate or interstate conflict

Benefits of interdependence

There is a positive side to **interdependence**. Those in the developed world, representing one-sixth of the total global population, benefit greatly from the current world order. Recognising the threats posed by interdependence, states have made serious efforts towards cooperation over the past 30 years. The volume of international law has grown exponentially and, most incredibly, there is a high degree of compliance with international law. The reason for this level of compliance is simply that most international law is created by consensus. All treaties are negotiated and no state is ever forced to sign a treaty; states agree to binding treaties and commit themselves to the treaties' provisions because of mutual benefit. While there are always some states that do not wish to sign up to treaties seen as detrimental to their interests, the vast majority of international treaties, whether they relate to trade, finance, transport or security, are recognised by the parties as benefiting them in some way.

interdependence
the interconnection of two or more states to such an extent that they are mutually dependent on each other for survival and mutually vulnerable to crises

The development of world order over time

The current world order is founded upon two principles that on their face value seem contradictory: **state sovereignty** and **multilateralism**. State sovereignty is a state's legal power and authority over everything that occurs within it. Multilateralism is cooperation between multiple states for mutual benefit or to deal with common threats. Multilateralism often requires a surrender of some degree of sovereignty. Both concepts were evident in the 17th-century *Treaty of Westphalia* (1648).

Additional information about state sovereignty and multilateralism is available in the digital versions of the book.

GO

Review 16.1

Read the additional information in the digital versions before answering these questions.

1 Explain how the term 'world order' is broader than 'international law.'
2 Explain the significance of the Treaty of Westphalia.

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state sovereignty
the authority of an independent state to govern itself (for example, to make and apply laws; impose and collect taxes; make war and peace; and form treaties with foreign states)

multilateralism
cooperation between multiple states for mutual benefit or protection from common threats

World War I and the League of Nations

The trend towards multilateral cooperation that had developed in the early years of the 20th century seemed to vanish instantly upon the outbreak of war in Europe in 1914. In 1917, US President Woodrow Wilson committed the United States to joining the war on the side of the Allies on condition that a 'league of nations' was established at the end of the war. At the 1919 Peace Conference this was agreed to. The main aim of the League of Nations was to prevent war; international peace would be guaranteed by the principle of **collective security**.

collective security
a principle based on the agreement of a group of states not to attack one another and to defend each other from attack by others; the idea is that an attack on one is an attack on all

World War II and the United Nations

The term 'United Nations' was first used on 1 January 1942, when 26 nations pledged their governments to fight for a common purpose against the Axis powers. Detailed planning for the new world organisation proceeded throughout the following three years of the war. The *Charter of the United Nations* was signed in San Francisco by 50 nations on 26 June 1945, and on 24 October 1945 the United Nations (UN) became a legal entity. The second try at a grand scheme for multilateral cooperation had begun.

The nature of conflict: interstate and intrastate

War has existed throughout human history, and it seems that it will exist into the future, though the way wars are fought may change, as the means of waging war evolve through new technologies. Warfare can be categorised as interstate war, which is conflict between states, and intrastate war, which is conflict within a state.

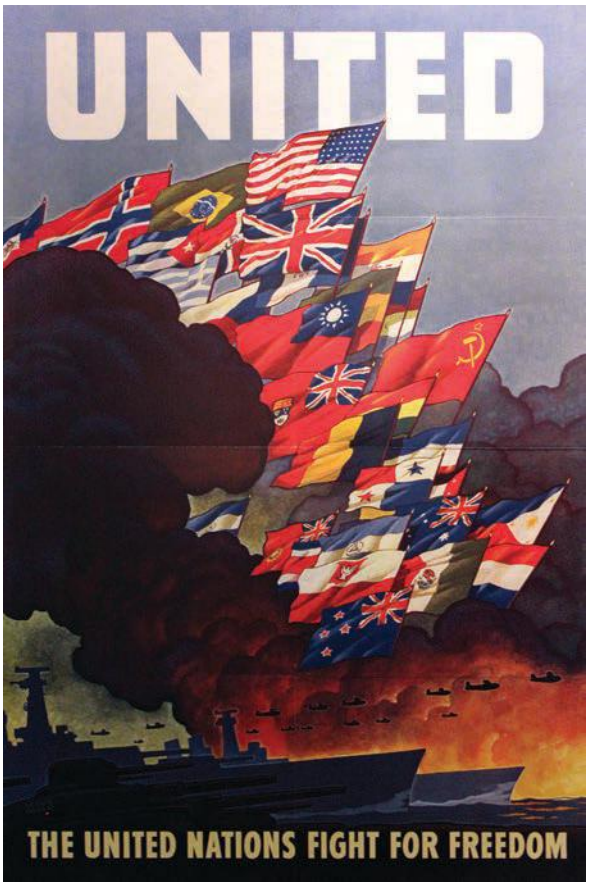

Figure 16.3 The United Nations was created in World War II as a fully functioning wartime alliance before it became a concrete organisation in 1945. This poster was created by the United States Office of War in 1943.

Interstate

Conventional war

Conventional war is the use of large, well-organised military forces. During such a war, soldiers wear clearly identifiable uniforms and there is a clear command structure. The majority of wars in history have been conventional. Both World Wars were conventional wars, as were the Korean War, the Vietnam War, the Iran–Iraq War, the two Gulf Wars and many more. From the beginning of the 20th century, technological advances have made each successive conventional war more deadly. It was interstate conventional warfare that the drafters of the UN Charter had in mind when they wrote the first words of the Preamble: 'We the peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind …' The provisions for the use of armed force in Chapter

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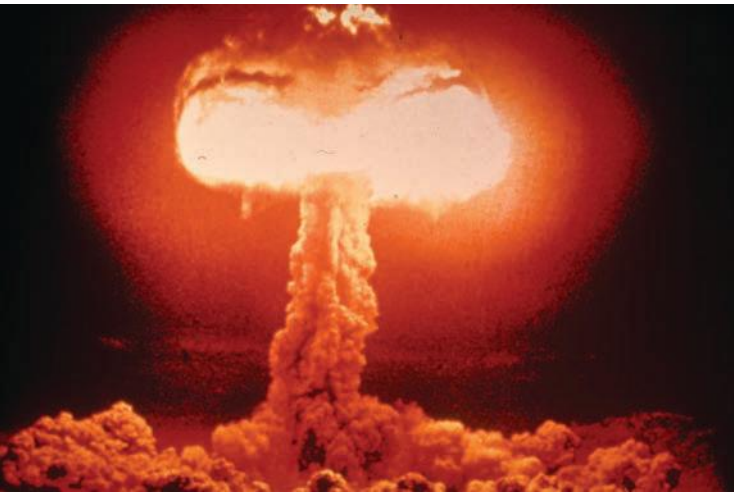

Figure 16.4 Nuclear weapons still threaten the planet.

VII of the charter were designed to deal with an aggressive attack by one state against another – that is, conventional interstate war.

Nuclear war

Nuclear war involves the use of atomic or hydrogen bombs. Since 1945, the number of types of nuclear weapons has increased. During the height of the Cold War, the United States and the USSR possessed 68 000 nuclear weapons between them. The use of just a few hundred of these would have caused utter devastation to the planet. The United States and the USSR ended atmospheric testing of nuclear weapons with the signing of the *Limited Nuclear Test Ban Treaty* in 1963. According to Robert McNamara, US Secretary of Defense from 1961 to 1968, luck has been the major factor preventing a nuclear war in the past 70 years.

Today there are nine countries which possess nuclear weapons: the United States, Russia, Britain, France, China, India, Pakistan, Israel and North Korea. In 2015, Iran was suspected of attempting to build nuclear weapons in violation of the 1968 *Nuclear Non-Proliferation Treaty*, which prohibits any state that does not already have nuclear weapons from acquiring or building them. Another major concern since the attacks of 11 September 2001 on the United States is that terrorist groups may succeed in acquiring nuclear weapons.

With the end of the Cold War, tensions between the United States and Russia decreased dramatically, nuclear weapons treaties were negotiated and massive cuts were made to the arsenals of both powers. The 1990s saw a new era of cooperation between these once determined enemies. However, the election of George W. Bush (Jnr) as US President in 2000 saw a revival of US interest in modernising its nuclear weapons and developing new types, and a weakening of the international mechanisms to control nuclear weapons. From 2008 and the election of Barack Obama as President of the United States, there seemed to be a renewed commitment on the part of that country to pursuing a multilateral approach to nuclear disarmament and to strengthening the *Nuclear Non-Proliferation Treaty*. However, at the Nuclear Non-Proliferation Review Conference in May 2015 neither Russia nor the United States offered any hope of a reduction in their nuclear arsenals.

As of 2016 there are approximately 16 000 nuclear weapons in existence. A regional war using nuclear weapons (for example, between India and Pakistan) would have a massive adverse impact on the world's environment as well as killing millions of people in the region. Use of thousands of nuclear weapons in a conflict between Russia and the United States would probably destroy all life on Earth.

Cyber warfare

A cyber attack can direct a carefully engineered packet of data towards systems that control essential infrastructure, such as power stations, dams, airports, hospitals, schools, transport systems, electricity grids and financial systems.

One of the problems of a cyber attack is that it is hard to determine its origin. It may take days after the beginning of an attack to determine its origin, if it can be done at all. A cyber attack could be launched by terrorists, criminals or states. Cyber war is now treated very seriously in the defence establishments of many states. As Shane Harris explained in his 2014 book *@War: The Rise of Cyber Warfare*, the United States now views cyberspace as the 'fifth domain' of warfare alongside warfare on land, in the air, on the seas and in space. In the future, any major conflict between great powers will be fought across all five domains. Military plans already exist for this purpose. More than ever the world needs a collective security approach to cyberspace.

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Figure 16.5 Cyber war threatens us all.

Cold War

The Cold War is the name given to the state of armed, uneasy peace between the United States and the USSR (the superpowers) between 1947 and 1991. It involved rivalry in almost every political, economic, military and strategic matter, but did not lead to direct war. Many commentators believe that direct war was avoided due to the threat of mutual annihilation if nuclear weapons were used. This situation is referred to by historians as the 'balance of terror'. However, this is disputed by others who argue that blind luck saved the world from nuclear annihilation during the Cold War period. One such occasion was on 26 September 1983 when a computer glitch indicated the Soviet Union was under US missile attack. Only the actions of one man, Lt Col Stanislav Petrov, saved the world from World War III.

The Cold War did not only involve the superpowers. Each side called upon its allies to wage war with the other superpower's allies in order to gain more influence and to counter the threat from the other side. The Cold War also paralysed the UN Security Council (UNSC), and this dramatically reduced the effectiveness of the UN in dealing with world order issues. After the Cold War, the five permanent members of the UNSC have cooperated on many things, though they still do not hesitate to use their veto power when they think their own interests, or the interests of an ally, are at stake.

Intrastate

The one thing that all the following forms of warfare have in common is that the UN Charter was not written with them in mind. The UN Charter focused on provisions to deal with interstate conventional warfare, yet today internal conflict now outstrips interstate conflict. The UN has had to develop approaches to each of these types of warfare and graft them into the UN system. The notable example of this is **peacekeeping**.

peacekeeping
the activity of creating conditions for sustainable peace in countries affected by conflict, through the use of force, quite often provided by a number of countries and consisting of soldiers, civilian police and civilian personnel

Civil war

A civil war is a conflict between two or more parties within one country. Prominent examples are the American Civil War (1861–65) and the war in Lebanon in the 1980s. Both the Korean War (1950–53) and the Vietnam War (1954–75) were civil wars in that there were two opposing sides in each country. The latter two wars also became Cold War conflicts by drawing in the superpowers. Some notable examples of places where civil wars have occurred since the 1990s are Bosnia, Burundi, Cambodia, Congo, Darfur, Georgia, Iraq, Kosovo, Liberia, Rwanda, Sierra Leone, Sri Lanka, Somalia, Sudan, Yemen and, more recently, Iraq, Syria and Ukraine. There is often considerable disagreement over whether a civil war or an armed conflict is occurring in a particular country, due to varying interpretations of international law.

Guerrilla war

Guerrilla war involves the use of hit-and-run tactics and the element of surprise. Guerrilla fighters harass the enemy, hide, retreat and repeat this pattern until the enemy's army is worn down. Only then will the guerrillas attack with some force. Such tactics can bog down a greatly superior military force. The Vietnam War (1954–75) is a prime example of a much smaller force, the Viet Cong, using guerrilla tactics against the technologically superior US (and other) forces. Guerrilla war tactics have been used by some armed groups opposing US occupation in Iraq and Afghanistan.

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War waged by governments against their own people

Dictatorial regimes often engage in systematic campaigns of **genocide**, mass murder, the elimination of classes of people, or state-sponsored terror and death squads. These activities can be classified as war crimes, crimes against humanity or mass atrocity crimes.

dictatorial
(of a government) having unrestricted authority or power

genocide
the deliberate extermination of a national, ethnic, racial or religious group

In his 1998 study of the spread of global democracy, *Pax Democratica*, James Huntley found it useful to describe this kind of warfare, waged by a regime against its own people, as 'democide'. Huntley argued that 'democide' captures the essence of this sort of activity, which is the killing of a democracy. The term was coined in 1994 by R.J. Rummel, an international law expert. It does not include military deaths in war or the deaths of non-combatants killed in attacks on military targets, because under international law war deaths are seen as legitimate killing. The term 'democide' has not gained the same status as the term 'genocide', which is defined in art 2 of the *UN Convention on the Prevention and Punishment of the Crime of Genocide* (1948).

Terrorism

Terrorism means actions intended to cause death or physical injury to civilians and to cause terror, with the intent of coercing a government or other body to meet certain demands. Terrorism has become a greater global phenomenon since the 11 September 2001 terrorist attacks against the United States. Terrorist networks such as Al Qaeda, which was responsible for those attacks, have loosely connected cells in many countries. ISIS emerged in Iraq and Syria during 2014 using both conventional military tactics and acts of terrorism.

Figure 16.6 The day of 11 September 2001 saw a terrorist attack on the Pentagon in the United States.

terrorism
acts of violence against a population, intended to cause terror and thereby influence a government

Communal violence

Communal violence refers to violence and warfare within communities, not necessarily perpetrated by the government. This may be a result of ethnic rivalries, historical differences, religious differences or territorial grievances. This type of violence has been a feature of the world since the end of the Cold War in the 1990s. During the Cold War, the superpowers exerted some restraining influence on rival groups in countries within their political orbit. Following the collapse of the USSR's empire in Eastern Europe, however, there were outbreaks of communal violence in Yugoslavia in the 1990s, after it was split up into Bosnia, Serbia and Croatia.

communal violence
violence and killing within communities

Communal killing has also occurred in the African states of Somalia (1993) and Rwanda (1994). Since 2004, the international community has been concerned about this type of conflict in the Darfur region in Sudan. Many of these activities may fit into the categories of **crimes against humanity**, **war crimes** or mass atrocity crimes. This type of internal warfare often spills into neighbouring states, thus becoming a serious issue of regional security and world order. The UN has found it very difficult to deal with communal killing because acting on it can be seen as violating the sovereign rights of that state (see below).

crime against humanity
a widespread or systematic attack against any civilian population

war crime
action carried out during a time of war that violates accepted international rules of war

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Review 16.2

1. Explain why the League of Nations failed to achieve its primary objective of preventing war.
2. Identify the milestones in the creation of the UN.
3. What is the difference between interstate and intrastate warfare?
4. Identify the areas of the world today where there in conflict. Which category of warfare do each of these fall into?

Access to resources as a source of conflict

War is the continuation of policy by other means.

Carl von Clausewitz

When nations do not get what they want by peaceful means, they are often tempted to revert to war. War has been a constant feature of the human race throughout history. However, for most of human history, war was also seen as a legitimate and in many cases a desirable way of sorting out issues between states. Technological advances in the weapons of warfare in the 20th century led to the belief that war was now too deadly to be allowed to happen randomly or without just cause. The desire to prevent war was the main motivation for the creation of the UN, and the UN Charter made war illegal except in two cases:

- self-defence (art 51)
- UNSC authorisation (Chapter VII).

While war has continued to have a destructive impact on the world since the signing of the UN Charter in 1945, there has been one significant change: states that go to war are now, on the whole, far more concerned to give a legal justification of their actions.

Despite this, the legal reasons that may be given for going to war are quite often merely a front for the real reasons. For instance, the stated public reason for the United States' invasion of Iraq in 2003 – to eliminate Saddam Hussein's weapons of mass destruction – has been widely criticised as a sham, concealing an agenda for securing American **hegemony**.

hegemony
dominance of one nation over others

Competition over resources can also cause regional instability, as is the case with the Democratic Republic of Congo. In 2012, according to the International Crisis Group, the illegal exploitation of natural resources by rebel militia groups and elements of the Congolese Army was still fuelling conflict in the region, and showed no signs of abating.

Access to resources

One reason why the United States has so many military bases around the world, and particularly in the Middle East, is so that it can secure energy resources for its economy, which is highly energy-dependent. The United States continues to be Israel's staunchest ally partly because of its pivotal position in the Middle East, and has sought good relations with oil-rich Arab states such as Saudi Arabia and the Gulf states. One major factor in the first Gulf War (1990–91) was the American fear that not only would Iraq succeed in its annexation of oil-rich Kuwait, but also that it stood poised to invade Saudi Arabia. The United States viewed the prospect of an enlarged Iraqi superstate with control over the vast majority of the world's oil supplies as unacceptable. Similarly, a major factor in the US invasion of Iraq in 2003 was Iraq's oil. Ridding Iraq of its leader, Saddam Hussein, and installing a democratic pro-US government in Iraq would be in the United States' geopolitical interests.

Other major powers are also very concerned to secure future access to essential resources. China, with the fastest growing economy in the world, is making great efforts to secure gas, coal, iron ore and oil contracts as well as food supplies in Australia and around the world, particularly in Africa.

It is highly likely that competition for increasingly scarce resources will become a major source of conflict in the future both internationally and within states. For example, many geoscientists and petroleum industry experts believe that the production of fossil fuels will reach its peak in the not-too-distant future, and then will decline. This is a major concern since so many of the products used in developed economies – and so much of their economic activity – are dependent on fossil fuels. Some experts argue that, before the world

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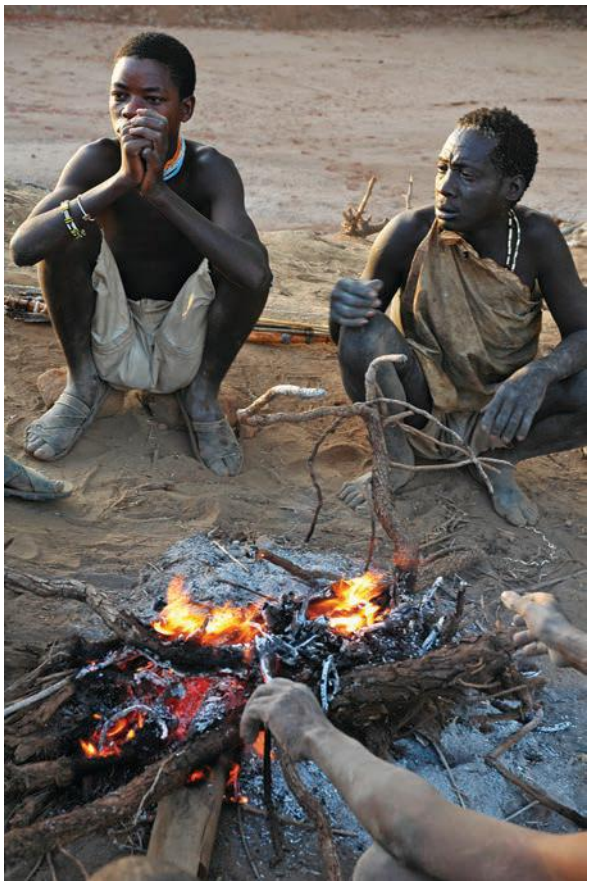

Figure 16.7 Food scarcity is likely to be a cause of future conflict.

reaches crisis point with dwindling fossil fuels, an 'Oil Depletion Protocol' needs to be negotiated, so that there is a planned and equitable approach to cutting back on the use of fossil fuels. Others argue that for the sake of the planet's climate, fossil fuels need to stay in the ground and we need to shift our dependence to renewable energy sources such as solar, wind and water.

Food scarcity is also likely to be a cause of future conflict. Lack of sufficient food for the people of the world today has a number of causes, including overpopulation, climate fluctuations and drought, soil degradation (from pesticides and inorganic fertilisers) and the redirection of food crops (to biofuels and livestock production). Water shortages caused by poor agricultural practices combined with drought are another source of conflict. The upheavals caused by climate change will also be catastrophic, creating millions of refugees in the Asia–Pacific region alone and a rise in tensions between states. The movement of large numbers of displaced people is almost certain to result in a scarcity of resources and disputes about which states are to bear responsibility for the refugees' survival and health.

Other causes of war

While competition over resources is a major cause of conflict, there are many others as well, such as:

- ideological disputes – the Cold War was in part a competition of ideas, between communism and capitalism
- religion – while religious conflict has been a recurring theme in wars throughout history, the rise of extreme fundamentalism in a number of countries has accompanied a backlash against the perceived decadence of Western consumer culture
- global or regional hegemony – a state's desire for dominance in an area or in the world often leads to conflict as other nations resist what may be seen as imperialism or the thwarting of their own ambitions
- ethnic, religious or racial intolerance – the wars that occurred when Yugoslavia split apart in the 1990s were fought on ethnic and religious lines, as have been many contemporary conflicts in Africa, including the conflict in Rwanda between the Hutus and Tutsi, where over 500 000 Tutsi were killed in 100 days by the Hutu majority.

Review 16.3

Outline some examples from the past of competition over resources leading to conflict.

16.2 Responses to world order

The role of the state and state sovereignty

As explained earlier in the chapter, the states of the world are like the building blocks of world order. States have sovereignty, which is the right to make all the laws within the territories they govern. State sovereignty also gives a state the right to make treaties with other states. These treaties are the primary source of international law. However, states

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can also impede the influence of international law to a certain degree, by using their sovereignty as a barrier to unwanted input from the international community regarding their conduct.

The architects of the UN opted to use the current system of international law, based on treaties made between sovereign states. As a result, individual states still have significant legal power. States can decide to cooperate with the international community on matters in which they have some interest, and they can also decide to reject international treaties that they believe conflict with their national interest. The principle of state sovereignty was enshrined in art 2.7 of the UN Charter:

> Nothing contained in the present Charter shall authorize the UN to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; <u>but this principle shall not prejudice the application of enforcement measures under Chapter VII</u>.

The last phrase of art 2.7 (underlined) allows the UNSC to use its Chapter VII powers to overrule a state's sovereign right to deal with its own affairs without UN intervention. This, combined with the placing of human rights as the second priority in the Preamble, has provided a thin legal wedge which in theory allows the UNSC to intervene in a state if there are widespread human rights violations or mass atrocity crimes. However, there must be a 'threat to peace', a 'breach of the peace' or an 'act of aggression' before the UNSC is allowed to take action to 'restore international peace and security', according to art 39. The difficulty is that the interpretation of these thresholds varies. In short, this means that the effects of human rights violations must in some way spill across the border of the offending state. For instance, mass killings within a state may cause an exodus of refugees into neighbouring states, which can then be viewed as a 'threat to peace' requiring UNSC-sanctioned intervention. This type of action is known as **humanitarian intervention**.

humanitarian intervention
military intervention in a state in order to stop serious human suffering and/or human rights violations

The problems with UNSC-sanctioned intervention in a state to stop mass atrocity crimes are:

- It is very difficult to get UNSC agreement, especially when the interests of one of the **Permanent Five** is threatened, as is the case with China's blocking of effective UN action in Darfur, due to its interest in obtaining oil from Sudan.
- The Permanent Five members of the UNSC are often unwilling to undertake the intervention themselves, yet usually they are the only ones that have the military muscle to mount an effective humanitarian intervention.
- It is also difficult to get other member states to place their armed forces in harm's way to protect the human rights of some distant state. The public back home may have little or no enthusiasm for placing their own troops in danger in some far-off land.
- States have a justified fear of failure, such as occurred with the US-led and UNSC-sanctioned humanitarian intervention in Somalia in 1993. The UN and US missions were both ill-defined and suffered from internal bickering. The UN force lacked sufficient resources, as well as political and financial support, and public opinion in the United States quickly turned against the intervention when 18 US soldiers were killed in a brutal firefight with Somali gunmen.

Permanent Five
the five permanent members of the UN Security Council: France, the United Kingdom, China, Russia and the United States

Figure 16.8 UN Peacekeeping has been an integral part of the UN since it was created as a permanent function of the UN in 1956.

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In short, although the UN Charter can be used to justify humanitarian intervention, it is difficult to motivate military intervention where member states' own interests are not obviously at stake. The more realistic option is the placement of peacekeeping forces once the fighting has stopped. This may or may not require the use of Chapter VII powers by the UNSC.

While state sovereignty is the foundation upon which our global system is based, its exercise can impede the resolution of world order issues.

Review 16.4

How has the UN Charter been used by the UNSC to justify humanitarian intervention in a country?

The United Nations

In June 1945, the leaders of 50 nations came together in San Francisco, along with representatives from many non-government organisations (NGOs). The meeting took place following the end of World War II (in Europe) and was held through a determination that the world would never again experience such widespread destruction. Through this conference, the leaders were able to establish a new world organisation with such a purpose: it was called the United Nations (UN).

The postwar record of the United Nations

In its history the UN has achieved the following aims. It has:

- advocated the human rights of individuals of all nationalities
- driven many peacekeeping operations
- acted as the central core for a large amount of international law
- facilitated dialogue to continue between countries engaged in hostilities
- retained membership of all states, even those that have been at odds with the international community
- functioned as a court of world opinion for important international issues.

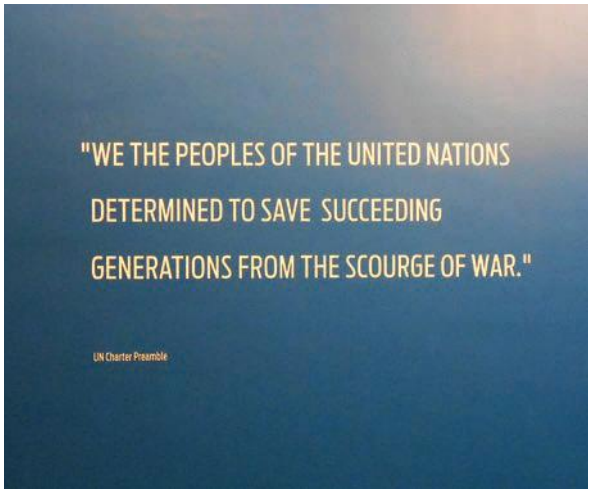

Figure 16.9 A quote from the UN Charter is displayed prominently inside the UN building in New York.

When considering the small amount of funding that the UN operates on, its achievements are impressive indeed. The small scale of the UN budget is indicated by the figures below.

UN core functions (employing 410 000 people) at a regular budget cost of A$3.8 billion a year.

This compares with:

- A$3.8 billion/year for the Tokyo Fire Department
- A$7 billion/year for the Australian Department of Human Services (with fewer staff)
- A$70 billion/year for the New York City budget.

The UN Development Program, the UNHCR and UN Peacekeeping (which employs over 120 000 people to be military, police and civilian peacekeepers) cost A$4.2 billion/year.

This compares with:

- A$77 billion a year spent by the US in the war against Afghanistan (averaged over 2001–14)
- Starbucks Coffee, which employs more than 191 000 people serving coffee around the world
- McDonald's and its franchisees, which employ 1.9 million staff worldwide.

Note: All money amounts are in Australian dollars. For further information on the costs of war, see http://cambridge.edu.au/redirect/?id=6396.

It is obvious from these figures that the UN makes a significant contribution to world order with very meagre resources. In 2015, the world allocated close to A$2 trillion to military expenditure. If the UN had this level of funding it could achieve far more.

The UN has been involved in numerous missions since the 1990s, and although there were some

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dramatic failures – such as Rwanda, Somalia and Bosnia – there have also been many successes. Furthermore, the great drop in the number of conflict deaths and politically motivated mass murders since the end of the Cold War can, to a certain extent, be attributed to the UN's activities in conflict prevention and peace operations.

Problems with the UN have come from a variety of sources, including its inflexible structure (under the UN Charter), poor leadership (though not since the end of the Cold War) and the dominance of the Permanent Five in the UNSC. However, it must be remembered that the UN is a collection of member states, and individual member states may act in ways that are counterproductive or unhelpful. The UN can only achieve what its member states allow it to.

The UN Charter

The UN Charter is similar to a constitution, as it outlines the rights and obligations of the members of the UN. The purposes of the UN, as stated in art 1, are:

- to maintain international peace and security
- to develop friendly relations among nations
- to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character
- promoting respect for human rights.

Article 2 states that the UN and its members should act in accordance with the following principles:

- sovereign equality of all its members
- fulfilling obligations in good faith
- settling international disputes by peaceful means
- refraining from the threat or use of force against of any state
- assisting in any action taken in accordance with the Charter, and refraining from giving assistance to any state against which the United Nations is taking preventive or enforcement action
- ensuring that states which are not members of the United Nations act in accordance with these principles
- no authorisation to intervene in matters within the domestic jurisdiction of any state.

The UN Charter can be amended only if two-thirds of the members the General Assembly vote in favour of the change; the General Assembly includes the five permanent members of the Security Council. A major criticism of the UN Charter is that this makes change very difficult. First, achieving a two-thirds majority of the General Assembly is an enormous task in itself and, second, it only takes one permanent member of the UNSC to use its veto for the proposed change to be rejected.

The structure of the United Nations

The UN headquarters was built in New York during 1948–49 on land donated by the wealthy American John D. Rockefeller, and officially opened in 1951. The UN also has other major agencies in Vienna, Geneva and The Hague.

All international states whose values align with the concept of 'peace loving' and will agree to commit to the UN Charter are accepted into the UN. In reality, no stringent conditions have to be met for a state to join the UN. By 2016, there were 193 member states.

The UN has five major organs: the General Assembly, the Security Council, the Secretariat, the Economic and Social Council, and the International Court of Justice. A sixth body, the Trusteeship Council, was also established in 1945 to supervise 11 trust territories and help them prepare for self-government and independence. By 1994, all the trust territories had attained self-government or independence. The Trusteeship Council suspended its own operations, its work completed, and agreed to meet 'as and when occasion may require'.

In addition to the myriad day-to-day activities of the UN and its agencies to promote world order, various other organisations participate in cooperative initiatives with the UN. These include NGOs, regional organisations (such as the European Union), military alliances (such as the North Atlantic Treaty Organization) and many other world organisations that are sympathetic to the aims of the UN Charter. The UN also provides leadership in dealing with issues that affect global order by:

- commissioning research and reports
- convening conferences
- initiating new treaties
- promoting arms control
- promoting human rights
- carrying out peacekeeping operations
- providing humanitarian and development assistance.

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Research 16.1

1 Find out how many states there are in the world, whether all states are members of the UN, and why or why not.
2 Use the UN website (refer to http://cambridge.edu.au/redirect/?id=6397) to complete the following tasks.
   a Construct a table about the six major organs of the UN. Draw up the table with columns titled 'Origins', 'Role', 'Functions' and 'History'. Complete the table using information from the UN site.
   b Examine the membership and system of voting in the UN General Assembly. Explain how the composition of and the system of voting in the General Assembly can be both democratic and undemocratic. (*Hint*: What are the respective populations of China and East Timor and how many votes does each have in the General Assembly? Also, how are the individual representatives of the various states chosen?)

The UN Security Council

The UNSC has the main responsibility for maintaining international peace and security. There are 15 members – five permanent and 10 non-permanent, elected by the General Assembly to two-year terms. The five permanent members – the United States, France, the United Kingdom, China and Russia – are often referred to as the Permanent Five, 'PERM 5' or 'P5'. For the UNSC to take action on a matter, there must be nine votes in favour of it, including all five permanent members. Any member of the Permanent Five can halt an action by exercising its power of veto. Often, member states (including P5 members) will not vote against a resolution, as it hinders relationships between states; instead, the state in disagreement will abstain from voting.

The veto power is one of the most controversial features of the Security Council. First, it enables any of the permanent members to stop any substantive action contemplated by the UNSC from being taken, and, second, it can be used to block the appointment of someone to the position of Secretary-General and to block any changes to the UN Charter, thereby hampering any substantial reform.

The UNSC is able to mandate ceasefire ordinance, arrange for peacekeepers or military observers, and encourage peaceful settlements through the establishment of harmonious conditions. By the terms of Chapter VII, various enforcement strategies may be employed by the Security Council, including collective military action, arms embargos and economic sanctions.

During the Cold War the UNSC was paralysed by the inability of its permanent members to cooperate to deal with regional and global issues that threatened world order. This all changed in 1990 with Iraq's invasion of Kuwait. The UNSC, for only the second time in 43 years, used its Chapter VII powers. It authorised a US-led military force against Iraq, ushering in a new era of global cooperation.

Figure 16.10 Gary Quinlan was Ambassador and Permanent Representative on the UN in New York from 2009 until January 2015, and Australian Representative on the UNSC in 2013–14.

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Though the UNSC has cooperated more effectively since then, there have been many calls for its reform, particularly with respect to who the permanent members are – they reflect the power realities of 1945 rather than of today. For instance, it has been suggested that India, Brazil, Germany and Japan would be front-runners for permanent member status today. Japan has been particularly vocal on this issue. Other possibilities for permanent membership are the Arab states and Africa. However, proposals like these are likely to be rejected by the current Permanent Five, as if even one of them objects, they have the power of veto on any proposal.

The non-permanent members of the UNSC are selected according to a geographical and rotating formula. There must be:

- three African states
- two Asian states
- one Eastern European state
- two Latin American states
- two states from Western Europe.

In 2007, the Rudd government campaigned vigorously to get a seat on the UNSC. This effort was successful and in October 2012 it was announced that Australia had won a seat with 153 nations at the UN giving Australia their vote. Australia took up its seat and served its two-year term from 2013 to 2014.

Review 16.5

1. Examine whether there are any membership conditions for joining the UN.
2. Identify the main aims of the UN as expressed in its charter.
3. Briefly outline the roles and functions of the major UN organs.
4. Outline the structure of the UNSC and evaluate its effectiveness in meeting its purposes.

Peacekeeping

The term 'peacekeeping' is not found anywhere in the UN Charter. However, the founders of the UN had a plan for enforcement action. This was to be an improvement on the League of Nations, which had no provision for a standing military force to deal with blatant acts of aggression. This was perceived as one of its weaknesses. The League of Nations was involved in many successful peacekeeping operations in the 1920s, using military forces put together on an ad hoc basis, but in the 1930s it crumbled in the face of aggression by three major powers: Germany, Italy and Japan. The framers of the UN Charter were conscious of this weakness, so they sought to give the UNSC the legal right to use whatever force was necessary to maintain or restore peace. This power (called 'peace enforcement') was incorporated into Chapter VII of the UN Charter, which enabled the creation of a permanent military staff committee consisting of the chiefs of staff of the five permanent members of the UNSC – all experienced military leaders. Their job was to coordinate a permanent UN armed force whose role was to respond to aggression and the illegal use of force. UNSC members were to have forces on standby to serve in the UN force.

The onset of the Cold War in 1947 halted the implementation of the original UN plan for a military staff committee and the concept of peace enforcement. This was because peace enforcement relied on the cooperation of the Permanent Five. The issue came to a head in the 1956 Suez Crisis, when Britain, France and Israel invaded Egypt. The United States, with Canada, sponsored a UNSC resolution calling for a ceasefire, which was promptly vetoed by Britain and France. The UN feared that if the United States and the USSR were also to become

Legal Links

For an outline of Australia's term on the UNSC in 2013–14, see the Department of Foreign Affairs and Trade report (*Australia's Term on the United Nations Security Council 2013–14: Achievements*, 18 March 2015) at http://cambridge.edu.au/redirect/?id=6398. For an independent review, see Peter Nadin's Lowy Institute report (*Australia on the UN Security Council: An End-of-term Review*, 19 December 2014) at http://cambridge.edu.au/redirect/?id=6399.

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Figure 16.11 An Australian serviceman with East Timorese orphans. Australia provided a military force to the UN peacekeeping mission in East Timor (Timor-Leste) up until November 2012, when the withdrawal of remaining troops began.

involved in the Suez Crisis it could lead to a nuclear war. So the then Secretary-General of the UN, Dag Hammarskjold, moved the debate to the General Assembly (over the objections of Britain and France) and accepted a plan from Canada's foreign minister at that time, Lester B. Pearson, for the establishment of a peacekeeping force – the UN Emergency Force – to supervise a ceasefire. Thus a watered-down version of peace enforcement, called 'peacekeeping', was born.

The main difference between peace enforcement and peacekeeping is that the latter could operate without the agreement of the five permanent members of the UNSC. Also, the whole UN peacekeeping apparatus has operated out of the Secretary-General's department since 1956.

The future possibilities for the UN

GO

Information about further development of the Peace Building Commission and the United Nations Emergency Peace Service is available in the digital versions of the book.

Legal Links

For further information on peacekeeping, go to the UN peacekeeping website (see http://cambridge.edu.au/redirect/?id=6400).

See the article by independent researcher Peter Nadin on Australia and UN peacekeeping: 'Australia's false start on peacekeeping: a post-summit review,' 13 October 2015 at http://cambridge.edu.au/redirect/?id=6400.

International instruments

Treaties and customary law are the main sources of international law. Treaties are also known as **conventions**, charters, covenants and statutes – all these terms refer to a binding agreement voluntarily entered into by states. The agreement, or treaty, places an obligation on the parties to act in a particular way or adopt a certain type of behaviour as the norm. Usually a treaty is entered into because a state perceives that it will benefit from it.

convention
another term for a treaty: an international agreement between parties who are subject to international law (states and international organisations such as the UN and its bodies)

There are two types of treaty:

- bilateral treaties – treaties between two states (for example, the Free Trade Agreement between the United States and Australia, signed in 2004)
- multilateral treaties – treaties between a number of states.

Treaties between states have existed for thousands of years, since the beginning of civilisation. The majority of these treaties have been bilateral. The number of multilateral treaties has increased over the past few hundred years, escalating sharply since the end of World War II. Multilateral treaties now number in the tens of thousands and are an indispensable part of the current world order.

Since 1945 all states have been obliged to lodge their treaties with the UN. This requirement is stated in art 102 of the UN Charter:

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Table 16.1 The most significant international documents since 1945

Charter of the United Nations (1945)
UN Convention on the Prevention and Punishment of the Crime of Genocide (1948)
Universal Declaration of Human Rights (1948)
Geneva Conventions (1949)
UN Convention Relating to the Status of Refugees (1951) and Protocol (1967)
Treaty on the Non-Proliferation of Nuclear Weapons (also called *Nuclear Non-Proliferation Treaty*) (1968)
Rome Statute of the International Criminal Court (1998)

> Every treaty and every international agreement entered into by any Member of the United Nations after the present Charter comes into force shall as soon as possible be registered with the Secretariat and published by it.

The requirement has its origins in former US President Woodrow Wilson's 'Fourteen Points' speech of January 1919. The first of Wilson's Fourteen Points declared that treaties should be arrived at openly. This declaration was made in response to the belief that one cause of World War I was the existence in 1914 of secret treaties between governments, treaties that had not been approved by their citizens.

The most significant treaties in terms of their contribution to world order would undoubtedly be the UN Charter, the *UN Convention on the Prevention and Punishment of the Crime of Genocide,* the *Universal Declaration of Human Rights* (UDHR), the Geneva Conventions, the *UN Convention Relating to the Status of Refugees*, the *Nuclear Non-Proliferation Treaty* and the *Rome Statute of the International Court* (1998). These treaties have to a large extent set the framework for international law.

Jus cogens

States do not need to have agreed to or signed a treaty for an obligation to be considered binding on them by the international community. The principle of ***jus cogens*** refers to a legal norm that is accepted by the international community and is therefore binding on everyone regardless of whether or not a particular leader or state accepts it. For example, it is now accepted as a norm that slavery, piracy and torture are prohibited under international law.

jus cogens
a Latin term meaning 'compelling law', also called a 'peremptory norm': a norm of customary international law that is indisputably accepted by the international community and is therefore binding on everyone regardless of whether or not a particular leader or state accepts it

Review 16.6

1. Explain how peacekeeping became a key function of the UN even though it is not mentioned in the UN Charter.
2. Identify the seven most significant international documents. Which of these documents was not created by the UN?

Courts and tribunals

International Court of Justice

The International Court of Justice (ICJ) deals with disputes between states. The ICJ was established in 1946 as an organ of the UN. The court is based in The Netherlands and has 15 judges, elected by the UN. The questions before the court are usually decided by a majority of judges, and decisions are arrived at by applying international conventions and international customary law. The ICJ may refer to academic writings and previous decisions to interpret the law, although it is not bound by previous decisions. If no clear-cut conventions apply to a case, the court may make decisions based on the concept of 'justice and fairness', as long as the two parties agree to this basis of decision-making.

The ICJ hears two types of case:

- disputes between states – the court gives rulings between states that have agreed to be bound by them
- advisory opinions – the court provides reasoned, but non-binding, rulings on questions of international law submitted by the General Assembly of the UN.

There are numerous treaties that confer jurisdiction on the ICJ. In theory, the court's decisions are binding, final and without appeal,

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except in cases where it gives an advisory opinion. In practice, however, the ICJ's effectiveness has often been limited by the losing party's unwillingness to abide by the court's ruling, and by the reluctance of the UNSC to enforce the rulings.

International Criminal Court

The *Rome Statute of the International Criminal Court* is a treaty signed in 1998 by 121 states, including Australia, which pledged the parties to the establishment of a permanent court in which individuals can be tried for mass atrocity crimes such as war crimes and genocide. In July 2002, the Rome Statute came into effect when it was ratified by more than 66 states. The International Criminal Court (ICC) was established at The Hague, although it can hear cases anywhere in the world if it decides to. The ICC was given jurisdiction only over acts of genocide, war crimes and crimes against humanity committed since 2002 – these are the three most serious types of international crime and the cause of a great deal of regional disorder.

The ICC is a legal entity created independently of the UN by a separate treaty between states. It was not a product of the UNSC acting under the UN Charter, as was the case with the tribunals set up to deal with war crimes in Rwanda and the former Yugoslavia; unlike those ad hoc international tribunals, the UNSC cannot veto a state's referral of a case to the ICC.

Despite this autonomy, the ICC works closely with the UN. By 2015, 123 states were members of the ICC, having both signed and ratified the Rome Statute; 41 states have signed but not ratified the statute. Cases can be referred to the ICC by a party to the statute, the UNSC or the ICC Prosecutor. It can be argued that this reduces the mandate and reach of the court and renders it perhaps not as beneficial to the countries who need it the most, as they may not be parties to the Rome Statute.

Other international tribunals

Following is a discussion of some other major international courts and tribunals. The first two of these were ad hoc tribunals set up by the UNSC in the 1990s to deal with the human rights abuses that had occurred in the Balkans and Africa, respectively.

The International Criminal Tribunal for the Former Yugoslavia (ICTY) was established by a UNSC resolution in 1993. It has jurisdiction over breaches of the Geneva Conventions and international customary law committed in the territory of the former Yugoslavia since 1991. The most high-profile case is that of former Serbian leader Slobodan Milosevic, who in 2001 was arrested for war crimes and crimes against humanity in Kosovo and was placed on trial in 2002. Milosevic died in 2006, before the completion of his trial.

The International Criminal Tribunal for Rwanda (ICTR) was established in 1994 and is based on the ICTY model. It has jurisdiction over acts of genocide committed by the Rwandan Government and armed forces in 1994. The government, dominated by the majority Hutu ethnic group, engaged in mass atrocity crimes during 1994 against the minority Tutsi people, following the assassination of President Juvenal Habyarimana. Since its establishment, many of the masterminds of the genocide have been tried. In 2012, the ICTR began the transfer of cases to national jurisdictions as part of its stated aim of winding up all cases and appeals by 2014. The ICTR proceeded to wind up its activities by the end of 2015.

The Extraordinary Chambers in the Courts of Cambodia (ECCC) was established in 2003 as a joint venture between the UN and the Cambodian

Research 16.2

Research the attitude of the United States to the ICC during the two terms of George W. Bush (2001–08). Then use the information you find to complete the following tasks.

1. Outline the US opposition to the ICC.
2. Outline the following measures that the United States took in relation to the ICC:
   - **a** *American Service Members' Protection Act* (also known as the Hague Invasion Act)
   - **b** the threat to use the veto in the UNSC
   - **c** art 98 agreements.
3. Assess the degree to which the attitude of the United States towards the ICC changed during the presidency of Barak Obama.
4. How has the ICC been used by the UNSC in recent years?

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Figure 16.12 The notorious Tuol Sleng prison (codenamed S-21) in which the Khmer Rouge tortured and killed thousands of people. Tuol Sleng had once been a high school.

Government. It has been given the task of bringing to justice Khmer Rouge leaders responsible for the deaths of at least 1.7 million people from torture, starvation, execution and forced labour between 1975 and 1979. However, the ECCC is plagued by the slow pace of its trials, lack of funding and corruption issues. Many of the ex-Khmer Rouge leaders die while awaiting trial. In 2010, Kaing Guek Eav, better known as 'Duch', was convicted and sentenced to life imprisonment for his role in the killing of up to 16 000 people. 'Duch' had been the chief of the infamous Tuol Sleng centre in Phnom Penh. In August 2015, Ieng Thirith, a former top Khmer Rouge official on trial in the ECCC, died at the age of 83. She had been known as the 'first lady' of the Khmer Rouge. Her husband was former foreign secretary Ieng Sary, who died in 2013 at age 87, before the genocide case against him could reach a verdict. By 2015, there were still top Khmer Rouge leaders, such as Khieu Samphan and Nuon Chea who are both in their eighties, awaiting trial.

The European Court of Human Rights (ECHR) was first set up by the Council of Europe in 1959 in Strasbourg, France. In 1998, it was reformed and established as a permanent court, directly accessible by individuals, with jurisdiction over issues of human rights arising under the European Convention on Human Rights. The Council of Europe (which is different from the European Union) is an intergovernmental organisation (IGO) with 47 member states across the continent of Europe, including all 28 member states of the EU. The court is becoming increasingly important, and in January 2011 there were almost 140 000 applications pending before it, more than half of which were lodged against Russia, Turkey, Romania or Ukraine. The court has been highly influential, not only in reforming the laws of the member states but also in promoting the development of human rights law both regionally and globally. Some commentators argue that the ECHR is one of the most effective mechanisms for the protection of human rights in the world.

As states intensify their competition for access to natural resources, tribunals with jurisdiction over the management of these resources, such as the International Tribunal for the Law of the Sea, are likely to grow in importance. This tribunal, established under the *UN Convention of the Law of the Sea*, can look at any issue relating to the sea, such as mining the seabed or overfishing of certain types of fish. State parties are obliged to use either this tribunal or the ICJ to settle peacefully any sea-related disputes.

Review 16.7

1. Identify all of the international courts.
2. Which courts predate the ICC and what are their functions?
3. Compare and contrast the effectiveness of each of the courts.

Intergovernmental organisations

Regional **intergovernmental organisations** (**IGOs**) are making an increasingly significant contribution to world order. Each of these organisations has been set up for a particular purpose. They vary enormously in their economic power, effectiveness, level of cooperation and integration, plans for the future and impact on the rest of the world. Profiled are two of the larger regional organisations: the EU and NATO. The following are other notable examples:

- African Union (AU) – the African Union is modelling itself on the EU and is receiving assistance from the EU to set up its structures.

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The African Union currently has peacekeepers serving in Darfur under a UN mandate.

- Commonwealth – this is made up of former members of the British Empire. In the past the Commonwealth made a strong stand against apartheid in South Africa. More recently, the Commonwealth has taken a strong stand against the dictatorship that has existed in Fiji since 2006. In 2009, Fiji was suspended from the Commonwealth for refusing to agree to hold elections in 2010.
- ASEAN (Association of Southeast Asian Nations) – this organisation has the most influence in trying to encourage the military dictatorship in Burma (Myanmar) to stop its systematic human rights violations.

intergovernmental organisation (IGO)
an organised group of two or more states, set up to pursue mutual interests in one or more areas

European Union (EU)

Despite the EU's recent financial problems, it still stands out as the most successful and influential regional intergovernmental organisation because it has created unprecedented wealth and security for its members and has revitalised European influence in the world. Furthermore, it has made the prospect of war between any of its 28 members unthinkable. A large number of states seek admission to the EU and it is emulated by other regional organisations, including the African Union. It is a **supranational organisation**.

supranational organisation
an organisation in which decisions are made by the appointed or elected representatives of the member states; because decisions are made by majority vote, it is possible for a member state to be forced to do something it does not itself agree with

A European federation of democratic states that would forever end the scourge of war in Europe was a dream of visionaries during and after World War I. Despite their hopes, it took another world war and the political commitment of a few individuals, especially Jean Monnet (credited as the 'father of Europe'), to bring the European federation into existence.

The EU officially began in 1992 after a long and gradual development from its origin in 1950, when it was named the European Coal and Steel Community

Figure 16.13 French, German and Belgian stamps honouring Jean Monnet, who is widely credited as being the 'father of Europe' for his role in the creation of the EU.

and consisted of just six countries: Belgium, Germany, France, Italy, Luxembourg and The Netherlands. Under the *Coal and Steel Treaty*, the member states agreed to common management of those industries, so that none could make weapons of war to turn against any of the others. As it evolved, economic and political goals continued to coincide. In 1957, the *Treaty of Rome* was signed, forming the European Economic Community (EEC), which had the aim of allowing free trade across borders. The 1992 *Treaty on European Union*, signed at Maastricht, The Netherlands, set rules for the future common currency (the euro) as well as for common foreign and security policy and closer cooperation in justice and legal procedures.

As of 2015, there were 28 member states with three more awaiting approval. The EU has strict membership criteria, adheres to the UN Charter regarding the use of force, and requires that its members are democracies that uphold the rule of law and respect human rights. It has a *Charter of Fundamental Rights* and a Fundamental Rights Agency whose role is to advise policy-makers and raise public awareness. Member states work together to develop common solutions in the areas of immigration and asylum, and to manage the application process for people coming to Europe to escape war, persecution, natural disasters or poverty. The states also cooperate to fight organised crime, including drug and people trafficking, money laundering and terrorism, through both legislation and police powers. Europol (the European Law Enforcement Agency) is responsible for coordinating the various states' police efforts in this area.

The EU has become a powerful role model to other states and regional organisations, and exercises a

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Figure 16.14 The euro is the common currency of the EU.

great deal of persuasive power by holding out the promise of membership, by using development assistance (it provides 50% of the world's aid) and by developing strategies for conflict management for use around the world. However, the debt crises that have afflicted the EU in recent years have led some commentators to question the EU's long-term viability.

North Atlantic Treaty Organization (NATO)

The North Atlantic Treaty Organization (NATO) was established in 1949 to counter the threat from the USSR-led communist bloc of Eastern Europe. It is an alliance of 28 countries from North America and Europe, and its mission is to safeguard its members through political and military means. It provides a forum for European states, Canada and the United States to discuss and address security issues of common concern.

NATO military forces have helped to end conflicts in Kosovo and Bosnia. The organisation provided transport and training for the African Union's peacekeeping mission in Darfur, Sudan. Currently, NATO has forces deployed in Afghanistan, aiming to support the fledgling democratic government. NATO's International Security Assistance Force (ISAF) in Afghanistan is under the authority of the UNSC, although it is not a UN body.

Like the EU, NATO has strict membership criteria, adheres to the UN Charter regarding the use of force, and requires that its members are democracies that uphold the rule of law and respect human rights. Ex-communist countries from Eastern Europe have flocked to join NATO, which they see as a guarantee against Russian domination. However, this eastwards spread of NATO has led to a Russian backlash. Over both Georgia and Ukraine, Russia has demonstrated its determination to allow no more former members of the old USSR to come into the EU or NATO orbit. As Russia increasingly calls NATO's bluff, it remains to be seen whether NATO can retain its reputation as the most successful military alliance in history.

Review 16.8

1. Identify the milestones that led to the creation of the EU.
2. Explain how NATO's membership expanded significantly at the end of the Cold War.

Research 16.3

1. Using the 'Institutions and bodies' section of the EU website (see http://cambridge.edu.au/redirect/?id=6402), identify the main institutions within the EU.
2. Research the other regional intergovernmental organisations listed on pages 446–7 and create a table with columns showing the origin, purpose, structure, membership and role of each organisation.

Non-government organisations

Organisations such as Amnesty International, Human Rights Watch, World Vision, Greenpeace, Oxfam and ICAN are just a few of the tens of thousands of privately run organisations, citizen associations and civil society organisations commonly known as **non-government organisations (NGOs)**. One of the first NGOs was the Red Cross. (In some countries the Red Cross is known by other names, such as

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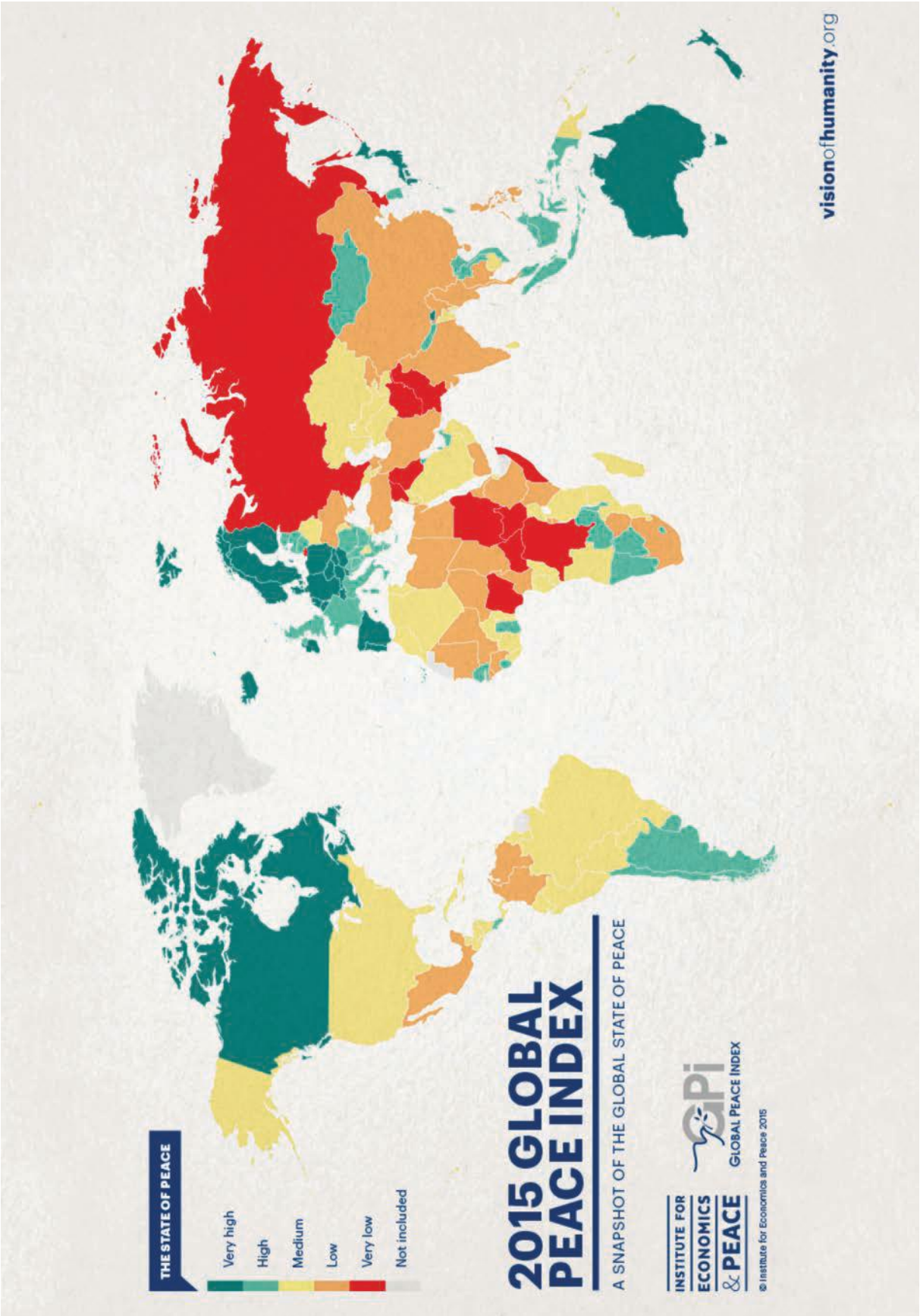

Figure 16.15 The Institute for Economics and Peace was created in 2007 by Australian businessman Steve Killelea, and is now one of the top 'think tanks' in the world.

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Figure 16.16 ICAN is an internationally operating NGO.

the Red Crescent or the American Red Cross.) The Red Cross gives humanitarian aid to victims of war and natural disasters, and champions international humanitarian law. NGOs have played an increasingly important part in world order since the end of World War II. There are about 40 000 internationally operating NGOs today, campaigning globally for humanitarian ideals. NGOs helped to write the UN Charter and are an integral part of the UN, and many of them collaborate with various specialised agencies in their humanitarian work on a daily basis.

non-government organisation (NGO)
an independent, non-profit group that often plays an important role in advocating, analysing and reporting on human rights worldwide

In addition to these NGOs, there are NGOs that specialise in world order issues by investigating, researching, educating policy-makers and the public, and lobbying leaders to take action. The International Crisis Group (ICG) was founded in 1995 by some retired international leaders in response to the failure of the international community to anticipate and respond effectively to the genocides that occurred in Somalia, Rwanda and Bosnia in the early 1990s. With a budget of around $22 billion a year, the ICG monitors 60 conflicts and potential conflict situations. The ICG's aim is to be an accurate source of information for governments, IGOs and NGOs that are working to respond directly to conflict situations. The ICG also uses the media effectively, getting 14 000 mentions annually. Gareth Evans, Australian Foreign Minister in the Hawke and Keating governments, served as president of the ICG from 2000 to 2009. The current president is Jean-Marie Guéhenno.

The ICG sees its role as:

- supplying behind-the-scenes support and advice in peace negotiations
- providing highly detailed analyses on policy issues
- offering strategic thinking on the world's most intractable conflicts, such as those in Burma (Myanmar), Iraq and Israel/Palestine.
- giving an early warning when a security situation is becoming a full crisis. The ICG is constantly on alert in areas like Darfur, Somalia, Pakistan and even Timor-Leste (which is still in a fragile nation-building stage after initial UN intervention in 1999).

Finally, the ICG is strongly supportive of a multilateral, rules-based approach to world order using the current structures of the UN and other international organisations, regional organisations and international courts. The ICG is particularly supportive of the new UN doctrine, the Responsibility to Protect (R2P). (Responsibility to Protect is covered later in this chapter.)

Some other NGOs that specialise in world order issues are:

- Centre for Peace and Conflict Studies (Sydney University) – http://cambridge.edu.au/redirect/?id=6403
- Campaign for Nuclear Disarmament (UK) – http://cambridge.edu.au/redirect/?id=6404
- Global Zero – http://cambridge.edu.au/redirect/?id=6405
- Carnegie Endowment for International Peace (a private, non-profit US organisation dedicated to international cooperation, especially US engagement; it has offices in Washington, Moscow, Beijing, Beirut and Brussels) – http://cambridge.edu.au/redirect/?id=6406
- World Federation of United Nations Associations (a global network connecting UN Associations, which disseminate information about the UN, lobby governments, and undertake other activities in support of the UN) – http://cambridge.edu.au/redirect/?id=6407.

Legal Links

For further information on the International Crisis Group, refer to its website at http://cambridge.edu.au/redirect/?id=6408.

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Research 16.4

Locate the websites of five internationally operating NGOs that are concerned with world order issues.

1. Outline an issue or a crisis that each NGO focuses on.
2. Assess the role of each NGO in promoting world order.
3. Locate the organisation that produces the Global Peace Index and find out who created it, when, and for what purpose.
4. How might the information contained in the Global Peace Index assist in the promotion of global stability and world order?
5. Where is Australia ranked in the Global Peace Index? What factors do you think would contribute to this ranking?

Australia's federal government

The *Australian Constitution*

The structure of Australia's federal government has implications for Australia's response to world order issues. First, under s 51(xxix) of the *Australian Constitution*, the federal parliament has the power to make laws relating to 'external affairs' – that is, matters of international concern. As such, the federal government has the authority to enter into international treaties and agreements. In order for international obligations to be binding in Australian domestic law, federal legislation must be passed implementing the treaty. For example, in 2006 parliament passed legislation relating to the *Lombok Treaty* with Indonesia, which provided for cooperation in a variety of security challenges.

The states and international law

Any international agreements entered into by the federal government can affect the states in some way. The federal government usually consults the states before signing an international agreement, but it is not obliged to do so. Sometimes international agreements can be a point of contention between the states and the federal government. As discussed in Chapter 11, in 1983 the federal government used its external affairs power to bring a halt to Tasmania's damming of the Franklin River. During the last years of the Howard government a number of the states, under Labor governments, were at odds with the federal government's refusal to ratify the Kyoto Protocol on global warming.

The states cannot enter into international agreements in their own right. However, they can enact legislation that is in harmony with international agreements. For instance, the New South Wales Government went further in adhering to UN human rights treaties with its *Anti-Discrimination Act 1977* (NSW) than the federal government did with its *Racial Discrimination Act 1975* (Cth).

Australia's role in global affairs

Since federation in 1901, Australia has taken its global responsibilities seriously. Australia's major contribution in World War I was due to its obligations to the maintenance of the British Empire, which it saw as essential to global stability, the spread of civilisation and the rule of law. From 1907 to 1914 Australia was a **dominion** of the British Empire – a political entity that was nominally under British sovereignty but independent from Britain in all matters except its foreign policy. Australia's contribution during World War I won it, along with the other dominions of Canada, New Zealand and South Africa, recognition as a state in its own right in the League of Nations. As a foundation member of the League, Australia played a very active role internationally. Many of its proposals were taken up by the UN when it was formed.

dominion
a semi-autonomous political entity that was nominally under the sovereignty of the British Empire

Australian involvement in the United Nations

A number of notable Australians have represented Australia internationally. One of these was Jessie Street, who attended the League of Nations Assemblies in Geneva in 1930 and 1938. She was co-founder of the UN Commission of the Status of Women and helped establish the *Australian Women's Charter*. After World War II, Australia was a strong supporter of the international organisations to promote world order. Dr H.V. Evatt, Foreign

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Minister in the Chifley Labor government (1945–49), was elected president of the UN General Assembly in 1948.

Many other Australians have also served the UN with distinction. From 1997 to 1999, Richard Butler was one of the most powerful and controversial figures in world politics as head of the UN Special Commission (UNSCOM) charged with monitoring Iraq's dismantling of its weapons facilities after the Gulf War of 1990–91. Butler was also involved in the Canberra Commission on the Elimination of Nuclear Weapons in 1996, which was initiated to formulate a plan for the reduction and eventual elimination of nuclear weapons. Gareth Evans, who served as Foreign Minister in the Hawke and Keating governments, has been very actively involved in the UN in the areas of nuclear disarmament and the new UN doctrine of Responsibility to Protect. In 2009, then Prime Minister Rudd took a leading role in the UN-sponsored debate on global warming and in the debate at the Copenhagen Conference in December. In October 2012, Australia won a temporary seat on the UNSC, held that seat throughout 2013 and 2014 and made significant contributions.

Australia's contribution to peacekeeping

Australia has also taken its responsibilities with respect to the maintenance of world order seriously, as evidenced by its consistent involvement in UN peacekeeping missions. When and how Australia becomes involved in such activities has to do with the need in the country in question and with Australia's own internal policies and priorities. Australia has contributed either military forces or police to 54 peacekeeping forces, two-thirds of these since 1991. In 1999–2000, Australia played a leading role in establishing order in East Timor (Timor-Leste) when Indonesian-backed **militia** went on a rampage of killing there after the East Timorese people voted for independence from Indonesia in a UN-sponsored referendum in 1999. Australian military and federal police have continued to play a peacekeeping role in East Timor.

militia
a group of unofficial soldiers who act outside international law and are often secretly used and funded by governments

Australia has also been engaged in peacekeeping efforts internationally outside the UN. In recent years, Australia has conducted a peacekeeping operation in the Solomon Islands and committed federal police to many peacekeeping operations around the world.

Australia and international agreements

Australia has also been a part of many other international agreements to promote world order. Australia is a signatory to the Geneva Conventions and the Rome Statute establishing the ICC. It is also party to other agreements that protect the rights of people who are subject to instability, such as the *UN Convention on the Rights of the Child*, the *UN Convention on the Elimination of All Forms of Discrimination Against Women* and the *UN Refugee Convention*. As a temporary member of the UNSC, Australia played a significant role in getting the *Arms Trade Treaty* passed in December 2014.

Australia has undertaken many international obligations outside its multilateral agreements. The majority of the 900 treaties and agreements that Australia has signed are bilateral. In addition, most of the $1 billion in Australian aid for the victims of the 2004 Boxing Day tsunami was given as part of bilateral aid partnerships with Indonesia and Sri Lanka, rather than through multilateral organisations, in order to more easily target the funds into particular

Figure 16.17 On the 70th anniversary of the Charter of the United Nations, Melissa Parke, Labor MP for the seat of Freemantle, spoke at Parliament House about Australia's significant contribution to UN peacekeeping.

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programs. The Australian Government continues to be involved in conferences about common global problems and to sign up to international agreements when relevant to Australia.

Review 16.9

1 Outline the power that s 51(xxix) of the *Constitution* gives the federal government.
2 Summarise Australia's involvement in international activities and evaluate its contributions.

The media

The media has an enormous influence on world order and that influence can be positive or negative. A free and unbiased media is an essential ingredient of the rule of law in the global sphere. We tend to see that the less democratic a country is, the more constraints there are on its media and its population's ability to freely access it.

Despite the immense technological advances in all areas of mass media, the question of ownership is a significant issue. For both print and broadcast media, the trend has been towards domination by a few large and powerful transnational corporations.

No matter who owns the media and controls its various aspects, the media today has a tremendous effect on how we view major events. One characteristic of modern media is the tendency to treat news as entertainment. This means that there is often little effort to provide a full and considered background to major problems and issues. Consequently, while people know of events taking place around the world, they often lack any real understanding of the issues involved. This is particularly the case when it comes to war.

Nevertheless, the media has played a significant role in drawing the world's attention to various disasters and political crises, and has the potential to influence political leaders through public opinion. Examples in the past decade include the ongoing crises in Zimbabwe and the Darfur region in Sudan. However, once such events are off the front pages of the newspapers and the evening television news, public interest in them tends to fade. This isn't so much about the media as about human nature and about 'donor fatigue', where the constant cycle of conflict tires out those who view it, despite the depth of suffering that is witnessed.

The rise of social media is challenging the role of traditional media. News happening anywhere in the world can be spread instantly without the global news networks being involved at all. Social media played a significant role in assisting the pro-democracy groups during the Arab Spring uprising in the Middle East in 2010. Due to the effectiveness of social media as a news source, authoritarian regimes (such as in Russia and China) are attempting to

Figure 16.18 Social media is now challenging the role of traditional media in disseminating news about global events.

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clamp down on and control social media. Meanwhile, the powerful American organisation, the National Security Agency, is attempting to monitor all communications in cyberspace. Social media and the internet generally are contested areas in the world today.

Non-legal mechanisms for international dispute resolution

Political negotiation

Political negotiation is the simplest and most frequently used means of working with other states and resolving disputes. Communication between states now occurs at many levels of government, and each state has a vast array of experts who can negotiate the details of international agreements. These changes in the means available for political negotiation have increased the scope for cooperation. When disputes cannot be solved through political negotiation, the next option is the use of persuasion.

Diplomatic pressure

States, international organisations and transnational corporations can be persuaded to change their behaviour through the pressure of world public opinion. 'Diplomatice pressure' is not a technical term, or something that governments openly aspire to, but it is a vitally important part of international relations. Persuasion, in the form of highlighting issues of concern, is one of the main ways in which NGOs achieve their objectives. The UN can also use this tactic, through reports that it delivers on various issues and the deliberations of its human rights bodies. In 2013, the UN Human Rights Council began an inquiry into human rights abuses in North Korea. This was led by Australian former High Court judge, Michael Kirby. The committee brought down its damning report in 2014. However, it cannot force North Korea to end its human rights abuses and can only keep up the pressure on the dictatorial regime by highlighting the abuses that occur in that country.

States can also be encouraged to improve their behaviour by the prospect of membership of world organisations. For instance, China had to raise its trade standards in order to comply with the rules of the World Trade Organization (for example, it had to apply the same tariff rates to all member countries, and apply internal laws equally to domestic and imported products). Another example is Turkey's bid for membership of the EU. To be permitted to join the EU and receive the massive economic benefits of a large, successful market, Turkey has to improve its compliance with human rights. This type of persuasive power is described as 'soft power'. Soft power co-opts rather than coerces people.

Persuasion was also effective in getting China to agree to pressure the government of Sudan to allow the deployment of a UN peacekeeping force into the violence-wracked Darfur region. Credit for this goes to Hollywood actor Mia Farrow and director Steven Spielberg in particular. Mia Farrow and a host of NGOs conducted a campaign that labelled the 2008 Beijing Olympics the 'Genocide Olympics' because of China's repeated blocking of UNSC resolutions on ending the violence in the Darfur region. The high point in the campaign came when Steven Spielberg, who was an artistic adviser for the Games, publicly challenged China to do something about Darfur. Finally, on 12 June 2007, the government of Sudan accepted the UNSC proposal for a peacekeeping force. On 31 July 2007, China was a signatory to UNSC Resolution 1769 which created a hybrid UN–African Union peacekeeping mission, known as UNAMID, tasked with securing humanitarian assistance and contributing to the promotion of human rights and the rule of law. As one commentator – Helen Cooper, from the *New York Times* – remarked, this was 'a turnaround that served as a classic study of how a pressure campaign, aimed to strike Beijing

Figure 16.19 Diplomatic pressure is one of the few tools that the international community can use in regard to widespread human rights abuses in North Korea.

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Figure 16.20 The Iran deal in 2015 was controversial in the United States.

in a vulnerable spot at a vulnerable time, could accomplish what years of diplomacy could not'.

Persuasion and negotiation were used to achieve a landmark nuclear agreement with Iran in 2015. This was after many months of diplomacy between the P5+1 (the United States, United Kingdom, France, China, Russia and Germany) as well as the EU. The final deal known as the Joint Plan of Action is a plan to ensure that Iran does not acquire a nuclear weapon. In return, tough trade sanctions that had been holding back Iran's economy for years were lifted.

Legal Links

For further information on the concept of soft power, see the article 'Propaganda isn't the way: soft power' by Joseph Nye, at the Belfer Center website (see http://cambridge.edu.au/redirect/?id=6409).

Force

When political negotiations break down and persuasion and soft power have no impact, then there may be a resort to force.

The idea that force or the threat of force should not be the norm in international relations is enshrined in the UN Charter. Article 2(4) of the charter states:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other matter inconsistent with the Purpose of the United Nations.

However, the architects of the UN Charter realised that force would sometimes be used, so they sought to create a legal framework for it. Article 51 of the charter states that force can be used in self-defence. The United States argued that its invasion of Afghanistan in November 2001 was legal because it was carried out in response to the 11 September attacks by terrorists of Al Qaeda. At the time of the attack, Al Qaeda had bases in Afghanistan and was supported by the Taliban regime in that country. However, with a military commitment that lasted from 2001 till 2014, commentators, while conceding the invasion may have been legal, now question whether it was wise and whether the Bush Administration had given due consideration to the amount of political and economic commitment that would be required.

As well as providing a self-defence clause, the UN Charter was realistic enough to legitimise the use of force in circumstances other than self-defence. However, the constraint placed upon this use of force was that it had to be agreed to by the UNSC. Article 42 states that the UNSC can 'take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security'.

Multilateral action

In 1998, the threat of the use of the veto by two Permanent Five members was enough to stop the UNSC from intervening in the genocide that was taking place in Kosovo. Kosovo is a province of the state of Serbia, and has a majority Muslim population. In 1998, the Serbian Government, under the leadership of Slobodan Milosevic, began engaging in '**ethnic cleansing**' of the Muslim population of Kosovo. In this case, the UNSC was unable to immediately pass a resolution condemning Serbia's actions and sanction the use of force by the UN, because of the threat of a veto from China or Russia. Russia had traditionally backed Serbia's control of Kosovo, and China sided with Russia. However, the prospect of a humanitarian disaster caused by the acts of genocide perpetrated by the

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Serbian forces caused great concern in Europe and the United States. As a result, in March 1999, NATO successfully intervened in Kosovo. The UNSC, minus China, which abstained, then called for an international civil and security presence in Kosovo, thus retrospectively ratifying the NATO intervention in Kosovo and lending it greater legitimacy.

ethnic cleansing
a euphemism for genocide

The NATO action in Kosovo invites questions about the circumstances that make the use of force legal under international law. The question is: was the NATO action legal under international law before it was retrospectively sanctioned by the UNSC? Scholars of international law would answer that the original NATO action in Kosovo was legal because it was carried out by a multilateral force (NATO).

As a general rule, multilateral or collective military intervention has the backing of international law if it is in response to a situation where the threat to peace is significant. **Unilateral** military intervention has been prohibited under international law since the end of World War II.

unilateral
undertaken by one state or body

Review 16.10

1 Outline the conditions laid down by the UN Charter on the use force.
2 What is Chapter VII and how is it used by the UNSC?

16.3 Contemporary issue: The principle of 'Responsibility to Protect' (R2P)

> How can we possibly do worse flying under the flag of R2P than we did for centuries accepting, in effect, that state sovereignty was a licence to kill?
>
> *Gareth Evans, President of the International Crisis Group, in an interview with* Stiftung Entwicklung und Frieden News, *2008*

As the international community has repeatedly proven to be inadequate when it comes to preventing mass atrocity crimes like genocide and war crimes, a new standard called the 'Responsibility to Protect' (or R2P) has come about. This principle arose from rising controversy over the conflict in Rwanda, Bosnia and Kosovo: whether there was a 'right of humanitarian intervention' by the international community. On one side, those who believe that humanitarian intervention is necessary claimed that the powers given to the UNSC in Chapter VII could be used to prevent more conflict. Their opponents, however, stressed the concept of state sovereignty, which doesn't allow humanitarian intervention according to art 2.7 of the UN Charter. Thus, the R2P was created in hopes of narrowing the division between these two perspectives of state sovereignty. It had its origin in the 2001 report produced by the International Commission on Intervention and State Sovereignty, called *The Responsibility to Protect*. Following some years of campaigning and negotiations, the heads of state attending the World Summit in September 2005 unanimously accepted

Figure 16.21 Ramesh Thakur is one of the principal exponents of the Responsibility to Protect (R2P), along with Gareth Evans. Ramesh is involved with the Asia–Pacific Centre for the Responsibility to Protect, based in Brisbane.

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R2P. It has also been accepted by the UNSC. As this new norm is widely adopted by the international community, it shows the commitment of states in the prevention of, and appropriate reaction to, international crises regardless of their locations. R2P was used in Libya, but then when the United States, United Kingdom and France went beyond the UN resolution 1973 and changed their mission to one of regime change, Russia and China objected. When the Syrian Civil War broke out in 2011, Russia and China each used their veto to stop any UNSC intervention.

Legal responses

R2P places the onus on states and international organisations to protect populations from mass atrocity crimes:

- Each individual state is responsible for the protection of its own citizens, and is expected to offer assistance to other states in order to improve their ability to do so.
- The UN, and other international organisations, are responsible for alerting and informing, for developing effective preventative measures, and for mobilising military action when required.
- NGOs and individuals have the responsibility to draw the attention of the policy-makers to what needs to be achieved, by whom and when.

From the perspective of international organisations, which includes the UN, the R2P represents their responsibilities to alert and inform, to develop effective preventative measures and to initiate military action when necessary. For NGOs and individuals, the R2P indicates their responsibility to draw the attention of the policy-makers to highlight the public's expectations of when what needs to be achieved and by whom.

Overwhelmingly, prevention is the key response in the R2P doctrine, through measures such as building states' capacities to safeguard human rights, remedying grievances, and conforming to the rule of law. But if prevention fails, R2P requires the use of whatever measures are necessary to stop mass atrocity crimes, whether those measures are economic, political, diplomatic, legal, security or, in the last resort, military.

Non-legal responses

Responsibility to Protect – Engaging Civil Society (R2PCS)

NGOs have taken up the cause of R2P. In 2003, the World Federalist Movement–Institute for Global Policy launched the 'Responsibility to Protect – Engaging Civil Society' project (R2PCS), with the aim of building support for R2P. The goals of this project were to engage civil society and educate other NGOs about R2P principles, in order to effectively lobby governments to respond promptly and appropriately to emerging humanitarian crises.

The R2PCS has been involved in:

- strengthening the acceptance of R2P by governments and international organisations
- raising awareness about R2P and building NGOs' advocacy skills
- promoting the implementation of R2P by the UN
- helping NGOs develop strategies to implement R2P in country-specific situations.

International Coalition for Responsibility to Protect (ICRtoP)

In January 2009, the R2PCS launched another project, the International Coalition for the Responsibility to Protect (ICRtoP). This effort is supported by a number of NGOs, such as Oxfam International, Human Rights Watch, the International Crisis Group and Refugees International. The coalition aims to raise awareness about R2P and to educate NGOs on how to form partnerships with other interested NGOs and how to apply the norm to specific regions.

Conclusion

R2P is a framework that enables the two contradictory aspects of the UN Charter – the non-interference principle in relation to state sovereignty and the obligation on UN members to act against human rights violations – to be reconciled. Some work still needs to be done in making R2P a useful mechanism

Legal Links

For more information on the Responsibility to Protect, R2PCS and ICRtoP, refer to http://cambridge.edu.au/redirect/?id=6410.

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for improving the international community's response to crisis situations. There are a number of priorities for R2P to work on, more than five years after its adoption by the UN. These are:

- Care should be taken in labelling conflicts as R2P situations. In his 2008 book, The *Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All*, Gareth Evans estimates that, of the 60 or so conflicts or potential conflict situations in the world at any time, only 12 to 15 would be R2P situations. Evans stressed that R2P does not apply to all human security situations.
- R2P is primarily about prevention and should not be focused narrowly on military action.
- The UNSC needs to develop specific guidelines for when force is used in R2P situations. It needs to clarify the limits of military action.
- There needs to be a greater emphasis on building the capacity of regional organisations such as the African Union and NATO so that they have a variety of options and are prepared to mount military operations.

Finally, world leaders need the political will to make the hard decisions. It is also the responsibility of all those people of goodwill who believe in the R2P principle to pressure their governments to be involved. The Responsibility to Protect has become a globally accepted international norm. The challenge now is to see it implemented into policy.

Review 16.11

1. Define the term the 'right of humanitarian intervention'.
2. Compare the meaning of R2P as it applies to international organisations, NGOs and individuals.
3. Explain the purpose of the International Coalition for the Responsibility to Protect (ICRtoP).

16.4 Contemporary issue: Regional and global situations that threaten peace and security – the nuclear threat

Nuclear weapons are a significant threat to global peace and security. At the height of the Cold War there were 68 000 nuclear warheads in the world. The number has now been reduced to around 16 000, with thousands still on a 20-minute alert. However, the detonation of only a few hundred would not only destroy targeted cities but also cause massive ecological damage to the parts of the world that were not targeted.

We were very lucky to survive the Cold War without a nuclear war between the superpowers. We came close to World War III a few times during the Cold War, particularly in 1962, 1973 and 1983. Then in 1995 a false reading nearly sparked a nuclear retaliation by Russia against a suspected US attack. There have been a number of bilateral nuclear weapons treaties and a few multilateral treaties to deal with the threat of nuclear war. However, the world has a long way to go before the threat of nuclear weapons is removed.

Legal responses

Bilateral treaties

The improved relationship between the two superpowers helped rejuvenate the UN, and also meant that significant progress that was made in the field of nuclear disarmament – the most significant since the start of the Cold War. However, the UN was not pivotal in this advancement. These bilateral improvements include:

- 1986 – the United States and the USSR talks on nuclear weapons reductions with the Reykjavik Summit in the October 1986. These talks eventually led to the groundbreaking INF Treaty and further agreed reductions in nuclear weapons.
- 1991 – the United States and Russia signed START I and began to reduce their nuclear stockpiles. They aimed to cut their arsenals from about 58 000 to around 5000 each. The total stores held by the two countries is about 11 000 at present.
- 2002 – US President Bush and Russian President Putin signed the SORT treaty. Both

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Figure 16.22 Nuclear fallout shelters and civil defence drills were common until the 1980s when it was realised that there is no real defence to a nuclear attack.

states were to reduce their nuclear weapons to between 1700 and 2000 each. However, SORT was widely criticised because it omitted 'tactical' nuclear weapons (those intended to be used on a battlefield) and only included deployed warheads, meaning parties could simply put them in storage. It also omitted verification procedures.

- 2010 – US President Obama and Russian Prime Minister Medvedev signed New START, to replace the expiring START I and SORT treaties. The reductions required include a reduction in deployed nuclear warheads to 1550 combined, down two-thirds from START I and one-third from SORT. The new treaty has been welcomed by commentators, but some have suggested that it could have gone further.

Multilateral treaties

In 1968, the *Treaty on the Non-Proliferation of Nuclear Weapons*, usually known as the *Non-Proliferation Treaty* (NPT), was signed in Washington, London and Moscow. In 1970 it came into force, after being ratified by a sufficient number of states. This treaty is based on an agreement between the five states that had nuclear weapons at the time, and all the other states of the world that did not have them. The states lacking nuclear weapons (except for Pakistan, India and Israel) promised not to develop them if the five that did have them (the United States, Russia, China, Britain and France) agreed to gradually reduce the number of weapons they held. The treaty was to be renewed every five years, but in 1995 a positive step was taken when the parties to the treaty decided to extend it indefinitely. At this conference, they agreed to adopt a new treaty called the *Comprehensive Test Ban Treaty* by 1996. This would ban weapons-grade fissile material from being produced, eradicate nuclear weapons, support nuclear-free zones and give security assurances to all states. The Australian Government took the treaty to the General Assembly, where it was adopted, and the *Comprehensive Test Ban Treaty* entered into force in 2007. As of 2015 there were 183 signatories and 164 ratifications, although the United States is not among the ratifications.

In 2000, the nuclear weapons states declared their unequivocal desire to completely eliminate nuclear arsenals. However, at the same time the United States announced its intention to abandon the *Anti-Ballistic Missile Treaty* of 1972. This was seen as ominous news by other major powers, who feared that it signalled the first stage of the United States putting weapons into space. Also disturbing was the United States' 2002 announcement that it was prepared to use 'pre-emptive' action – to strike an enemy first, before the enemy could strike. This represented an abandonment of basic UN principles.

Multilateral cooperation took another hit at the 2005 World Summit. There were high expectations that the world leaders would agree to a strengthening of the NPT. However, despite five weeks of negotiations, nothing was achieved and no final document was produced. The despair created by this failure of the nuclear weapons states to meet their requirements under art 6 of the NPT led to renewed efforts by anti-nuclear groups to work towards the elimination of nuclear weapons by other means. President Obama's commitment to the NPT, expressed in support of UN Resolution 1887 (2009), was a positive sign, but real progress was very minimal. The 2010 NPT Review Conference appeared to be more successful. A 64-point action plan was agreed on, but over the following years

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For further information about the *Nuclear Non-Proliferation Treaty* and the NPT review conferences see:

- UNODA – United Nations Office for Disarmament Affairs (http://cambridge.edu.au/redirect/?id=6411)
- Reaching Critical Will (http://cambridge.edu.au/redirect/?id=6412).

very few steps were taken in the implementation of the plan. The 2015 NPT Review Conference failed to agree on a final document.

The UNSC and nuclear disarmament

The General Assembly has focused on general disarmament and on supporting bilateral and multilateral treaties. For a long time, the UNSC was unable to take action, but since the end of the Cold War, it has been able to function more collaboratively on some cases.

Iraq

At the end of the 1990–91 Gulf War, the UNSC passed Resolution 687, which set out the terms that Saddam Hussein's Iraq was to comply with. The resolution required the destruction of all biological and chemical weapons, and ballistic missiles with a range over 150 kilometres, and required Iraq to submit to a rigorous UN inspection system. The inspections were conducted by the UN Special Commission (UNSCOM), and later by the UN Monitoring, Verification and Inspection Commission (UNMOVIC), throughout the 1990s and from the end of 2002 until the US-led invasion in 2003. The fact that no 'weapons of mass destruction' were found after the US invasion in 2003 attested to the success of the earlier UN weapons inspections. The inspectors were confident that the inspection regime had precluded the development of these weapons.

Figure 16.23 The UNSC chamber inside the UN building in New York

North Korea

In 1993, North Korea was referred to the International Atomic Energy Agency (IAEA) for violating its safeguards. (The IAEA is an independent UN organisation that supports the peaceful, secure and safe use of nuclear technologies, and verifies states' compliance with these principles.) The following year, the Agreed Framework was signed between the United States of America and the Democratic People's Republic of Korea. This framework was a non-binding political commitment, noted by the UNSC, under which North Korea agreed, among other things, not to manufacture nuclear weapons and to remain a party to the NPT. However, in 2003 North Korea withdrew from the NPT, and in 2006 it detonated a nuclear bomb, allegedly as a test. The UNSC put further pressure on North Korea, and in 2007 the country agreed to shut down its nuclear weapons program. However, this did not happen. In 2013, North Korea detonated another nuclear bomb. By 2015 it was estimated that North Korea had between 10 and 16 nuclear weapons, with some Chinese experts estimating as many as 20.

Iran

For some time, Iran has seemed determined to develop a nuclear bomb. Since 2006 the UNSC has been putting pressure on it, but has been divided on how to deal with Iran's violations of the NPT. However, after years of tension over Iran's nuclear ambitions an agreement was made between the P5+1 and the EU and Iran. Iran agreed to a deal which limits its nuclear program and in return punishing economic sanctions were to be lifted.

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Conclusion

The UNSC has not fulfilled its role of establishing 'a system for the regulation of armaments' in order to promote peace and security, as set out in art 26 of the UN Charter. Article 47(1) also gives the UNSC a disarmament role, and in art 39 legal authority is provided for the UNSC to take action on matters that affect international peace and security. So it potentially has great power to deal with weapons of mass destruction (WMD) and conventional weapons, as it can pass resolutions that virtually legislate what the rest of the world can and cannot do. Only time will tell whether the Permanent Five can work together and provide leadership in this area, which represents perhaps the UNSC's most important responsibility. If the UNSC fails in this task of delivering the world from the threat of nuclear weapons, it will be up to civil society to show the way forward.

Non-legal responses

The International Campaign to Abolish Nuclear Weapons (ICAN)

As a result of the dismal failure of the NPT Review Conference in 2005 a new organisation, with the specific task of working towards an international treaty banning nuclear weapons, was created in Australia in 2006: the International Campaign to Abolish Nuclear Weapons (ICAN). ICAN was also launched internationally in Vienna in 2007. ICAN now has 424 partner organisations in 95 countries. Former Prime Minister Malcolm Fraser was a patron of ICAN.

The humanitarian impact movement

ICAN took a prominent role in three conferences on the humanitarian impact of nuclear weapons in Oslo (Norway), Nayarit (Mexico) and Vienna (Austria), in 2013 and 2014. In these conferences, representatives from 158 countries attended to consider the humanitarian impact that nuclear weapons have had both in the conduct of nuclear testing in the past and the various scenarios of catastrophic harm that would occur if a new weapons on large numbers of nuclear weapons were used again. Calls were made at these conferences to 'fill the legal gap' and outlaw the use of nuclear weapons in the same way that chemical and biological weapons are illegal under international law. The process of achieving such a goal was seen as being similar to the Ottawa Treaty banning landmines. One hundred and sixty-five countries signed the 'Vienna Pledge' calling for an elimination of nuclear weapons.

Figure 16.24 ICAN was created in Melbourne in 2006.

Further information on the humanitarian impact movement is available in the digital versions of the book.

GO

Legal Links

For further information about the movement to ban nuclear weapons see:

- International Campaign to Abolish Nuclear Weapons (http://cambridge.edu.au/redirect/?id=6413)
- Reaching Critical Will (http://cambridge.edu.au/redirect/?id=6414)
- Vienna Conference on the Humanitarian Impact of Nuclear Weapons (http://cambridge.edu.au/redirect/?id=6415).

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Figure 16.25 Indigenous Australian Sue Coleman-Haseldine spoke in Vienna, at both the Civil Society Forum (organized by ICAN) and the Vienna Conference on the Humanitarian Impact of Nuclear Weapons, on the impact of nuclear bomb tests on her people in South Australia.

Research 16.5

1. Examine the case made at the Vienna Humanitarian Impact Conference about the catastrophic harm of nuclear weapons and the need to achieve a treaty banning nuclear weapons.
2. Research the NPT Conference of 2015. Find articles analysing the failure of the NPT Review Conference.
3. Investigate the current global movement for a nuclear weapons ban treaty and the extent to which any progress has been made since 2015 towards achieving this goal.
4. What is the current Australian government's policy regarding a nuclear weapons ban treaty?

Efforts of individuals – Ramesh Thakur and Gareth Evans

GO

Information about Ramesh Thakur and Gareth Evans is available in the digital versions of the book.

Conclusion

The elimination of the threat of nuclear weapons is an enormous undertaking. However, nuclear weapons are one of the most serious threats to world order. The only other threat that is of the same magnitude is climate change. The difference is that nuclear annihilation can occur within hours, not decades. Furthermore, a decision to launch a nuclear attack can be made by one person. There will be no lengthy conferences, working groups and committees to decide whether to start a nuclear war. The only effective way to address this issue is through multilateral cooperation. No single country can solve this problem. The UNSC's Resolution 1887 of 2009 and the NPT Review Conferences of 2010 and 2015 have failed to make progress on this issue. The future of genuine nuclear disarmament now depends on the actions of NGOs such as ICAN working with the majority of nation states who want to see the elimination of nuclear weapons before it is too late. For the time being it seems that NGOs and nation states will have to work outside of the processes of the UN.

Review 16.12

1. Suggest why the *Nuclear Non-Proliferation Treaty* is reviewed every five years.
2. Explain why the end of the Cold War has made it easier for the UNSC to take action against those countries still developing nuclear weapons.
3. Describe the role of non-legal campaigns and movements in the abolishment of nuclear weapons.

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16.5 Contemporary issue: The success of global cooperation in achieving world order – East Timor and UN intervention

The UN intervention in East Timor in 1999 and in the years since is considered a successful example of global cooperation in world order issues. In the case of East Timor, the issues were the illegal invasion of East Timor in 1975, the mass atrocity crimes committed during the 25-year Indonesian occupation, and violence committed by pro-Indonesian militias in 1999.

Background

From the 1600s, East Timor was part of the Portuguese empire, while the rest of Indonesia was under the Dutch. In general, Indonesia has a mainly Muslim population, but East Timor is a mix of Malay and Portuguese, and the people are predominantly Catholic. In 1949, the Dutch gave independence to their colony in Indonesia, but it was not until 1975 that Portugal decided to withdraw from East Timor.

Indonesian invasion

With the departure of the Portuguese, there was dispute over who should be the ruling party in East Timor. The Indonesian Government was uncomfortable with this small, unstable state on its perimeter, fearing it might host groups antagonistic to Indonesia, such as communists. Because of this, the Indonesian government decided to take advantage of the disorder in East Timor, and invade it. The international community viewed this as a clear case of the type of aggression that is outlawed by the UN Charter, but the Australian Government, who were in the middle of an election campaign, decided to ignore the invasion. However, it damaged relations between Indonesia and Australia, and this was made worse when Indonesian soldiers murdered five Australian journalists on the border of East Timor and Indonesia – the 'Balibo Five'. The resulting tension between Indonesia and Australia lasted for at least the following two decades.

The UN never accepted Indonesia's annexation of East Timor, and it was debated repeatedly over the following 25 years in the General Assembly. Australian representatives to the UN did not openly criticise Indonesian rule of East Timor. Instead, Australia tried to ensure that Indonesia ruled the territory fairly, sending a number of missions to East Timor to research and report on conditions there. But in 1991, there was a massacre of civilians in the East Timorese capital, Dili, which happened to be filmed. When the film footage was aired, the world and the Australian public became more inclined to believe the stories of mass atrocities that refugees from East Timor had been telling for years. In addition, there was a growing number of politicians in Australia who felt that we had betrayed the people of East Timor by doing nothing about the 1975 invasion, and that now it was time we stood up for the rights of the East Timorese.

The UN-sponsored referendum

There had not been a true democracy in Indonesia since the Dutch withdrawal in 1949. In 1966, the country was ruled by General Suharto, who called himself president but ruled as a dictator. Suharto gave the Indonesian army (the TNI – Tentara Nasional Indonesia) many positions of power and even seats in the legislature. However, in 1999, widespread disturbances and protests led

Figure 16.26 The killing of Australian journalists at Balibo by Indonesian troops in 1975 caused much controversy.

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to Suharto's resignation. The new president, B.J. Habibie, committed his country to becoming a true democracy. In May 1999, the then Prime Minister John Howard wrote to President Habibie, asking him to let the people of East Timor vote on whether to remain part of Indonesia or become independent. Habibie agreed to allow the UN to conduct a referendum on the issue.

Legal responses

The UNSC and Resolution 1246

The matter was then referred to the UNSC, which unanimously adopted Resolution 1246: 'Ballot to Decide on Special Autonomy for East Timor'. The UNSC established the UN Mission in East Timor (UNAMET) and authorised the deployment of 280 civilian police to act as advisers to the Indonesian police (in East Timor) and 50 military liaison officers to keep the lines of communication to the TNI open. Despite the robust UNSC mandate, the force deployed to implement it was appallingly weak. None of the civilian police, many of whom were Australians, was armed. The Indonesian authorities in East Timor resented the UN-sponsored vote and were uncooperative, to the point of paying armed groups of thugs to disrupt the process. It seemed that the UNSC still had not learnt the lessons of UN failures earlier in the 1990s, in which under-manned and under-armed forces were sent to do a job against impossible odds. However, the force that the UNSC authorised was all that the Indonesians would allow. Under international law, the Indonesians still had sovereignty over East Timor and the UNSC was not willing to authorise the use of military force. The Indonesian Government was able to use its sovereignty to keep UNAMET as weak as possible.

The referendum and militia violence

The referendum was held in August 1999 and was overseen by UNAMET. Unarmed UN personnel worked courageously to administer the ballot despite constant threats and harassment from pro-Indonesian militia groups. The result was announced on 3 September 1999: 78.5% of the East Timorese voted for independence.

A violent reaction from pro-Indonesian militias ensued. Hundreds of independence supporters were killed, many buildings were destroyed and 250 000 people were forced from their homes. It is estimated that the militias destroyed over 70% of the infrastructure, leaving East Timor without utilities, health care, food or schools. Also, it was estimated that over the next few weeks between 1000 and 2000 people were killed while the TNI and Indonesian police stood by. Foreign aid workers also became targets of the militias. The TNI were seen giving guns to militias, and Kopassus (Indonesian special forces) were alleged to have been supplying the militias with money and drugs. Around the world, people were appalled by the violence that was filmed by the few remaining journalists before they fled the country.

UNSC Resolution 1264

At the UNSC in New York the violence was discussed for two days, and then the UNSC adopted Resolution 1264. Under this resolution, a UN peacekeeping force under Australian command was formed: INTERFET (International Force for East Timor).

Soon after, an Australian-led multinational force was dispatched, closely followed by humanitarian aid. The TNI left East Timor after a series of strained negotiations between Australian commanding officers and Indonesian leaders. Within a few weeks, INTERFET was able to establish control over East Timor, and the remaining Indonesian troops left by 1 November 1999. The decisive military action of the Australian armed forces under a UNSC mandate was hailed as an outstanding success for the UN, for Australia and for global cooperation. Behind the scenes, significant diplomatic pressure had been put on the Indonesian Government not to attack the Australians.

UNTAET

The dramatic events of 1999 were only the beginning of the UN involvement in East Timor. INTERFET was replaced by the UN Transitional Administration in East Timor (UNTAET). UNTAET was established to administer the territory, exercise legislative and executive authority during the transition period and help East Timor prepare for self-government. It has an ambitious mission, including the exercise of judicial powers, assisting with social services and the delivery of humanitarian aid, providing security, and promoting sustainable development. Essentially, UNTAET's role was to lead East Timor to statehood and help build the foundation for democracy.

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On 20 May 2002, East Timor, which is now known as Timor-Leste, became an independent country. The UN Mission of Support in East Timor (UNMISET), which was authorised by the UNSC Resolution 1410, took over from UNTAET in supporting administrative structures.

UN success in East Timor

Overall, the UN's role in East Timor has been generally considered successful, as it put a halt to the militia-led violence that followed the UN ballot. However, it has also been criticised for not anticipating that violence. Defenders of the UN's role in 1999 argue that there could not have been an intervention without the agreement of the Indonesian Government, and that taking action without that consent would have had even more disastrous results. In terms of its mission since 1999, the UN is viewed as having led to positive outcomes, chiefly the creation of East Timor as a nation. However, as UN historian Paul Kennedy reminded us in his book, *The Parliament of Man: The Past, Present and Future of the United Nations*, a key component of the success was the fact that a member state – namely Australia – was prepared to provide military assistance. Australia's ongoing willingness to contribute to the rebuilding may be a necessity for East Timor's long-term success.

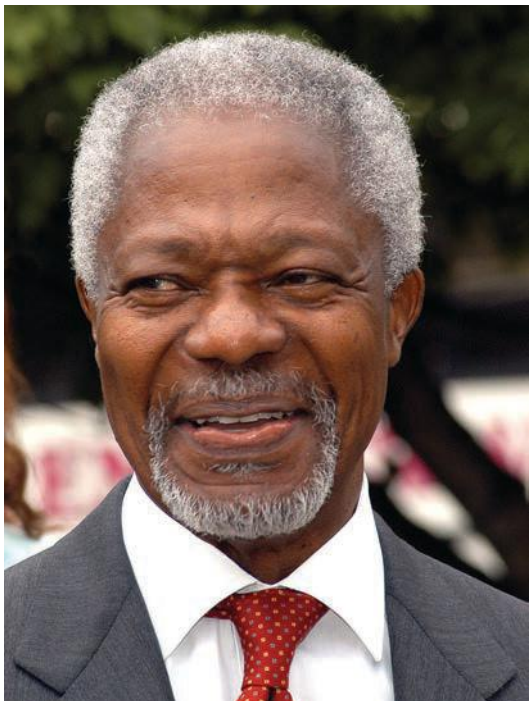

Figure 16.27 Kofi Annan played an important role in ensuring a peaceful settlement of the situation in East Timor.

Kennedy also argued that the UN is fortunate that smaller powers like Australia are increasingly willing to be involved in peacekeeping. The 47 000 military personnel and civilian police serving in the UN's 15 peacekeeping operations came from 88 different countries.

East Timor's transformation to an independent nation was an enormous legal step, but it occurred relatively quickly due to the assistance of the UN. It was only a few months before Timor-Leste became the 191st member of the UN on 27 September 2002.

Non-legal responses

The media

Journalists and global media networks were able to broadcast real-time film footage of the murderous rampage of pro-Indonesian militia, as well as the lack of action to stop the violence by the Indonesian Army and police. This was highly influential in turning world opinion against the Indonesian occupation of East Timor and prompting decisive UN action.

Diplomatic pressure

UN Secretary-General Kofi Annan did everything he could, talking to all the parties involved in pursuit of an end to the violence that occurred after the referendum. He kept constant communication with the Indonesian and Portuguese governments, as well as other governments, such as Australia, that could be involved in the establishment of an international force.

In the meantime, the increasing violence in East Timor led to an expression of concern by the UN High Commissioner for Human Rights, Mary Robinson, who argued that the UNSC should consider deploying forces to East Timor, as a matter of urgency. In the weeks after the UN ballot, there was a great deal of communication between the UN and Indonesia, with the UN urging Indonesia to accept outside intervention. US President Bill Clinton also pressured the Indonesian President to allow UN intervention.

Finally, the Indonesian Government conceded and the Australian-led INTERFET mission began moving into East Timor. US generals quietly warned their Indonesian counterparts not to attack the Australian peacekeepers. Again, in the area of diplomacy, global cooperation was an essential ingredient.

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NGO expertise

Many NGOs are involved in Timor-Leste, working in a range of areas including education, health, women's rights and housing. There are also NGOs working in the area of peace and security. One notable NGO that has maintained a deep interest in Timor-Leste, particularly since the civil strife that arose in 2006, is the International Crisis Group (ICG). The ICG assists the Timor-Leste Government and the UN administration there by producing reports on issues that are of vital importance to Timor-Leste's future peace and security. For instance, the February 2009 report, *No Time For Complacency*, noted that the security situation had dramatically improved since 2008 but that there were still problems with security, the justice system was weak and corruption was still a concern. Assistance was still needed from the UN, Australia and the international community. The December 2009 report, *Handing Back Responsibility to Timor-Leste's Police*, also sounded a cautionary note. The report was very critical of the way in which the UN administration came in and took control of the Timor-Leste police.

In short, work by NGOs such as the ICG is indispensable for the long-term success of nation-building in Timor-Leste.

Legal Links

The ICG has an extensive database on Timor-Leste, including detailed reports on various issues. For the latest information on peace and security in Timor-Leste, go to the ICG website (see http://cambridge.edu.au/redirect/?id=6408).

UN nation-building

The UN has committed itself to the long-term future of Timor-Leste. It has learnt from past errors in leaving conflict zones too early, only to see the area slip back into anarchy. The UN is using all its experience and expertise while also seeking out support globally to ensure that Timor-Leste finally makes the transition to a strong, economically sustainable state characterised by the rule of law. To this end the UNSC passed a resolution in 2006 to shift the focus of the UN mission to nation-building. On 25 August 2006, Resolution 1704 established the UN Integrated Mission in Timor-Leste (UNMIT). Resolution 1867 in 2009 further extended UN operations into 2010. The UN began handing over responsibility for its operations to Timor-Leste in 2012.

Legal Links

For the latest information on the UN mission in Timor-Leste go to http://cambridge.edu.au/redirect/?id=6416.

Australian aid

Australia has assisted Timor-Leste since 1999 in numerous ways. Here are a few examples:

- providing $890 million in assistance between 1999 and 2009
- building partnerships with the World Bank and the UN to help with the coordination of development assistance
- training 800 police for the Timor-Leste police force
- providing medical aid in the form of 10 000 operations and 15 000 consultations by Australian medical personnel, and providing specialist training for people from Timor-Leste
- training and supporting thousands of civil servants
- providing 170 scholarships for Timor-Leste students to study at universities in Australia
- creating 32 000 jobs through public works projects
- supplying aid, water, food and medicine for thousands of internally displaced people.

Australia has given strong political and moral support to the government of Timor-Leste.

When Timor-Leste's President Jose Ramos-Horta was shot in an attempted revolt by some rebels in 2008, Australia lent support by rushing the Timorese leader to hospital in Darwin and ensuring that Australian troops maintained peace and security in the country.

Conclusion

While the UN intervention in East Timor is considered a successful example of global cooperation in world order issues, its work did not finish in 1999; it

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continues to this day. The main task now is building the institutions, infrastructure and economic foundations for the future peace and security of Timor-Leste. In working towards this goal, the UN knows that Timor-Leste will need all the global cooperation it can get. The UN also appreciates the special responsibility that Australia has taken for helping to maintain peace and security, and for continuing its aid packages.

Australian commitment has been needed. In fact, on two recent occasions Australia has had to take significant action. In 2006, thousands of additional Australian police and soldiers were rushed to the country to restore order and prevent further bloodshed, and in 2008 Australian reinforcements were again sent. In 2012, the success of the recent elections, held a mere 10 years after achieving nationhood, was a positive sign for the new nation.

The UN's success in Timor-Leste has been based on global cooperation in the following areas:

- UNSC working together to give a strong legal mandate for UN intervention
- diplomatic pressure exerted on Indonesia by John Howard, Kofi Annan, Mary Robinson and Bill Clinton
- media coverage of the violence in Timor-Leste
- Australian willingness and capability with respect to sending military forces in 1999
- UN commitment to continued nation-building in Timor-Leste
- Australian commitment to providing long-term assistance.

Review 16.13

1. Discuss why Australia did nothing to assist the East Timorese when Indonesia first attacked.
2. Explain why the 1999 referendum resulted in extreme violence from pro-Indonesian militias
3. Explain why Australia has a sense of duty to East Timor, and discuss the role the locations of the two countries in this relationship.

16.6 Contemporary issue: Rules regarding the conduct of hostilities – international humanitarian law

International humanitarian law refers to the body of treaties and humanitarian principles that regulate the conduct of armed conflict and seek to limit its effects. The treaties that form the basis for international humanitarian law include the Hague Conventions, the four Geneva Conventions of 1949 and the Geneva Protocol of 1977. International humanitarian law operates during wartime in addition to international human rights law, but international humanitarian law trumps international human rights law if there is a conflict between the two.

international humanitarian law
a body of international law developed from the Geneva and Hague Conventions that deals with conduct of states and individuals during armed conflict; also known as the law of armed conflict

International humanitarian law had its origins in the late 19th century. While travelling through a war-ravaged part of northern Italy on a business trip in 1859, a Swiss merchant named Henri Dunant witnessed the aftermath of a battle between French and Austrian forces near the town of Solferino: thousands of wounded soldiers were lying on the battlefield, dying slow and lonely deaths. Dunant was appalled, and he abandoned his original trip to help care for them. Reflecting on this experience, Dunant came up with the idea of setting up a permanent organisation that would look after the wounded of both sides in wartime. His book, *A Memory of Solferino*, was published in 1862 and concluded with two appeals:

- that permanent relief societies should be established in peacetime, with nurses who would be available to treat the wounded in the event of war
- that these volunteers who give medical assistance in wartime should be protected by an international treaty.

In 1863, the International Committee for Relief to the Wounded (which later became the International Committee of the Red Cross) was established. International conferences in Geneva, Switzerland were held that year and the following year, the second

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of which resulted in a treaty that was called Geneva *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*. This convention, with 10 articles, was the First Geneva Convention.

Before the treaty, the treatment of people during wartime was random, with no agreed universal standards. All nations that signed the convention understood that it would afford protection to their own wounded or captured soldiers in the future. They all had a stake in agreeing to respect international humanitarian law.

Today we take the rules regarding the conduct of hostilities for granted. Warfare is still horrific and some soldiers commit atrocities in war. However, today everyone knows the standards and the rules of war. No one can say that they did not know that a particular action was illegal. In an imperfect world in which wars still occur, international humanitarian law encourages compliance with the standards of human decency that this branch of international law highlights.

Legal Links

Dunant's book, *A Memory of Solferino*, can be downloaded free as a PDF file from the Red Cross (refer to http://cambridge.edu.au/redirect/?id=6417).

Legal responses

The International Committee of the Red Cross (ICRC) has a hybrid nature. It is an NGO, since it was created by a group of private individuals and is not controlled by any government. However, its main role, to provide assistance and protection to people in wartime, is now mandated by international treaties and applies to all states. Indeed, the Geneva Conventions are the most signed and ratified set of treaties in the world, with 194 signatories – this means they have universal jurisdiction. This makes the ICRC more than just an NGO, because the treaties give it a legal personality of its own and raise it to the level of IGO, with some similarities to the status of the UN. Like the UN, the ICRC enjoys privileges and immunities, and its offices and facilities enjoy exemptions from taxation and duties, inviolability of documents and premises, and immunity from prosecution.

Treaties

The primary instruments governing international humanitarian law are the four Geneva Conventions.

The 10 articles of the First Geneva Convention were adopted by 12 nations in 1864. The convention covered the neutrality of ambulances, military hospitals and medical personnel; it provided that wounded prisoners of war, if incapable of serving, were to be returned to their home countries; and it established the use of the white flag with a red cross as a symbol for neutral medical units.

After World War II, the First Geneva Convention was updated and expanded, giving it a total of 64 articles. Three other conventions were also created. The four Geneva Conventions of 1949 specifically protect people who are not taking part in the conflict – civilians, medical personnel and aid workers – and those who once were but are no longer participating, such as the wounded, the sick, shipwrecked soldiers and prisoners of war.

In 1977, two additional protocols were drafted to supplement the Geneva Conventions, and another in 2015. The conventions and their protocols contain strict rules to deal with 'grave breaches', which include wilful killing of people protected by the conventions, torture and inhuman treatment, including biological experiments, unlawful deportation and forced service in the opposing side's military. People responsible for grave breaches must be located and tried or extradited, regardless of their nationality.

In brief, the content of the Geneva Conventions of 1949 is as follows:

- The First Geneva Convention protects wounded and sick soldiers, as well as medical and religious personnel, on land during war.
- The Second Geneva Convention relates to people at sea during war. It protects wounded, sick and shipwrecked personnel, as well as medical staff and hospital ships.
- The Third Geneva Convention protects prisoners of war. A central principle is that there be no delay in releasing and repatriating prisoners of war, once hostilities have ended.
- The Fourth Geneva Convention protects civilians, including those in occupied territory. World War II brought the necessity of such a Convention into stark relief.

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- All four Geneva Conventions have a common article, art 3, which covers situations of intrastate armed conflict. This includes civil wars, internal wars that spill over into other states, and internal conflicts in which other states or a multinational force intervenes. This provision is essential given the nature of armed conflict today.
- Additional Protocol I (1977) further strengthens protection for civilians in international conflict and bans the use of child soldiers.
- Additional Protocol II (1977) further strengthens protection for civilians in intrastate conflict.
- Additional Protocol III (2005) protects people working under any of the official symbols of the International Red Cross and Red Crescent Movement. (The Red Crescent was formally recognised in 1929, in connection with military forces from Muslim countries; the Red Crystal was introduced as an additional symbol with equal status, for military forces from Israel and predominantly Jewish countries.)

The Hague Conventions of 1899 and 1907 govern other aspects of the conduct of war. Along with the First Geneva Convention, they are among the earliest formal statements about the laws of war and certain types of war crimes. They were negotiated at two peace conferences held at The Hague, in The Netherlands. The chief purpose of the Hague Convention of 1899 was to prohibit the use of certain types of technology in war, including chemical weapons and hollow-point bullets, as well as the aerial bombing of cities and villages. The Hague Convention of 1907 modified and expanded upon the 1899 convention, with a greater focus on naval warfare.

In addition to the formal written law contained in treaties, customary international humanitarian law is another source of obligations on states. Customary international law is general practice accepted as law by the international community. In 2005, the ICRC undertook an exhaustive study of this, resulting in the identification of 161 rules that constitute the body of customary international law.

Courts

The ICRC was instrumental in the creation of the ICC. In 1872, Gustav Moynier, one of the founders of the ICRC, proposed a permanent criminal court. At the Paris Peace Conference in 1919, a permanent criminal court was considered, but with the massive agenda facing the representatives and the peace conference, it did not eventuate.

In 1945–46 the Nuremberg Trials put top Nazi leaders on trial for war crimes and set a precedent of holding leaders accountable for their actions. In 1948, when the *Convention on the Prevention and Punishment of the Crime of Genocide* was adopted, the UN General Assembly asked the International Law Commission to develop a treaty establishing a court to hear and determine charges of genocide. However, the Cold War put an end to the project.

In the 1990s, the UNSC established ad hoc international tribunals in response to the mass killings in Rwanda and the former Yugoslavia. In 1998, 160 countries and 200 NGOs participated in a conference resulting in the *Rome Statute of the International Criminal Court*. After its 60th ratification in 2002, the treaty entered into force and the ICC came into being. The ICC finally gave teeth to the Geneva Conventions. Previously, the ICRC had to depend on states to prosecute offenders. Individuals can now be prosecuted at the ICC for war crimes under the Geneva Conventions.

Abu Ghraib and Guantanamo Bay: the Geneva Conventions defied

In recent years the ICRC has had to deal with breaches of the Geneva Conventions by nationals of an unexpected state: the United States. Vice-President Dick Cheney announced in 2001 that the 'gloves were off' and the United States had to be prepared to work on the 'dark side' in its pursuit of terrorists. This was more than just talk. Secret orders were given to allow the use of various torture methods on those in US detention. The US Government claimed that since these people were terrorists and therefore 'unlawful combatants', they were outside the protection of the Geneva Conventions. In addition, the US military made it difficult for the Red Cross to visit detention facilities.

Finally, the US Government set up a prison for people captured in the 'war on terror' at their military base in Cuba: Guantanamo Bay. Again, the reason was to avoid US law, albeit in a highly questionable fashion. The Fifth and Fourteenth Amendments to the US Constitution state that a person cannot be deprived of 'life, liberty or property' without due

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process of law – that is, they cannot be held without trial – and the Eighth Amendment prohibits 'cruel and unusual punishment'. The argument offered for their continued detention and their treatment was that the constitutional protections did not extend to foreigners held outside US borders. Nor, apparently, did the *UN Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment*, signed and ratified by the United States in 1994. That convention prohibits, without exceptions, the kind of treatment the detainees were subjected to.

The Bush Administration's dabbling in the use of torture badly damaged the United States' international reputation when photos of Iraqi victims being tortured in Abu Ghraib prison in Iraq were released to the media and the Red Cross released a damning report on the prison. The United States' allies in the war, including Britain and Australia, were dismayed that their alliance partner was sanctioning the use of torture. Not only had many of the Guantanamo inmates, including Australian David Hicks, been held in detention for years without being charged, but other factors also made the practices thoroughly imprudent. For example, it was argued that terrorists could use photos showing the truth about Americans' treatment of Muslims to attract more recruits.

In 2009, the Obama Administration announced that it would not use torture and would respect international laws in this regard. Discussions began in the United States about whether or not to conduct an inquiry into the actions of the people at the top levels of the Bush Administration. The Obama Administration also announced that it would close Guantanamo Bay prison, but by the end of 2015 this had not happened.

The International Court of Justice and International Humanitarian Law

In 1996, following a request from the General Assembly, the ICJ issued an advisory opinion regarding the legality of the threat or use of nuclear weapons. Though the 14 judges on the bench differed on some aspects they were unanimous in stating the following: 'There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons.' The ICJ viewed the use of nuclear weapons as a violation of both customary and humanitarian law. Yet there are nine nation states in the world that possess nuclear weapons and are reluctant to get rid of them. The issue at stake here is whether nuclear weapons are exempt from the rule of law or whether they are in violation of not only customary law and humanitarian law, but also treaty law.

Currently the Marshall Islands are taking the nine nuclear weapons states to the ICJ because they are in violation of art VI of the NPT, which states:

> Each of the Parties to the Treaty undertakes to pursue negotiations in good faith on effective measures relating to cessation of the nuclear arms race at an early date and to nuclear disarmament, and on a treaty on general and complete disarmament under strict and effective international control.

Why is the Marshall Islands pursuing this case? While under the control of the United States, 105 atmospheric nuclear tests were undertaken on these islands. The people of the Marshall Islands believe that no one else should ever suffer from the effects of nuclear weapons as they have suffered. It will be

Figure 16.28 Phon van den Biesen (far left) speaking about the Marshall Islands case at the Marshall Islands Forum held in Vienna in December 2014. He is assisting the Marshall Islands in the preparation of the the legal cases against the nuclear weapons states at the ICJ. Phon van den Biesen is based in Amsterdam and is a specialist in the protection of nature and environmental law, human rights, the laws of war and peace, and related areas of law. Sitting to the far right is Tony de Brum, Foreign Minister of the Marshall Islands.

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interesting to see the ICJ's judgement after hearing all the cases that the Marshall Islands are bringing to the court. The question to consider is: what will the ICJ say about the legality of nuclear weapons when the ICJ itself ruled that they were a violation of international humanitarian law in 1996?

For the full text of the 1996 Advisory Opinion see International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons* at http://cambridge.edu.au/redirect/?id=6418.

Non-legal responses

The International Committee of the Red Cross (ICRC) plays a significant role in educating the military forces of the world and the general public about the requirements of international humanitarian law. The ICRC has detailed guides designed for all the groups involved in wartime situations:

- victims
- journalists
- humanitarian workers
- UN peacekeepers
- soldiers.

The ICRC also undertakes extensive education programs in high schools around the world so that the next generation may be fully informed about international humanitarian law.

As well as initiating the rules and enforcement mechanisms regarding the conduct of war, the ICRC works in many non-legal ways to help people in armed conflict. In this work, the ICRC acts as a neutral party and helps people on all sides in a conflict. This does not mean that ICRC representatives stay silent if they witness atrocities or war crimes. The ICRC is the only organisation that has the right to free movement across battle lines in times of war. The following is a list of activities that ICRC delegates are constantly engaged in:

- visiting prison camps, internment camps or labour camps of both sides
- evaluating the conditions of prisoners of war held in detention
- providing food, medicine, clothes and blankets to those in need
- facilitating the exchange of information between people on both sides of the conflict about prisoners of war and missing persons. The ICRC has a database in Geneva with 55 million entries, which represent more than 30 million cases over the last 100 years.

Today the ICRC has offices in more than 60 countries and conducts operations in about 80 countries. Geneva remains the head office and provides backup for its field operations.

Legal Links

Go to http://cambridge.edu.au/redirect/?id=6419 for more information about the global work of the ICRC.

Conclusion

The rules regarding the conduct of hostilities have evolved into a sophisticated branch of public international law. The international community has given this body of law universal jurisdiction and strengthened enforcement measures. In addition, the ICRC has not only alleviated the suffering of people caught up in armed conflict, but has also served as an inspection mechanism on the ground. International humanitarian law plays an important role in the maintenance of the international rule of law, which in turn promotes world order.

Review 16.14

1. In your own words, define the term 'international humanitarian law'.
2. Explain the purpose of the prison set up by the US Government for people captured in the 'war on terror'
3. Discuss the following sentence: 'The issue at stake is whether nuclear weapons are exempt from the rule of law or whether they are in violation of not only customary law and humanitarian law, but also treaty law.' Share your thoughts on the issue.

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Chapter summary

- An ordered world is needed if states are to cope with globalisation and to counter global threats such as nuclear war, climate change and economic meltdown.
- Our system of international law is based on the concept of state sovereignty.
- Multilateral approaches are far more effective than unilateral action in dealing with the common problems that face the international community.
- Competition over access to resources such as fossil fuels and water is likely to become an even more serious source of conflict.
- The creation of the UN was a massive multilateral commitment to a global environment characterised by the rule of law.
- A growing number of international courts exist to enforce international treaties and conventions. These include the International Court of Justice, the International Criminal Court and ad hoc tribunals set up to hear matters arising from armed conflicts.
- Australia has been an enthusiastic contributor to the UN in the areas of the regulation of nuclear weapons, peacekeeping and humanitarian assistance.
- Chapter VII of the UN Charter sanctions the use of force if authorised by the UNSC, and art 51 of the Charter allows a state to go to war in self-defence.
- The Geneva Conventions of 1949 are the most signed treaties and are universally applicable.
- The UN intervention in East Timor from 1999 to the present has been a success, but this success has only been possible with the cooperation and support of the international community.

Questions

Multiple-choice questions

1 The principle of the Responsibility to Protect:
- **A** is the same as humanitarian intervention
- **B** allows the UNSC to send in peacekeepers as soon as a country fails to meet basic standards of human rights
- **C** focuses more on prevention than reaction
- **D** has yet to be agreed to by the UN General Assembly

2 The *Nuclear Non-Proliferation Treaty*:
- **A** does not apply to the five permanent members of the UNSC
- **B** has not been signed by Israel, India and Pakistan
- **C** has failed to prevent most countries of the world from acquiring nuclear weapons
- **D** has not been signed by Iran, North Korea and Burma (Myanmar)

3 The ICC:
- **A** was authorised by the UNSC in 1998
- **B** was set up to deal with the mass atrocities committed by the Nazis in World War II
- **C** was created by the Rome Statute, an agreement between a number of states
- **D** can hear only cases against states, not individuals

4 International humanitarian law:
- **A** applies to all people in peacetime
- **B** applies to all people affected by armed conflicts
- **C** was created by the *Universal Declaration of Human Rights*
- **D** only applies to about half of the states in the world

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5 The UNSC can override a state's sovereignty when:
   - **A** there are widespread human rights abuses or mass atrocity crimes that require intervention
   - **B** the state does not trade with any of the Permanent Five members
   - **C** there is a greater than 50% chance of success
   - **D** the state agrees to waive sovereignty

Chapter summary questions

1 Describe the main means of achieving world order that were put in place in the first five years after the end of World War II.
2 Explain the concept of state sovereignty and how states can use their sovereign powers to create treaties and promote world order, but can also use these powers as a barrier to international law.
3 Explain how access to resources can become a cause of conflict.
4 Assess the effectiveness of the various legal and non-legal responses to the threat of nuclear weapons.
5 Evaluate the effectiveness of the UN missions in Timor-Leste (East Timor) since 1999.

Extended-response questions

1 Critically evaluate the effectiveness of multinational efforts to achieve world order over the past century.
2 Discuss the role of NGOs in limiting the harm resulting from interstate and intrastate conflicts.
3 Choose one or more states and non-state actors (which can include international organisations) and an example of a world order issue from recent history or current events that has not been discussed in this chapter. Outline the interrelationships and critically evaluate the parties' conduct.
4 Can pressure be brought to bear on a state that refuses to participate in international efforts to promote world order? Outline potential strategies and identify the parties that may be able to use such strategies. Justify your answers.

In Section III of the HSC Legal Studies examination you will be expected to complete an extended response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended response questions can be found at http://cambridge.edu.au/redirect/?id=6420. Refer to these criteria when planning and writing your response.

Themes and challenges

The role of law in encouraging cooperation and resolving conflict in regard to world order

- The UN Charter laid out the mechanisms for encouraging cooperation for the purpose of safeguarding human rights and promoting social and economic progress. It also gave detailed guidelines for resolving disputes using peaceful means and for the use of force by the UNSC if all else fails.
- The ICRC has encouraged all military forces to educate their personnel about international humanitarian law, particularly the Geneva Conventions, and seeks to educate the community about how to alleviate the suffering of people affected by war.

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- NGOs use education and persuasion to encourage global cooperation.
- Multilateralism is an approach to world order that draws on the individual and collective strengths of the various parties, and is generally the most effective way to resolve conflicts.
- Peacekeeping has been strengthened since the 1990s by the willingness of the UNSC to use Chapter VII powers to give its operations legal authority.

Compliance and non-compliance in world order contexts

- Interdependence of states encourages greater compliance with international law, but also may contribute to non-compliance.
- State sovereignty can be used as an impediment to compliance with international law, but also may encourage compliance, especially when two or more states agree on world order issues.
- States that fail to comply with the Geneva Conventions and other mechanisms that regulate the conduct of hostilities will usually face international condemnation.
- The UN and the UNSC sought to secure compliance from Indonesia in 1999 by intervening in East Timor.
- International courts and tribunals seek to enforce individuals' compliance with international law by providing a means to bring people to justice when their countries either cannot or will not take action.
- Force, persuasion and political negotiation are generally used to obtain states' compliance with international law.
- Force alone is generally ineffective in producing long-term compliance with the law; hence the need for more measured, long-term approaches, such as are represented by R2P and the Peace Building Commission.

The effect of changing values and ethical standards on world order

- The UN Charter represents a fundamental change in world order; it declared war to be illegal except in specified conditions, and declared the protection of human rights to be one of the world community's main priorities.
- The *Universal Declaration of Human Rights* marked a fundamental change in the values of the international community and laid the foundation for a major new branch of international law.
- The *UN Convention on the Prevention and Punishment of the Crime of Genocide* declared that the international community would never again tolerate the sort of genocide carried out by the Nazis against the Jews in the World War II.
- Responsibility to Protect places the security of individuals at the centre of the international community's concern, rather than the security of states.
- UNSC Resolution 1887 of 2009 marked a return to multilateral cooperation in dealing with the threat of nuclear war.

The role of law reform in promoting and maintaining world order

- As the doctrine of Responsibility to Protect becomes the norm, all those organisations involved in dealing with difficult regimes that have little regard for their citizens will have clear guidelines on how to proceed.
- The Geneva Conventions have been subject to ongoing improvement for over 150 years; the ICRC continues to educate both the public and all military forces about the conventions, as well as monitor their observance.
- The *Nuclear Non-Proliferation Treaty* has proved very useful in limiting proliferation to a small number of countries. However, genuine reform must occur from 2010 to tighten the treaty and enforce compliance by intransigent states, as well as to reduce nuclear stockpiles significantly.
- UN peacekeeping was grafted onto the UN system to meet an urgent need during the Cold War. Since then it has been accepted as performing an invaluable role in maintaining world order.

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- The ICC plays a critical role in enforcing international human rights law and international humanitarian law.

The effectiveness of legal and non-legal responses in promoting and maintaining world order

- Most international law is made by treaties, which therefore have a major role in giving order and direction to global governance.
- UNSC resolutions have the force of law and are binding upon all UN member states. However, it is only since the 1990s that a level of cooperation has existed between the permanent members of the UNSC to allow their effective operation. If the members are prepared to back them with action, UNSC resolutions can be the most powerful legal mechanism.
- The advent of the ad hoc tribunals in the 1990s marked the beginning of a new chapter in using international courts to maintain world order by prosecuting serious breaches.
- NGOs use investigation, research, education and lobbying to promote the welfare of individuals and groups.
- Wise political leadership is always a necessary ingredient for promoting a just and stable world order.

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Answers to multiple-choice questions

Part I

Chapter 1

1 B 2 A 3 D 4 D 5 B

Chapter 2

1 A 2 D 3 A 4 C 5 A

Chapter 3

1 A 2 B 3 C 4 A 5 A

Chapter 4

1 A 2 D 3 C 4 C 5 C

Chapter 5

1 B 2 C 3 C 4 B 5 C

Chapter 6

1 D 2 C 3 C 4 C 5 D

Part II

Chapter 7

1 B 2 B 3 A 4 C 5 B

Chapter 8

1 B 2 C 3 C 4 C 5 D

Chapter 9

Issue 1 – 1 C 2 C 3 A 4 B 5 D
Issue 2 – 1 B 2 C 3 B 4 A 5 A
Issue 3 (digital only) – 1 D 2 C 3 C 4 A 5 C

Part III

Chapter 10

1 A 2 C 3 A 4 B 5 A

Chapter 11

1 C 2 C 3 B 4 B 5 B

Chapter 12

1 C 2 C 3 A 4 D 5 D

Chapter 13 (digital only)

1 A 2 D 3 C 4 B 5 A

Chapter 14 (digital only)

1 B 2 B 3 A 4 C 5 D

Chapter 15

1 A 2 D 3 C 4 C 5 A

Chapter 16

1 C 2 B 3 C 4 B 5 A

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Glossary

This glossary includes words from the digital version of the book.

abolitionism
a worldwide political movement that sought to abolish slavery

acceptable quality
an implied guarantee in ACL that goods sold are fit for purpose, acceptable in appearance, free from defects, safe and durable

acceptance
the unconditional consent to all the terms of an offer

accommodation bond
a payment made by nursing home residents to secure a place, partially refunded when they leave the home

accommodation charge
a daily amount payable by nursing home residents who require 'high care'

accused
the person or alleged offender that criminal action is being taken against

acquittal
a judgement that a person is not guilty of the crime with which they have been charged

actus reus
a Latin term meaning 'guilty act' that refers to the physical act of carrying out a crime

ad hoc
for a particular purpose, usually exclusive and often temporary

adoption
the legal process of transferring parental rights and responsibilities from the biological parents to the adoptive parents

adversary system
a system of law where two opposing sides present their cases to an impartial judge or jury

advertising
any action designed to draw the attention of consumers to the availability of goods or services in the marketplace

affray
using or threatening to use violence on another that would cause a reasonable person present at the scene to fear for their safety

aggravated sexual assault in company
sexual assault performed with another person or people present together with aggravating circumstances

aggravating factor
a circumstance that makes the offence more serious; it can lead to an increased sentence

alternative dispute resolution (ADR)
methods other than formal court proceedings for settling disputes, including arbitration, negotiation, mediation and conciliation

ancestor
a person from whom someone is descended, on either parent's side, such as a parent, grandparent or great-grandparent

annulment
a declaration by a court that a supposed marriage is in fact void

appeal
an application to have a higher court review a decision of a lower court

appeal against conviction
an appeal where the appellant (the defendant) argues that they did not commit the offence of which they were found guilty

appellant
in an appeal case, the party who is making the appeal

appellate jurisdiction
the authority of a court to review matters on appeal from another court

Apprehended Domestic Violence Order (ADVO)
a specific type of AVO issued under Part 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) when the perpetrator of violence is a family member

Apprehended Violence Order (AVO)
a court order that aims to protect the applicant from violence and other forms of intimidation or abuse by another person

arbitration
(industrial relations law) the process of resolving an industrial dispute, often after conciliation has failed, by a legally enforceable order of a court or commission

arrest
to seize a person by legal authority and take them into custody

assault
a criminal offence involving the infliction of physical force or the threat of physical force

assimilation policy
a policy based on the idea that a minority group should adopt the language and traditions of the majority group

Atlanta Agreement
an agreement between the ILO, the Sialkot Chamber of Commerce and Industry and UNICEF to abolish child labour in Sialkot, including the manufacturing of commercial products for the Pakistani football industry

attempt
an offence where a principal crime was attempted but failed or was prevented for some reason despite the intention to complete it

auction
a public sale in which people bid for goods or property, and the sale goes to the highest bidder

***Australian Consumer Law* (ACL)**
federal legislative provisions contained in Schedule 2 of the *Competition and Consumer Act 2010* (Cth) – formerly the *Trade Practices Act 1974* (Cth)

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Australian Federal Police (AFP)
Australia's Commonwealth police force, established to uphold Commonwealth criminal law and to guard Australia's interests from crime in Australia and overseas

Australian Workplace Agreement (AWA)
an individual workplace agreement between an employer and an employee under the *Workplace Relations Act 1996* (Cth); an AWA overrides and takes the place of any award or collective agreement

autonomy
freedom of the will, self-government; the ability to act without outside interference

award
a legal agreement, made between federal and state industrial commissions, employers and employees, which sets out the workers' wages and conditions

Bachpan Bachao Andolan
an organisation created by the Indian government to enforce the criminalisation of child labour and forced labour

bail
the temporary release of an accused person awaiting trial, sometimes on particular conditions such as lodgement of a sum of money as a guarantee

bait advertising
advertising goods or services for sale at a specified price with the knowledge that the company will not be able to offer them at that price for a reasonable period

better off overall test (BOOT)
a criterion for Fair Work Australia's approval of an enterprise agreement, requiring that employees are better off overall than under the relevant modern award

beyond reasonable doubt
the standard of proof required in a criminal case for a person to be found guilty

bilateral agreement
an agreement between two countries

biodiversity
the variety of life forms on Earth; the complete range of types that are possible within an ecosystem, biome or species

bipartisan
having the support of the two major political parties

blended family
a family that is created when a parent remarries; it includes the stepmother or stepfather and stepchildren

bond
a compulsory condition imposed on an offender for a period of time, which the offender undertakes to comply with

breach
to fail to obey

break and enter
commonly known as burglary, break and enter offences usually occur when a person enters a home with intent to commit an offence

built environment
all the buildings, transport routes and infrastructure, parks and other surroundings that have been made by people and constitute the setting for human activities

burden of proof
in criminal matters, the responsibility of the prosecution to prove the case against the accused

cartel
a group of companies that work together to control prices and markets; their behaviour is unlawful if it is found to be anti-competitive

casual employment
employment 'as needed', on an irregular basis, with no set schedule or guarantee of ongoing employment; generally paid at an hourly rate

causation
the link between the behaviour of the accused and the result (that is, that the behaviour of the accused actually caused the criminal act alleged)

caution (1)
a formal warning without charge issued by police for less serious offences

caution (2)
a formal, recorded alternative to prosecution where a young offender admits to the offence and consents to receiving a formal police caution; it can later be taken into account in the Children's Court, but not in an adult court

caution (3)
a statement issued by police to a suspect when they are detained to inform the suspect of their rights

caveat emptor
a Latin term meaning 'let the buyer beware'; it implies that consumers should use their own care and knowledge to protect themselves against exploitation

celebrant
a person who is authorised to perform a civil or religious marriage ceremony

chain of title
a series of deeds under the Old System title, used to establish the ownership history of a property

challenge for cause
when the legal team rejects a juror because they believe that for some reason the juror will be prejudiced

charge
formal accusation of a person of committing a criminal offence

charge negotiation
an agreement between the DPP and the accused that involves the acceptance of a guilty plea, usually in exchange for something else

child soldier
a person under the age of 18 who participates, directly or indirectly, in armed conflict as part of an armed force or group, including both armed and support roles

circle sentencing
a form of sentencing for some adult Indigenous offenders where sentencing is conducted in a circle made up of local community members and a magistrate

codification
the spelling out of obligations in legislation

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Cold War
the state of hostility, without actual warfare, between the USSR and its satellites and the United States and its allies in the Western world, which lasted from just after World War II until about 1991

collective right
a right belonging to a group or a people, as opposed to an individual right

collective security
the principle based on the agreement of a group of states not to attack one another and to defend each other from attack from others; the idea is that an attack on one is an attack on all

colonisation
the establishment of colonies; settlement, as in 'the British colonisation of Australia'

committal proceedings
proceedings in which a magistrate determines if there is enough evidence for a case to proceed to trial in a higher court

common assault
assault where there is no actual physical harm to the person assaulted, including threatening to cause physical harm to another person

common law (or Old System title)
a system of registration and transfer of ownership of property in use in New South Wales; under this system an unbroken chain of title is required to be proven to establish title to the property

common property
the areas in a strata scheme building or property that are owned jointly by all the lot owners, rather than being part of an individual lot

communal violence
violence and killing within communities

community housing
secure and affordable rental properties for people who earn a low income and who have a housing need; homes are provided by not-for-profit community housing organisations

community service order
a penalty where an offender is sentenced to serve specified hours of work in the community

compensation
a monetary payment made to a person to make amends for any loss, injury or damage to property they have suffered

conciliation
a form of alternative dispute resolution in which the disputing parties use the services of a conciliator, who takes a more active role than in mediation, advising the parties, suggesting alternatives and encouraging the parties to reach agreement; the conciliator does not make the decision for them

conclusive presumption
a legal presumption in favour of one party that is final and cannot be rebutted by the other party

condition
(of a contract) a term of fundamental and essential importance; if a condition is breached by one party the other party is entitled to terminate the contract and can sue for damages

condition report
an inspection checklist of the state of the premises signed by both landlord and tenant prior to the tenant moving in

conscription
compulsory enlistment in the military force of a state

consent
it is a complete defence for some crimes if the accused can show the victim freely consented to the act in question

consideration
something given, done or suffered by the promisee in return for a promise in a contract

conspiracy
when two or more people plot to commit a crime together

constitutional corporation
a corporation to which s 51(xx) of the *Australian Constitution* applies (for example, foreign corporations and companies incorporated under Australian law that engage in financial activities and buying and selling)

constructive manslaughter
the killing of a person while the accused was carrying out another dangerous or unlawful act

consumer contract
a contract for the supply of goods or services, or for a sale or grant of interest in land, to an individual purchasing the goods, services or land for personal, domestic or household use

contemporary slavery
a form of forced or bonded labour, with or without pay, under threat of violence

continued detention
ongoing detention of a person who has served the full sentence for their offence

contract
an agreement made between two or more people that is recognised by the courts as being legally binding on the parties

contract for services
an agreement between a contractor and a client under which the contractor performs agreed tasks for an agreed fee but is not employed by the other party

contract of service
an employment agreement under which a worker (employee) works for an employer; it imposes certain duties on each party and provides specific rights for the period of employment, which may be for a fixed term or ongoing

control order
similar to an adult sentence of imprisonment, except served in a Juvenile Justice Centre

convention
another term for a treaty: an international agreement between parties who are subject to international law (states and international organisations such as the UN and its bodies)

conveyancing
the legal process used to transfer title of ownership from one party to another

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cooling-off period
a period of time that gives buyers an opportunity to rethink their decision to enter into a contract of sale

coroner
a judicial officer appointed to investigate deaths in unusual circumstances

coronial inquest
a court hearing conducted by a coroner to help determine the manner and cause of death

correctional centre
commonly known as a prison – an institution where offenders are held in custody for the period of their imprisonment

court attendance notice
a legal document that states when and where a person must appear in court and the charge to which they must answer

court hierarchy
the system of courts within a jurisdiction, from lower courts to intermediate and higher courts

covenant
a restriction on a property that is part of the title; an example is a restriction not to build any structure or fences above a certain height

crime
an act or omission against the community at large that is punishable by the state

crime against humanity
described in the Rome Statue as an act 'committed as part of a widespread or systematic attack directed against any civilian population'

crime against the international community
a most serious crime, of concern to the international community as a whole, and recognised by the international community as requiring punishment

criminal infringement notice
a notice issued by the police outside of court alleging a criminal infringement and requiring payment of a fine

criminal negligence
where the accused fails to foresee the risk when they should have and so allows the avoidable danger to occur

criminology
the scientific study of crime and criminal behaviour

Crown
the state party that commences a criminal action in a court of law against an alleged offender: in New South Wales, the action is usually commenced by the Director of Public Prosecutions; if the alleged crime is against a federal criminal law, the action is usually commenced by the Commonwealth Director of Public Prosecutions

Crown land
land held under permit, licence or lease; reserves managed by the community; lands of environmental value kept in public ownership; lands used for Crown public roads; and other unallocated lands

customary law
principles and procedures that have developed through general usage according to the customs of a people or nation

damages
(contractual) money ordered by a court to be paid to a plaintiff where a contract is breached, for the purpose of placing the plaintiff in the same situation as if the contract had been performed

debt bondage
a situation where a person is forced to repay a loan with labour instead of money, where the proper value of the labour is not applied towards repayment and/or the type or duration of services is not properly limited

debt slavery
slavery in order to pay off a loan with forced labour rather than money

declaration
a formal statement relating to a particular issue or set of issues, agreed to by a group of states but without binding legal force

decree absolute
a final decree of the dissolution of marriage

decree nisi
a Family Court order that is made to signal the intended termination of a marriage

deed
documentary proof establishing ownership of a property

de facto relationship
a relationship where the partners act as a married couple but are not legally married

delegated legislation
laws made by people or bodies to whom parliament has delegated law-making authority

descendant
a person who by genetics or adoption follows the family line of another, such as a child, grandchild or great-grandchild

deterrent
something that discourages or is intended to discourage someone from doing something

dictatorial
(of a government) having unrestricted authority or power

diminished responsibility
also known as substantial impairment of responsibility, this defence is used when the accused is suffering from a mental impairment

direct discrimination
a practice or policy of treating a person or group of people less favourably than another person or group in the same position, on the basis of gender, race, national or ethnic origin, age, sexuality, etc.

discrimination
unfavourable treatment of a person or group relative to the way others are treated

diversionary program
an alternative to the traditional court system that focuses on the rehabilitation of offenders

division of powers
how powers are divided between the federal and state governments

divorce
the legal termination of a marriage by an official court decision

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DNA evidence
genetic material (such as hair, blood and saliva) that can be used to link a suspect with a crime scene or criminal offence, or to clear a suspect

doli incapax
a Latin term meaning 'incapable of wrong'; the presumption that children under a certain age cannot be held legally responsible for their actions and thus cannot be guilty of an offence

domestic violence
any act, whether verbal or physical, of a violent or abusive nature that takes place within a domestic relationship

dominion
a semi-autonomous political entity that was nominally under the sovereignty of the British Empire

dualist system
a legal system that does not deem treaties enforceable domestically until and unless they are incorporated into domestic law, usually by passing similar legislation

duress
coercion or pressure used by one party to influence another party

easement
a right of someone other than the property owner to use the property for a certain purpose

ecological footprint
a measure of human demand on Earth's ecosystems, comparing human demand with the planet's ecological capacity to regenerate; a person's impact on the planet as a result of their lifestyle

ecologically sustainable development (ESD)
development which aims to meet the needs of today's society, while maintaining and conserving ecological processes for the benefit of future generations

Economic and Social Council (ECOSOC)
the UN organ that acts as a forum for international economic and social cooperation and development

embezzlement
when a person steals money from a business over a period of time while they are employed at that workplace

employment
the contractual relationship between an employer and an employee, involving work performed for monetary payment and other benefits

enterprise
a business or company

enterprise agreement
a legally binding agreement between the employees of a corporation, non-profit organisation or government body and their employer, setting the terms and conditions of the employment relationship

enterprise bargaining
negotiation of an agreement about wages and working conditions by an employer and its employees, or by the trade union representing them

enumerated power
a legislative power that is specifically set out as belonging to a particular parliament; in Australia, the enumerated powers of the Commonwealth Parliament are listed in s 51 of the Constitution

envirostunt
a publicity stunt to attract attention to a particular environmental issue

equal employment
opportunity legislation laws requiring employers to ensure that people are not subjected to discrimination, to eliminate factors that restrict groups' equality of opportunity in the workplace

equal employment opportunity legislation
laws requiring employers to ensure that people are not subjected to discrimination and to eliminate factors that restrict groups' equality of opportunity in the workplace

ethnic cleansing
a euphemism for genocide

evidence
information used to support facts in a legal investigation or admissible as testimony in court

ex aequo et bono
a Latin term meaning 'according to the right and the good'; on the basis of what is fair and just in the circumstances

exchange of contracts
when the vendor and the buyer of property exchange signed copies of the contract of sale

executive committee
an elected subgroup of the owners' corporation which makes decisions about the management of the common property and other areas of concern that affect all residents

ex-nuptial
a Latin term meaning 'outside marriage'; an ex-nuptial child is a child born outside a marriage

exploit
the act of using another person's labour without offering adequate compensation; often the work is not voluntary and is obtained through the threat (real or perceived) of violence

express rights
rights that are included (written) in a document

express term
a contractual term that has been specifically stated and agreed to by both parties at the time the contract is made, either in writing or orally

extended family
a family that includes individuals related through marriage or parentage and not limited to one couple and their children; in some cultures, close family friends are regarded as members of the extended family

external costs (externalities)
the effects of an activity (such as the production, transport and sale of goods) on people who are not directly involved in the activity, and that are not paid for by those who are involved (such as the producer)

extradition
the legal surrender of a suspect or convicted criminal by one jurisdiction to another to face criminal charges or sentence

fiduciary duty
where one person (the fiduciary) undertakes to act in the interests of a second person (the beneficiary) and has the power to effect the interests of the beneficiary

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fine
a monetary penalty imposed for infringement of a law

fit for purpose
an implied term in ACL, guaranteeing that the goods sold will do what they were designed to do

forced labour
work performed under the threat of a penalty or harm and which the person has not voluntarily submitted to

forced marriage
marriage in which one or both parties is married against their will, often on promise of payment of money or goods to the family or the other person involved

forfeit
(also known as forfeiture) loss of rights to property or assets as a penalty for wrongdoing

Four Freedoms
the freedoms for all people called for by US President Franklin Roosevelt in his 1941 State of the Union address: freedom of speech and conscience, and freedom from fear and want

fraud
deceitful or dishonest conduct carried out for personal gain

free trade
trade between countries that is subject to few or no government restrictions

freedom of contract
the freedom of individuals to bargain the terms of their own contracts, without regulation by the state

gazump
buy a property for which the vendor has already reached a verbal agreement with someone else, by offering a higher price

general deterrence
punishment attempting to make an example of an offender in order to send a message to the rest of the community

Geneva Conventions
four treaties, with three extra protocols, that set the standards in international law for the humane treatment of the victims of war, whether military or civilian

genocide
the deliberate extermination of a national, ethnic, racial or religious group

globalisation
the ongoing integration of regional economies, societies and cultures brought about by the removal of restrictions on international trade, and advances in travel and mass communication

governance
a method or system of government

good root of title
when the Old System chain of title has not been broken through the loss of one or more of the previous deeds of sale

gratuitous violence
excessive violence carried out without reason, cause or excuse

grave adult behaviour
where a young offender has acted like an adult in committing an offence, in terms of the seriousness of the offence and other factors surrounding the behaviour, such as premeditation

greenfields agreement
an agreement created to cover prospective employees of a new enterprise

guideline judgement
a judgement issued by the court, on application of the Attorney-General, that will set out sentencing guidelines for a particular offence

guild
a medieval association of craftsmen or merchants

hard law
conventions and treaties that under international law create legally binding obligations

heads of power
powers listed in ss 51 and 52 of the *Australian Constitution*: the areas that the Commonwealth can legislate on

hegemony
dominance of one nation over others

historical continuity
the existence of social, cultural, linguistic or spiritual links with past practices

holistic
taking into account all aspects; looking at the whole system rather than just specific components

home detention
an imprisonment sentence where the offender is confined to their home under certain conditions of monitoring

homicide
the unlawful killing of a human being

Housing Affordability Index
a key indicator that reports on the relationship between household income, mortgage costs and the price of housing

human rights
in a general sense, basic rights and freedoms believed to belong to all human beings

human shield
the placement of civilians in or around military targets to deter the other party from attacking that target

human trafficking
the commercial trade or trafficking in human beings for the purpose of some form of slavery, usually involving recruiting, transporting or obtaining a person by force, coercion or deceptive means

humanitarian intervention
military intervention in a state in order to stop serious human suffering and/or human rights violations

implied rights
rights that can be implied through the text, structure or purpose of a document

implied term
a contractual term that has not been included in the formal agreement; a term can be implied by custom or law, or because of the presumed intentions of the parties

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inadmissible evidence
evidence that cannot be considered by a judge or jury in court (for example, confessions that were obtained by force)

inalienable right
a right that cannot be taken away

incapacitation
making an offender incapable of committing further offences by restricting their freedom

incorporation
the process by which a country incorporates a treaty into domestic law

indecent assault
an assault and 'act of indecency' on or in the presence of another person without their consent

indefeasible title
title that has been transferred to the new owner, and will not be changed except under very limited circumstances

independent contractor
someone who is paid for work done for another person without there being a contract of employment between them; instead, the parties will have a contract for services

indictable offence
a more severe offences that is heard and sentenced by a judge in a District Court or tried before a judge and jury

indirect discrimination
a practice or policy that appears to be neutral or fair because it treats everyone in the same way, but which adversely affects people with a particular characteristic

industrial action
any action taken by employees to reduce productivity in the workplace, such as strikes, slowdowns of work, refusal to work overtime, or doing only the minimum required; the purpose is usually to protest unjust workplace policies of the employer

industrial award
a standard set of wages and working conditions for employees in a particular industry or occupation, or those who are employed by particular employers

industrial relations
the relationship between employers, employees, the government and trade unions

Industrial Revolution
the rapid development of industry in the 18th and 19th centuries, characterised by changes in manufacturing, agriculture and transport

infanticide
the death of a baby under the age of 12 months at the hands of its mother

injunction
a court order directing someone to do something or prohibiting someone from doing something

injury management
a program developed for an injured worker that includes all aspects of their treatment, rehabilitation and retraining, and that is aimed at facilitating their return to work

inquisitorial system
a system of law where two sides present their cases to a judge who directs the cases and can call for particular evidence

in situ
a Latin term meaning 'in the place'; used to describe the place in which a piece of evidence is found or situated

insider trading
when a person illegally trades on the share market to their own advantage using confidential information

instrument
a document by which some legal objective is achieved; it may be binding (for example, statutes, treaties and deeds) or non-binding (for example, guidelines, declarations and recommendations)

Intensive Correction Order (ICO)
an alternative to a custodial sentence where an offender has restricted movement and must attend a rehabilitation program

interdependence
the interconnection of two or more states to such an extent that they are mutually dependent on each other for survival and mutually vulnerable to crises

intergenerational equity
fair and just behaviour of one generation towards subsequent generations; in terms of environmental issues, a concept that centres on preserving Earth's resources for future generations

intergovernmental organisation (IGO)
an organised group of two or more states, set up to pursue mutual interests in one or more areas

International Bill of Rights
the informal term collectively describing the UDHR, ICCPR and ICESCR combined

International Court of Justice (ICJ)
the primary judicial organ of the UN; has jurisdiction to hear disputes submitted by member states and issue advisory opinions

***International Covenant on Civil and Political Rights* (ICCPR)**
the binding international treaty creating obligations on states to respect the civil and political rights of individuals

***International Covenant on Economic, Social and Cultural rights* (ICESCR)**
the binding international treaty creating obligations on states to respect the economic, social and cultural rights of individuals

international crime
a broad term covering any crime that is punishable by a state, but that has international origin or consequences, or a crime recognised by the international community as punishable

International Criminal Court (ICC)
an independent international court established by the Rome Statute in July 2002 to prosecute and try international crimes of the most serious nature

International Criminal Police Organization (INTERPOL)
the world's largest international police organisation, established in 1923 to facilitate collaboration among intelligence agencies around the world

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international customary law
actions and concepts that have developed over time to the extent that they are accepted by the international community and have become law

international humanitarian law
a body of international law developed from the Geneva and Hague conventions that deals with conduct of states and individuals during armed conflict; also known as the law of armed conflict

International Labour Organization (ILO)
an international agency of the UN, created with the aim of improving conditions for workers around the world

interrogate
to formally question a suspect in relation to an alleged crime

interrogation
the act or process of questioning a suspect, carried out by the investigating officers

interview friend
a parent, guardian, friend or legal representative present at the police interview of a minor; the interview friend's role is to offer support and witness that statements are made voluntarily

intragenerational equity
fair and just treatment of people and groups within a generation; in terms of environmental issues, a concept that focuses on fair management and use of Earth's resources among different groups of the same generation

investigate
for the police, carrying out research to discover evidence and examine the facts surrounding an alleged criminal incident

invitation to treat
an initial invitation to others to make an offer

involuntary behaviour or automatism
an act that cannot be controlled or is not voluntary, such as an epileptic fit

involuntary manslaughter
the killing of a person where the death occurred because the accused acted in a reckless or negligent way without intention to kill

journeyman
dating from the later Middle Ages, a worker who had completed his apprenticeship (period of training) and was then qualified to work for wages for a master

judicial discretion
the power of a judge or magistrate to make a decision within a range of possibilities based on the particular circumstances of a case

jus cogens
a Latin term meaning 'compelling law', also called a 'peremptory norm': a norm of customary international law that is indisputably accepted by the international community and is therefore binding on everyone regardless of whether a particular leader or state accepts it

juvenile justice
the area of law and policy concerned with young people and the criminal justice system

Juvenile Justice Centre
a detention centre housing young offenders subject to control orders

labour rights
rights at work, including rights to safe working conditions, minimum wages, paid leave or to join a trade union

laissez-faire
a French term used to describe economic philosophies that government should not intervene in business

***laissez-faire* economy**
an economic system in which the state refrains from interfering with markets by regulation or other means

larceny
when one or more people intentionally take another person's property without consent and without intention of returning it

legal aid
a subsidised legal service provided by the state for those on low incomes

LEP (Local Environment Plan)
a document prepared by a local council, and approved by the state government, to regulate the use and development of land within the council's control

licensee
licence holder

litigation
civil legal proceedings in which disputing parties seek a binding remedy from a court

locus standi
a Latin term meaning 'a place for standing', also 'standing'; a requirement that a person or group have a sufficient interest in the subject matter to be permitted to bring an action

magistrate
a judicial officer in the Local Court; in New South Wales they are appointed by the Governor

Magna Carta
a document signed in 1015 which recognised the principle that everyone, including the king, was subject to the law; 2015 was this historic document's 800th anniversary

mandatory sentencing
removal of judicial discretion by legislation, by setting a minimum or mandatory sentence for a particular offence or type of offender

manslaughter
the killing of a person in a manner that is considered to be less intentional than murder

marriage
the union of a man and a woman to the exclusion of all others, voluntarily entered into for life

mass atrocity crimes (mass atrocities)
a broad term for crimes that fall into the categories of genocide, war crimes, 'ethnic cleansing' and crimes against humanity; this is the term favoured by the United Nations, as it avoids making distinctions on the basis of whether the crimes were committed in war or peace, or as part of an intrastate or interstate conflict

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maximum penalty
set by parliament, this is the maximum sentence available to a court to impose for an offence; the maximum penalty is rarely handed down

mediation
a form of alternative dispute resolution in which a neutral third party assists the disputing parties in reaching an agreement

mens rea
a Latin term meaning 'guilty mind', meaning that the accused intended (to some degree) to commit the crime, knowing their actions were wrong

mental illness or insanity
mental incapacitation at the time of the act, meaning the accused cannot have formed the *mens rea* at the time of the offence

militia
a group of unofficial soldiers who act outside international law and are often secretly used and funded by governments

mistake
the defendant acted under an honest and reasonable mistake and thus could not have formed the *mens rea*

mitigating circumstances
circumstances that make an offence less severe; they can lead to a reduced sentence

mitigating factor
a circumstance that makes an offence less severe; it can lead to a reduced sentence

monist system
a legal system that deems treaties enforceable in domestic law as soon as they have been signed

monopoly
exclusive control of a market by one company, which generally results in increased prices because there are no alternative suppliers

mortgage
a type of loan whereby the property being purchased is used as collateral in case the borrower fails to meet the repayment obligations as set out in the home loan contract

multilateralism
cooperation between multiple states for mutual benefit or protection from common threats

multilateral treaty
an international agreement involving three or more parties

murder
the deliberate killing of a person

nation
a people that share common heritage, language or culture and sometimes a common race

native title
recognition under Australian law of the traditional laws and customs of Aboriginal and Torres Strait Islander people, as they apply to their interests and rights in land and waters

natural environment
all the elements that surround and influence life on Earth, including atmospheric conditions, soil, plants, animals, micro-organisms, the water cycle and the systems in which these elements interact

natural law
the theory that certain laws come from an unchanging 'natural' body of moral principles that are the basis for all human conduct, and so have validity everywhere

neglect
ongoing failure by a parent to provide a child with the basic requirements for proper growth and development, such as food, shelter, medical care, hygiene and supervision

negligence
a breach of the duty of reasonable care owed by one party to another, and damage to the plaintiff resulting from this breach

negotiation
discussion aimed at reaching an agreement

non-government organisation (NGO)
an independent, non-profit group that often plays an important role in advocating, analysing and reporting on human rights worldwide

non-parole period
a period of imprisonment for which parole cannot be granted

nullify
to declare legally void or invalid

nuptial
a Latin term meaning 'marriage'; a nuptial child is a child born within a marriage

Nuremberg trials
a series of military tribunals that took place in Nuremberg, Germany after World War II (from 1945 to 1946); they were organised and run by the victorious Allied powers, and are famous for their prosecution of prominent leaders of defeated Nazi Germany for crimes against humanity and war crimes

observer status
in the UN General Assembly (UNGA), the position of an organisation or other entity that has been granted the right to speak at UNGA meetings, participate in procedural votes, and sponsor and sign resolutions, but not to vote on resolutions and other important matters

offer
a firm proposal to form a binding contract, made with a willingness to be bound by its terms

offeree
the person to whom the offer of an agreement is made

offeror
the person making an offer of an agreement

Office of the High Commissioner for Human Rights (OHCHR)
the UN human rights office responsible for monitoring and reporting on human rights worldwide

Old System title
a system of registration and transfer of ownership of property in use in New South Wales; under this system an unbroken chain of title is required to be proven to establish title to the property

original jurisdiction
the authority for a court to hear a matter for the first time

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outworker
an employee who works at home or another place besides the premises of their employer, or an independent contractor in the textile, clothing or footwear industry who works at home or other premises

owners' corporation
a group consisting of all the lot owners within a strata scheme

parole
release of a prisoner before the expiry of an imprisonment term, temporarily or permanently, on the promise of good behaviour

pastoral lease
a government lease that allows Crown land to be used, generally for farming; exists under Australian Commonwealth law and also under state jurisdictions

peacekeeping
the activity of creating conditions for sustainable peace in countries affected by conflict, through the use of force, quite often provided by a number of countries and consisting of soldiers, civilian police and civilian personnel

peak body
an association made up of a number of organisations that have similar interests and aims; it sets policy and coordinates common activities for its member organisations

penalty unit
a specified unit of money used in legislation to describe the fine payable; currently $110 in New South Wales

people smuggling
illegal transportation of people across borders, where people voluntarily pay a fee to the smuggler, and then are usually free to continue on their own after arrival in the hope of starting a new life in the destination country

peremptory challenge
when the legal team rejects a juror without needing to provide a specific reason

Permanent Five
the permanent five members of the UN Security Council: France, the United Kingdom, China, Russia and the United States

picket line
a line of striking union members forming a boundary outside or near their place of employment, which they ask others not to cross

plea
a formal statement of guilt or innocence by the accused

point of law
a question which must be answered by applying the relevant legal principles and by an interpretation of the law

police prosecutor
a legal practitioner employed by the Director of Public Prosecutions, usually used to prosecute summary offences

pollution
environmental damage caused by the discharge or emission of solid, liquid or gaseous materials into the environment

polygamous
having more than one wife or husband at the same time

positivism
the theory that laws are valid simply because they are enacted by an authority or from existing decisions, and that moral and ideal considerations do not apply

precautionary principle
the principle that if an activity or policy may cause serious harm to people or to the environment, the best course is to halt or modify that activity or policy, even when there is no proof of the probability of the risk or the seriousness of the harm

press-ganging
the act of forced conscription used in England during the 1800s; groups of men known as press gangs were employed by the government to recruit people forcibly into lifetime service with the armed forces

preventive detention
keeping a person in custody, even though they have not committed any offence, to prevent some future harm that they may commit

price-fixing
suppliers keeping prices in the market at a certain level by agreeing among themselves not to lower or raise their prices

private treaty
when the sale of a property is carried out directly between the vendor and buyer; usually completed with the assistance of a registered real estate agent

probation
a type of good behaviour bond where the offender is released on condition of good behaviour but placed under some form of supervision, such as daily reporting to a probation officer

procedural fairness
the body of rules that ensure that decision-makers act fairly, in good faith and without bias when resolving disputes

proceeds of crime
assets (money or property) obtained by an offender through their criminal activities

product warranty
a manufacturer's promise or assurance that it will repair or replace or otherwise compensate for defective goods; breach of a warranty entitles the aggrieved party to sue for damages, but not to end the contract

profit
financial gain; money remaining after expenditure has been subtracted from total income

prosecute
when the Crown or state takes action against an alleged offender in a court of law

protocol
an instrument that supplements a treaty, containing specific provisions that the parties have committed to in order to fulfil the terms of the treaty

provocation
the defence where the defendant claims that their actions were a direct result of another person's actions, which caused them to lose control of their own actions

public defender
a public barrister who can appear for an accused in a serious criminal matter where legal aid has been granted

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public prosecutor
a legal practitioner employed by the Director of Public Prosecutions, usually used to prosecute indictable offences

pyramid selling
an illegal type of selling in which an individual pays to become a distributor of goods in return for a reward for recruiting new distributors

ratify (ratification)
the process of a state formally approving a treaty, making it legally binding

reactionary
responding to a situation after it has occurred

reasonable force
such force as is reasonably necessary for the officer to perform the function; the officer must honestly believe that it was justified and not excessive

rebuttable presumption
a legal presumption in favour of one party – it can be rebutted by the other party if they can show sufficient evidence to disprove it

recidivism
habitual or repeated acts of criminal behaviour after having undergone treatment or punishment to deter such behaviour

recklessness
when the accused was aware that their action could lead to a crime being committed, but chose to take that course of action anyway

referendum
the referral of a particular issue to the electorate for a vote

referral of powers
the giving up of a state's legislative powers in a certain area to the Commonwealth by passing an Act, pursuant to s 51(xxxvii) of the Australian Constitution

regulation
a form of subordinate legislation, made up of a set of rules made under an Act on the legislature's delegated authority (that is, by the executive, which is composed of ministers and their departments), providing the technical and administrative detail required by the Act

rehabilitation
an objective of sentencing designed to reform the offender so that they do not commit offences in the future

relinquishing parent
a parent who nominates their child for adoption

remand
a period spent in custody awaiting trial

remedy
a means by which redress or reparation is provided for the breach of a legal right

remorse
deep regret or sorrow for one's wrongdoing

rescind
to revoke, retract or cancel

residential lease
an agreement between the owner of a property (landlord) and the person who is renting it (tenant)

residual power
a government power that is not listed in s 51 of the *Australian Constitution* as a legislative power of the Commonwealth Parliament, and thus belongs to the states

resolution
a decision passed by the UN General Assembly or Security Council; when passed by the Security Council it can be legally binding on all member states

restorative justice
a form of sentencing involving a voluntary conference between the offender and the victim of the crime

retrenchment
the loss of a job because there is no longer a job for the employee to do

retribution
punishment considered to be morally right or deserved because of the nature of the crime

right to peace
the right of citizens to expect their government to do all in its power to maintain peace and work towards the elimination of war

right to silence
the right of a person to refuse to answer any question put to them by the police

riot
similar to affray, but with 12 or more people using or threatening to use unlawful violence for a common purpose

robbery
when property is taken directly from a victim, usually forcefully

Rome Statute
the *Rome Statute of the International Criminal Court*; the international treaty that established the International Criminal Court

search and seizure
the power to search a person and/or their possessions and take and detain items that are discovered

Secretariat
the UN administrative body headed by the UN Secretary-General; contains the departments and offices of the UN

sedition
promoting discontent, hatred or contempt against a government or leader of the state through slanderous use of language; in Australia, sedition includes the offences of urging force or violence against the government

self-defence or necessity
the defendant acted in defence of self, another or property; only accepted in limited circumstances and only for reasonable force

self-determination
the right of people to determine how they will be governed, or their political status based on territory or national grouping

self-identification
the principle that indigenous people themselves perform the determination of their indigenous identity

sentence appeal
an appeal against the severity or leniency of a sentence

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sentencing hearing
a hearing following a finding of guilt in which a magistrate or judge will determine the sentence to be given to the accused

separation of powers
preventing one person or group from gaining total power by dividing power between the executive, the legislature and the judiciary

settlement
when final payment for purchase of property is made to the vendor, and the purchaser receives title

sexual assault
when someone is forced into sexual intercourse against their will and without their consent

sexual harassment
unwelcome and uninvited behaviour of a sexual nature which is likely to intimidate, humiliate or offend the person it is directed to

sexual intercourse
broadly defined in the *Crimes Act 1900* (NSW) to include oral sex or penetration of the vagina or anus by any part of another person's body or by an object manipulated by another person

sexual slavery
repeated violation or sexual abuse, or forcing of a victim to provide sexual services; it often takes the form of forced prostitution or forced labour where sexual abuse is common

slavery
a type of forced labour in which a person is considered to be the legal property of another

social housing
affordable and secure housing provided by Housing NSW for low to moderate income earners who meet specific eligibility requirements

soft law
international statements, such as declarations, that do not create legal obligations for states but do create pressure to act in accordance with them

sovereignty
complete legal and political control; supreme authority

specific deterrence
punishment against an individual offender aiming to deter them from committing crime in the future

stand down
to suspend an employee from the workplace without pay, usually temporarily

standard contract for sale
the contract for sale used to buy and sell in New South Wales; contracts must contain minimum standard terms

standard of proof
the level of proof required for a party to succeed in court

state
a government and the people it governs; a country

state sovereignty
the authority of an independent state to govern itself (for example, to make and apply laws; impose and collect taxes; make war and peace; and form treaties with foreign states)

Stolen Generations
Indigenous Australian children who up until the 1960s were removed from their families and tribal lands by federal and state governments and church missions under Acts of the respective parliaments

strata scheme
a detailed pictorial description of lots within a strata complex; this includes the outlines of the buildings, the dimensions of each lot, the details of each unit entitlement and the common property

strict liability offence
an offence where the *mens rea* does not need to be proved; only the *actus reus* (the guilty act) needs to be proved

strike
employees' organised withdrawal of labour

subpoena
a legal document issued by a court, requiring a person to attend and give evidence and/or to produce specified documents to the court

suffrage
the legal right to vote in a democratic election

suffragette
a supporter of women's right to vote (or women's suffrage); the term was first used in Britain at the end of the 19th century

summary offence
a less severe offence that is heard and sentenced by a magistrate in a Local Court

supranational organisation
an organisation in which decisions are made by the appointed or elected representatives of its member states; because decisions are made by majority vote, it is possible for a member state to be forced to do something it does not itself agree with

surety
in bail, where another person agrees to provide a financial guarantee that the accused will return to the court for trial in exchange for the accused's release until that date

suspended sentence
a sentence of imprisonment imposed but suspended on condition of good behaviour

tax evasion
an attempt to avoid paying the full amount of taxes due by, among other things, concealing or underestimating a person or business's income or assets

terra nullius
a Latin expression meaning 'land belonging to no one', which is used in international law to describe territory that has never been subject to the sovereignty of any state

terrorism
acts of violence against a population, intended to cause terror and thereby influence a government

testator
a person who makes a will

Torrens title
the central registration and transfer of ownership of property

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trade union
an organisation of workers created to preserve and further their rights and interests

trafficking
dealing or trading in something illegal, particularly drugs

transatlantic slave trade
the trading of African people by Europeans, who transported them as slaves from Africa to the colonies of the New World

transnational crime
crime that occurs across international borders, either in origin or effect

treason
an attempt or manifest intention to levy war against the state, assist the enemy or cause harm to or the death of a head of state

Trusteeship Council
inactive since 1994 but originally responsible for overseeing the transition of UN trust territories to self-government after decolonisation

unconscionable conduct
one party's exploitation of the vulnerability of another party to a contract; the victim may have been impaired by some external factor (such as age, disability or lack of education) or may have been deceived or threatened by the stronger party

unfair dismissal
under the *Fair Work Act 2009* (Cth), termination of employment for reasons that are 'harsh, unjust or unreasonable', as found by the Fair Work Commission

UN General Assembly (UNGA)
the UN organ representing all UN member states; acts as a forum for global discussion and runs numerous committees and programs

UN Human Rights Council (UNHRC)
the UN forum of member states responsible for overseeing and making recommendations on human rights in all member states

UN Security Council (UNSC)
the UN organ responsible for the maintenance of international peace and security; it has the power to authorise military action or other measures

unilateral
undertaken by one state or body

union
a united group of workers who are able to use the power of numbers to negotiate with their employers, usually for better wages and conditions

***Universal Declaration of Human Rights* (UDHR)**
a declaration of rights adopted by the UN in 1948; the first universal acceptance of the idea of human rights and the reference point for all subsequent human rights treaties. In 1948 the UDHR was hailed as being 'a Magna Carta for all humanity.'

universal education
free and compulsory education for all children

universal jurisdiction
where a state claims a right to prosecute a person for actions committed in another state, based on the common international opinion that the alleged crime is so serious that normal laws of criminal jurisdiction do not apply

universal suffrage
the right of all citizens to vote in political elections, regardless of status, gender, race or creed

vicarious liability
legal liability of an employer for the wrongful act of another

victim impact statement
a statement written by the victim or victim's family about the effects the crime has had on them, heard at the time of sentencing

voluntary manslaughter
the killing of a person where the accused did intend to kill or was reckless about killing someone but there were mitigating circumstances

war crime
action carried out during a time of war that violates accepted international rules of war

warning
a notice given to a young offender (usually for a first minor offence) that is recorded by police but with no conditions attached; the offender must be told of the nature, purpose and effect of the warning

warrant
a legal document issued by a magistrate or judge authorising an officer to perform a particular act, such as make an arrest, conduct a search, seize property or use a phone tap

warranty
a minor term of a contract whose breach entitles the aggrieved party to sue for damages, but not to end the contract

weights and measures laws
laws that govern weights and measures stated on the packaging of products (such as food and beverages) or as indicated on the trading premises (for example, at a petrol station) in order to protect consumers from being cheated or deceived

white-collar crime
a general term for various non-violent crimes associated with professionals or businesspeople, such as embezzlement, tax evasion or insider trading

workers' compensation
a compulsory insurance scheme paid into by employers to compensate, through financial payments, employees injured at work; claims do not require proof of fault

workplace surveillance
an employer's use of technology such as cameras, computers and tracking devices to monitor employees

world order
the activities and relationships between the world's states, and other significant non-state global actors, that occur within a legal, political and economic framework; an international set of arrangements for promoting stability and peace

wrongful dismissal
termination of employment that constitutes a breach of the employment contract, an award or a statute

youth justice conference
a measure under the *Young Offenders Act 1997* (NSW) to divert young offenders from the court system through a conference that addresses the offender's behaviour in a more holistic manner

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Index

ABC v Lenah Game Meats Pty Ltd [2001] HCA 63 196
abolitionism 156–8, 207, 211
Aboriginal and Torres Strait Islander people 89, 197, 336
Abu Ghraib 469–70
acceptable quality 245
acceptance of the offer 242
acquittal 62
actus reus 6–8
adjournment 111
adjudication (family dispute) 358
adoption 337, 345–8, 369, 372
adversary system 54
advertising 240, 250–5, 272–4
aerial herbicide spraying case *(Ecuador v Columbia)* 306
affray 20
African Union (AU) 186, 448
Age Discrimination Act 2004 (Cth) 196, 405, 407–8, 410–11
age of criminal responsibility 100–4
aggravating factors (sentencing decisions) 77–9
agreements and awards (workplace) 391–8
alternative dispute resolution (ADR) 254, 263
American Convention on Human Rights (1988) 166, 187
Anti-Discrimination Act 1977 (NSW) 196, 363, 407–8, 410, 451
appeals 48, 80–1
appellate jurisdiction 48
Apprehended Domestic Violence Order (ADVO) 353–5
arbitration (workplace) 387, 401
Arms Trade Treaty 452
arrests 32, 40–1, 104, 106–8
assault 10–13, 25, 34, 72, 79, 343, 352
Association of Southeast Asian Nations (ASEAN) 189, 449
Astley v Austrust (1999) 197 CLR 1 247
attempts, criminal 20–1
Australia, responses by
  to child soldiers issue 225–7
  in East Timor 463–7
  to global environmental protection 288–9, 296–7, 313–16, 318, 322–4
  to human rights issues 189, 192–8, 199–201
  to human trafficking issues 212–15
  to international crime 135–8
  to world order concerns 451–3
Australian Border Force 137–8
Australian Communications and Media Authority (ACMA) 274, 277
Australian Competition and Consumer Commission (ACCC) 260, 267, 269, 271–2
Australian Conservation Foundation v The Commonwealth (1980) 28 ALR 257 286
Australian Constitution
  criminal trials and courts in 53, 68
  environmental protection and 313–15, 322
  framework for industrial relations in 398
  human rights protected by 193–5
  marriage and divorce in 333, 338
  misleading or deceptive conduct in 251
  world order issues and 451
Australian Consumer Law (ACL) 248–55, 269
Australian Council of Trade Unions (ACTU) 404, 414–15, 421
Australian Crime Commission (ACC) 137
Australian Crime Commission v Louise Stoddart and Anor [2011] HCA 47 196
Australian Defence Force (ADP) 223, 226
Australian Direct Marketing Association (ADMA) 277
Australian Federal Police (AFP) 32, 136
Australian High Tech Crime Centre (AHTCC) 138
Australian Human Rights Commission (AHRC) 196–7, 340, 363, 405
Australian Industrial Relations Commission (AIRC) 387, 392, 418, 420
Australian Law Reform Commission (ALRC) 15, 75, 104, 106, 351
Australian Municipal, Administrative, Clerical and Services Union v Ansett Australia Ltd (2000) 175 ALR 173 406
Australian Securities and Investments Commission (ASIC) 248, 259–60, 269, 277
Australian Workplace Agreements (AWA) 392
autonomy of children 344–5
awards and agreements (workplace) 391–8

B v J (1996) 21 FamLR212 367
bail 32, 42–3, 112
Bail Act 2013 (NSW) 43, 112, 117, 120–1
bait advertising 251
barristers 56–7
al-Bashir, Omar 133
Better Off Overall Test (BOOT) 395
beyond reasonable doubt 5, 59–60
bilateral treaties 140, 443, 459
Bill of Rights 1789 (US)
biodiversity 295, 297, 323
Biodiversity Convention (1993) 303–4, 324
birth technologies, family law and 367–8, 371
Blackpool and Fylde Aero Club v Blackpool Borough Council, Court of Appeal [1990] 3 All ER 25 243
blended families 333, 337
bonds (sentencing penalties) 84, 111
Booth v Bosworth & Anor [2001] FCA 1453 287
Boughey v The Queen (1986) 161 CLR 10
Bradford Corporation v Pickles [1895] AC 587 285
Bradley v The Commonwealth (1973) 128 CLR 557 298–9
built environment 285–6
burden of proof 59–60
Bury v Pop, Cro. Eliz. 118 [78 Eng. Rep. 375] (1587) 285

C and M [2006] FamCA212 351
Cannabis Caution Scheme 82
Cartagena Protocol on Biosafety 304
cartel behaviour 260
casual employment 390
causation 8–9
cautions 41, 82, 106–7, 115, 116
caveat emptor 238
challenges for cause 66
charge (for a crime) 34, 42
charge negotiations 57–8
charter of rights for Australia 197, 199–201
Charter of the United Nations (1945) 444
  framework of 440
  on peace rights and enforcement 167–8, 442
  on self-determination 164–5
  signing of 432
  on state sovereignty 179, 184–5, 438–9
  on treaty registration 443–4
  on universal human rights 169–70
  UNSC in 461
  on use of force 455
  on war 432–4, 436
Child Protection (Offenders Registration) Act 2000 (NSW) 92, 340
child soldiers 208, 218–29
child support legislation 337
children
  autonomy of 344–5
  care and protection of 372–5
  divorce and 348–9
  human rights of 218–19
  legal rights of 339–41
  neglect of 342
  nuptial and ex-nuptial 336, 344–5, 365
  parental responsibility of 336, 339–45, 348–9, 365–7
  violence against 343, 354, 357
  violence by 354
Children (Criminal Proceedings) Act 1987 (NSW) 101–2, 104–6, 108–9, 111–13, 117–19, 340, 343, 354
children and crime 101–4, 354
  see also young offenders
Children and Young Persons (Care and Protection) Act 1998 (NSW) 340, 341, 342–3, 344, 354, 360, 372
Children Legislation Amendment (Wood Inquiry Recommendations) Act 2009 (NSW) 354
Children's Court 51, 109–11, 359–60
Children's Court Act 1987 (NSW) 51, 109–10, 340
circle sentencing 88–9
Civil and Administrative Tribunal Act 2013 (NSW)
civil law 5–6
civil war 434
coercion 253
Cold War 430, 433–5, 442, 458
collective right 164
Combination Acts (1799, 1899 and 1825) 385–6
Commercial Bank of Australia Ltd v Amadio (1983) 151 CLR 447 246
committal proceedings 50
common law 195–6
Commonwealth Attorney-General's Department 136
Commonwealth Consumer Affairs Advisory Council (CCAAC) 259
Commonwealth of Nations 186
Commonwealth v Tasmania (1983) 158 CLR 1 313
communal violence 435
Community Justice Centres Act 1983 (NSW) 264
community service orders (sentencing penalties) 84–5, 111
Competition and Consumer Act 2010 (Cth) 238, 248, 250, 257–8, 263–4, 267, 269, 271, 273, 277
Competition and Consumer Policy Division of the Commonwealth Department of the Treasury 259
conciliation (dispute resolution) 263–4, 387, 401
conclusive presumption 101
conditions (contract) 244
conduct of hostilities 467–71
consent as defence 63
conspiracy, criminal 20–1
Constitution Act 1902 (NSW) 398
Constitution of the United States of America 1787 (US) 156, 161
constitutional corporations 393

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constructive manslaughter 11
Consumer Affairs Forum (CAF) 260
consumer law 238–40, 247–55, 265–77
consumer(s) 267
advertising and marketing to 250–5
awareness and self-help used by 257
contemporary issues facing 264–77
contracts 248–9
credit issues 264–7
definition 238–9
government organisations' support of 258–60
industry organisations for 260–1
legal avenues for 265, 267, 272–3, 275–7
legal protection for 238, 247–55, 265–77
marketing innovations and 272–4
media and 262
NGO support for 262
non-legal avenues for 266–7, 271, 274, 277
product safety and 267–72
redress and remedies for 240, 247–8, 257–64
technology and 275–7
tribunals and courts for 261–3
continued detention 91–2
contract(s) 240
case examples 243, 246
consumer 248–9
elements of 241–4
of employment 388–91
relief for unjust 247–8
of service 388
for services 388
terms of 244–5, 390
types of 240–1
unconscionable 245–7
Contracts Review Act 1980 (NSW) 247, 263–4
control orders 111–12
Convention on Wetlands of International Importance (1971) (Ramsar Convention) 303
conventional war 432–3
Conveyancing Act 1919 (NSW) 244, 254
conviction or no conviction recorded 82, 111
cooling-off period 253–4
Copenhagen Conference (2009) 320
Copyright Act 1968 (Cth) 4–5
Coroner's Court 49–50
corporate compliance programs 261
corporate compliance programs, customer-focused 261
correctional centres 85, 90–1
Council of Europe 446
court attendance notice 42
Court of Criminal Appeal 52, 53
courts
consumer-focused 262, 263
family law and 333, 350, 358–60
federal 53–4, 359, 402–3
global environmental protection and the 305–7
hierarchy 48–9
High Court 53–4, 197–8
human rights and 187–9, 196–8
hybrid 138–9
intermediate 48, 51–2
international humanitarian law and 469
lower 48–51
state and territory 48–9
superior 48–9, 52–3
workplace law and 402–3, 410–11
world order and 444–5
credit and consumers 264–7
Credit Law Toolkit 266
crime(s)
categories of *see* offences
causation and 8
criminal law and 5–6
definition 4
elements 6–7
against humanity 128–9, 131–3, 435
international 126–43
investigating 34–40
nature of 4–5
parties to 22–3
preliminary 9, 20–1
prevention 26–8
against property 15, 34
reporting 33–4
transnational 126, 132–8, 140–3
war 128–9, 132–3
white-collar 15–17
Crimes Act 1900 (NSW) 11–12, 14–16, 19–21, 72, 83, 343
Crimes Act 1914 (Cth) 4, 14, 75
Crimes (Sentencing Procedure) Act 1999 (NSW) 72–4, 76–7, 79, 82–3, 85
Crimes (Domestic and Personal Violence) Act 2007 (NSW) 351–2, 354
Crimes (Sentencing Legislation) Amendment (Intensive Correction Orders) Act 2010 (NSW) 87
Criminal Assets Recovery Act 1990 (NSW) 83
criminal behaviour, factors affecting 23–5
Criminal Code Act 1995 (Cth) 14, 127, 135, 137, 212–13, 226
Criminal Code Amendment (Trafficking in Persons Offences) Act 2005 (Cth) 212
criminal courts 59–60
burden and standard of proof 59–60
defence to criminal charges 61–5
international *see* International Criminal Court (ICC)
juries, role and responsibilities of 65–8
jurisdiction of 48–54
legal personnel in 55–7, 109
legal representation and legal aid NSW 58–9
pleas and charge negotiations 57–8
role of juries
use of evidence 60–1
see also courts
criminal defences 61–5
criminal infringement notices (sentencing penalties) 82
criminal justice system, effectiveness of 117–19
criminal law 5–6, 32
criminal negligence 7
criminal responsibility, age of 100–4
criminology 23
Croome v Tasmania (1997) 191 CLR 119 190, 197
Crown, the 5
Customs Act 1901 (Cth) 18
cyber warfare 433

damages 244
dangerous driving causing death 11
Darby v Director of Public Prosecutions [2004] 38
de facto relationships 333, 338–9, 350, 355, 361–3, 420
debt bondage 207–8
debt slavery 155
decisions 77–8
declaration, definition 308
Declaration of Independence (US) 156, 164
Declaration of the Rights of the Child (1959) 218
Declaration on the Right of Peoples to Peace (1984) 167–8
Declaration on the Rights of Indigenous Peoples (2007) 165
decree absolute 348
decree nisi 348
Defence Act 1903 (Cth) 225
defences, criminal 61–5
delegated legislation 193
deportation 92–3
detention, criminal 41–4, 85–7, 91–2, 107
deterrent, criminal sentencing as 73–5
development, impact of 290–2
Di Mento v Visalli (1973) 1 ALR 352 335
dictatorial regimes 435
Dietrich v The Queen (1992) 177 CLR 292 58
diminished responsibility 63, 65
diplomatic pressure 454, 465
Director of Consumer Affairs of Victoria v AAPT Ltd (Civil Claims) [2006] VCAT 1493 249
Disability Discrimination Act 1992 (Cth) 196, 405, 407–8
discipline of children 343
discrimination, workforce 407–11
dismissals
from a job 416–19
for young offenders 111
dispute resolutions 260–1, 349, 357–8, 400–3, 454–6
District Court Act 1973 (NSW) 51
District Court of NSW 49, 51–2
diversionary programs 88
division of powers 193–4
divorce 348–51
DNA evidence and sampling 35–7, 107–8
doli incapax 100–3
domestic violence 10, 13, 34, 343, 349, 351–7, 366, 372–5
DPP v Newbury and Jones [1977] AC 500 11
driving offences 8–9, 11, 19
drug courts 88
drug offences 9, 18–19, 88
dualist system 193
Durban Climate Change Conference (2011) 320
duress
contracts and 244, 393, 395
as defence 63
duty of care 412–14
Dyilo, Thomas Lubanga 144–5

East Timor 452, 463–7
ecological footprint 292, 319–20
ecologically sustainable development (ESD) 294–7
economic factors (criminal behaviour) 23
economic offences 9, 15–18
education, universal 162–3, 343
Education Act 1900 (NSW) 343
embezzlement 16
employees 391, 400
employers 390–1, 400, 405, 413–14
Employers Liability Act 1880 (NSW) 413
employment
definition of 384
termination of 416–19
enterprise agreements and bargaining 393, 395–400
enumerated powers 313
environment
court cases 307
definitions 285–6
disasters 291, 317
protection *see* global environmental protection
rights 166–7
Environment Protection and Biodiversity Conservation Act 1999 (Cth) 286, 289, 296, 314, 318, 323
Environmental Planning and Assessment Act 1979 (NSW) 286, 288, 314, 316
envirostunt 312
EPA v Gardner (1997) NSWLEC 169 53, 316, 323
equal employment opportunity legislation 408–10
equal pay 408–9
ethnic cleansing 455
European Court of Human Rights (ECtHR) 188–9, 446

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European Economic Community (EEC) 447
European Union (EU) 311, 446–8
evidence 32, 34–8, 60–1
Evidence Act 1995 (NSW) 35, 60, 339
ex aequo et bono 305
Ex Parte H.V. McKay (1907) 2 CAR 1 (Harvester Case) 392
exclusion clauses 245
ex-nuptial (children) 336, 344–5, 365
express rights 194–5
express terms (contract) 244–5, 390
extended families 333
external affairs power 194
external costs (externalities) 285
Extradition Act 1988 (Cth) 140–1
extradition treaties 139–41

Factories and Shops Act 1921 (NSW) 413
Fair Entitlements Guarantee Act 2012 (Cth) 418
Fair Trading Act 1987 (NSW) 247, 249–51, 263–4, 267, 269, 273
Fair Work Act 2009 (Cth)
  on AHRC powers 405
  creation of 392
  on discrimination 407–8, 410
  on dispute resolution procedures 400401
  on employment termination 417, 418–19
  on enterprise agreements 393, 395–8
  on FWO function 404
  on industrial relations 399
  main features 387, 396
  National Employment Standards in 396
  on parental leave 420
  on small claims matters 403
Fair Work Australia (FWA) *see* Fair Work Commission (FWC)
Fair Work Commission (FWC) 387, 399–401, 403, 405
Fair Work Ombudsman (FWO) 387, 399, 401–2, 404, 411, 418
Family and Community Services (FaCS) 342
family law
  adoption and 337, 345–8
  alternative family relationships in 333, 336–9
  birth technologies and surrogacy in 367–71
  concept of 333
  contemporary issues 361–75
  courts and 333, 350, 358–60
  dispute resolutions and 357–8
  divorce and 348–51
  legal responses to domestic violence 351–7
  legal rights (parents and children) 339–45
  marriage and 333–6, 339
  media, role of 361
  NGOs support role in 360–1
  parental responsibility and 336, 339–45, 348–9, 365–7
Family Law Act 1975 (Cth) 333
  amendments to 341–2, 349, 356, 365–6, 372
  on blended families 337
  on de facto and same-sex relationships 338, 362
  on dispute resolutions 357
  on divorce 348–51
  on Family Court jurisdiction 359, 362
  on parental responsibility 341, 365–7
  on polygamous marriages 339
  on the protection of children 336, 372
  on the rights of children 339
  on surrogacy 368–9
Family Provision Act 1982 (NSW) 345
Family Provisions Test Case [2005] AIRC 692 420–1
family violence *see* domestic violence
federal courts 53–4, 359, 402–3
fiduciary duties 256
fines (sentencing penalties) 83, 111
fingerprints (young people) 107–8
fit for purpose 245
force, threat of (for dispute resolution) 455–6
forced labour 207–8
forced marriage 208
forensic procedures 37, 107–8
forfeiture of assets 83–4
fossil fuels 321
Four Freedoms 169
framework treaties 302
fraud 17–18
free trade 290
freedom of contract 385–6

gender pay gap 409, 410
general deterrence 74–5
genetic theories (criminal behaviour) 23, 25
Geneva Conventions 135, 140, 222–3, 444, 452, 467–70
genocide 127–8, 130–1, 133, 435, 469
Giller v Procopets [2008] VSCA 236 196
global cooperation 293, 324–5, 430–1, 463–7
global environmental protection 289
  Australia's responses to 288–9, 296–7, 313–16, 318, 322–4
  barriers to 324–5
  concept and scope of 285
  conferences and treaties for 289–90, 308–11
  contemporary issues facing 316–25
  courts and tribunals for 305–7
  demand for resources and 319–22
  development of 288–90
  ESD and 294–7
  IGOs and 311
  impact of consumption and development on 290–2
  interdependence and cooperation for 293, 324–5
  international instruments for 300, 302–5
  international law's role in 316–19
  local activism and domestic legislation for 288–9
  media and 313
  nature of 285–8
  need for 290–4
  NGOs and 300, 310–12, 315, 319, 322
  state sovereignty's impact on 297–9
  UN's role in 299–302, 324–5
globalisation 290, 430
gratuitous violence 77–8
grave adult behaviour 113
greenfields agreement 397
greenhouse gas emissions 321
Guantanamo Bay (military base) 469–70
guerrilla war 434
guideline judgments 73
guilds 384–5

Hague Conventions 467, 469
hard law 170, 302, 304
heads of power 194
hegemony, securing of 436
hierarchy, court 48–9
High Court of Australia 49, 53–4, 197–8
Hollis v Vabu Pty Ltd (2001) 207 CLR 21 389
home detention 86–7
homicide 9–11
human rights
  abolition of slavery 156–8, 207, 211
  Australia's response to 189, 192–8, 199–201
  of children 218–19
  courts, tribunals and authorities 187–9, 196
  definition 154–5
  developing recognition of 154
  environmental rights and 166–7
  formal statements on 169–73
  IGOs and 186–7
  labour rights and 158–60
  legislation on 196
  media and 191–2, 198
  NGOs and 168, 170, 190–1, 198, 215–16, 227
  peace rights as 167–8
  self-determination and 164–5
  state sovereignty and 126, 180–1
  trade unionism and 158–60
  treaties 189, 194
  UN and 182–5, 187–8, 189, 438
  universal education as 162–3
  universal suffrage as 160–1
human shield 219
human trafficking 137, 158, 208–16
humanitarian impact movement 461
humanitarian intervention 438–9, 456
  see also Responsibility to Protect (R2P)
hybrid courts 138–9
Hyde v Hyde and Woodmansee (1866) LR 1 P&D 130 333

implied rights 194–5
implied terms (contract) 244–5, 390
imprisonment 85–6, 90–3
in situ 34
inadmissible evidence 34, 38, 60
inalienable rights 154
incapacitation 76–7
incorporation 193
Independent Commission Against Corruption (ICAC) 138
independent contractors 384, 388–9
indictable offences 22–3
individual agreements (workplace) 393, 395
industrial actions 386, 399–400
Industrial Arbitration (Amendment) Act 1932 (NSW) 387
industrial awards 391–3
Industrial Court of NSW 403
Industrial Relations Act 1996 (NSW) 397, 400, 407
industrial relations in Australia 386–8, 398–400
Industrial Revolution 158–9, 385
industry organisations 260–1
industry-based ombudsman 261
infanticide 11
injunctions 263, 353
injury management (workplace) 413
inquisitorial system 54
insider trading 16–17
intensive correction order (ICO) 87
intention (criminal) 6–7
interdependence, global 293, 324–5, 430–1, 463–7
INTERFET (International Force for East Timor) 464–5
intergenerational equity 295, 297
Intergovernmental Agreement on the Environment (IGAE) 315
intergovernmental organisations (IGOs) 186–7, 311, 446–8
Intergovernmental Panel on Climate Change (IPCC) 300–1
intermediate courts 48–9, 51–2
International Bill of Rights 171–2, 181, 189
International Campaign to Abolish Nuclear Weapons (ICAN) 461
International Coalition for Responsibility to Protect (ICRtoP) 457
International Committee of the Red Cross (ICRC) 191, 448, 450, 467–71
international community, crimes against the 126–43
International Covenant on Civil and Political Rights (ICCPR) 171–2, 179, 181, 189–90

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International Covenant on Economic, Social and Cultural Rights (ICESCR) 160, 164, 171–2, 179, 181
international crime 126–8, 132–45
International Criminal Court (ICC)
  environmental rights in 166–7
  foundation of 128, 139, 469
  human rights violations and 188
  jurisdiction of 128–9, 188, 445
  peace rights and 168
  response to international crimes by 143–6, 188
  world order and 445
International Criminal Court Act 2002 (Cth) 135, 193
International Criminal Court (Consequential Amendments) Act 2002 (Cth) 135, 193
International Criminal Police Organization (INTERPOL) 140–2
International Crisis Group (ICG) 450, 466
international customary law 170
international humanitarian law 191, 467–71
International Labour Organization (ILO) 159–60, 207, 214, 405, 407, 421–2
International Monetary Fund (IMF) 186
International Tribunal for the Law of the Sea 446
Internet, work use of 405–6
INTERPOL (International Criminal Police Organization) 140–2, 186
interrogation, suspect 32, 41, 104–6
interview friend 106, 108
intragenerational equity 295, 297
investigating crime, process of 32–40
invitations to treat 242
involuntary manslaughter 11
Iran 460
Iraq 460

James Hardie (Civil Penalty Compensation Release) Act 2005 (NSW) 415
Johannesburg Summit (2002) 309
Joint Investigation Response Team (JIRT) 342
journeymen 385
Jovicic, Robert 93
judges 55
judicial discretion and guidelines 72–4
Judiciary Act 1903 (Cth) 48, 53
juries/jurors 65–8
Jury Act 1977 (NSW) 65–6, 68
jus cogens 444
juvenile justice 98, 100
  see also young offenders
Juvenile Justice Centres 111–12

Kable v DPP (1996) 189 CLR 51 91–2
Kony, Joseph 229
Kyoto Protocol (1997) 166, 302, 304, 308, 320, 324

labour rights 158–60
laissez-faire economy 238, 385–6
Land and Environment Court 53
Lange v Australian Broadcasting Corporation (1997) 189 CLR 520 195, 197
larceny 15
Law Enforcement (Powers and Responsibilities) Act 2002 (NSW) 32, 37–8, 40–1, 104, 106, 108
League of Nations 157, 159–60, 164, 167, 432, 442, 451
Leatch v National Parks and Wildlife Services (1993) 81 LEGRA 270 297
leave (workplace) 419–22
legal aid, definition 57
Legal Aid NSW 58–9, 259, 359
legal personnel in a criminal trial 55–7, 109
legal representation 58–9
licensing, occupational 255–6
Limited Nuclear Test Ban Treaty (1963) 433
litigation 262
Local Court of NSW 49–50
locus standi 286
lower courts 48–51

Mabo v Queensland (No.2) (1992) 175 CLR 1 197
magistrates 50, 55–6, 109
Magna Carta (1215) 154, 173
mandatory sentencing 73–4
manslaughter 10–11
marketing 240, 250–5, 272–4
marriage 208, 333–6, 339, 361–4
Marriage Act 1961 (Cth) 333–6, 339, 361, 364, 368
Marriage Amendment Act 2004 (Cth) 334, 362
mass atrocity crimes 430–1, 435, 457
maximum penalty 72–3
McCartney v R [2009] NSWCCA 244 79
media
  consumers and 262
  East Timor in 465
  family law and 361
  global environmental protection and 313
  human rights and 191–2, 198
  workplace law and 405–6
  world order and 453–4
mediation (dispute resolution) 263–4, 401
medical treatment, consent for 344
mens rea 6, 8–9
Migration Act 1958 (Cth) 92–3
militia 452
minimum wage 394–5
Minors (Property and Contracts) Act 1970 (NSW) 263–4, 344
mitigating circumstances 11
mitigating factors (sentencing decisions) 78–9
M'Naghten test 61
monist system 193
monopoly 260
Montreal Protocol (1989) 303–4, 317–18, 324
Motor Dealers and Repairers Act 2013 (NSW) 254, 256
multilateral treaties 289, 302, 443, 459
multilateralism 431–2, 455–6
murder 10, 63–5, 72, 133
Murphyores v The Commonwealth (1976) 136 CLR 1 314

Nairobi Conference (1982) 309
nation, definition of 179
National Consumer Credit Protection Act 2009 (Cth) 247, 265
National Credit Code 265–7
National Employment Standards (NESs) 396, 420
National Environment Protection Council Act 1994 (Cth) (NEPC Act) 315
National Security Legislation Amendment Act 2010 (Cth) 15
natural environment 285–6
natural law 154
neglect of children 342
negligence (in consumer law) 249
non-government organisations (NGOs) 190
  consumer redress and 262
  family support by 360–1
  global environmental protection and 300, 310–12, 315, 319, 322
  human rights abuses and 168, 170, 190–1, 198, 215–16, 227
  workplace law and 405, 409, 419
  world order and 448–50, 457, 462, 466, 469
non-parole period 85
Non-Proliferation Treaty (NPT) *see Nuclear Non-Proliferation Treaty* (1968)
North Atlantic Treaty Organization (NATO) 186, 446, 448, 456
North Korea (Democratic People's Republic of Korea) 460
NSW Civil and Administrative Tribunal (NCAT) 261
NSW Domestic Violence Intervention Court Model 356
NSW Fair Trading 258, 267, 271–2
NSW Industrial Relations Commission (IRC) 388, 392, 399, 402–3
NSW Ombudsman 33, 258–9
nuclear disarmament and non-proliferation 459–62
nuclear energy and uranium 321
Nuclear Non-Proliferation Treaty (1968) 321, 433, 444, 459–60, 470
nuclear threat/weapons 433, 458–62, 470–1
nuptial (children) 336, 365
Nuremberg Trials 131, 138, 469

observer status 312
Occupational Health and Safety Act 2000 (NSW) 413–14
occupations, regulation of 255–7
offences
  computer 4, 15–16
  driving 8–9, 11, 19
  drug 9, 18–19, 25, 88
  economic 9, 15–18
  elements applicable to 6
  examples 9
  against the person 9–13
  preliminary 9, 20–1
  public order 9, 19–20, 25
  regulatory 9, 21
  sexual 12–13, 25, 34, 72, 79, 92
  against the sovereign 14–15, 25
  strict liability 7–8, 21
  summary and indictable 22–3
offer (contract) 240–2
oral contracts 241
Organisation for Economic Cooperation and Development (OECD) 311
Organization of American States 187
original jurisdiction 48
outworker 404
ozone layer destruction 317–18
Ozone Protection and Synthetic Greenhouse Gas Management Act 1989 (Cth) 324

Pacific Transnational Crime Network (PTCN) 142–3
parentage orders 369–70
parental care 340
parental neglect 342
parental responsibility and family law 336, 339–45, 348–9, 365–7
Paris Agreement 166
Paris Climate Conference (2015) 310–11, 320
Paris Peace Conference (1919) 167, 469
parole 85, 90–1
parties to a crime 22–3
pathological factors (criminal behaviour) 23
peace
  enforcement 442–3
  rights 167–8
peacekeeping 136, 434, 439, 442–3, 452
peak body for unions 404
penalty units 83
people smuggling 208
peremptory challenges 66
Permanent Five (UN) 438, 441–2
photos (young people) 107–8
pleas 57
police powers 32–3, 35, 37–8, 40
police prosecutors 56
political factors (criminal behaviour) 23, 25
political negotiation 454

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pollution 288
polygamous marriage 334, 339
positivism 154
precautionary principle 295–7
press-ganging 219
preventive detention 42, 91–2
price-fixing 260
prisons *see* correctional centres
probation 84, 111
procedural fairness 257
proceeds of crime legislation 83
product
  certification 268–9, 271
  safety and information standards 267–8
  warranties 263
property 15, 34, 350
Property (Relationships) Act 1984 (NSW) 338, 362
prosecution (criminal) 5
Prosecutor v Thomas Lubanga Dyilo ICC-01/04-01/06 224–5
prosecutors 56
protective custody 90
Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children (2000) 208, 211–12
protocols 304–5
provocation 11, 63, 65
psychological factors (criminal behavior) 23–4
public defenders 57
public prosecutors 56
punishments, sentencing 72, 74–7, 82–8, 111–13
  see also sentencing
pyramid selling 253

questioning of young people 104–5

R v AEM (Snr); R v KEM; R v MM [2002] NSWCCA 58 13, 76, 81
R v Camplin [1978] AC 705 63
R v Cortez, CE, ME, IKEA & LT (unreported, NSWSC, Dowd J, 3 October 2002) 106
R v GDP (1991) 53 A Crim R 112 114
R v Kirby; Ex parte Boilermakers Society of Australia (1956) 94 CLR 254 387
R v Knowles; ex parte Somersett (1772) 20 State Tr 1 156
R v LMW [1999] NSWSC 1343 102–3
R v Pham & Ly (1991) 55 A Crim R 128 113–14
R v Tang (2008) 237 CLR 1 213
R v Thomas Sam; R v Manju Sam (No. 18) [2009] NSWSC 1003 7
R v Wei Tang (2009) 233 FLR 399 213
R v Whybrow (1951) 35 CAR 141 21
R v Williamson [1972] 2 NSWLR 281 63
R v Zecevic (1987) 162 CLR 645 62–3
Racial Discrimination Act 1975 (Cth) 196, 405, 407–8, 451
Ramsar Convention (1971) 324
ratification (of treaties) 171–2, 193, 289–90
Re Michael: Surrogacy Arrangements [2009] FamCA 691 369
Reardon v Morley Ford Pty Ltd (1980) 49 FLR 401 251
reasonable force 32–3, 37, 40–1
rebuttal presumption 101
recidivism 75–6, 86, 89, 117–19
recklessness 6–7
redress, consumer 257–64
redundancy packages 418
referral of powers (legislative) 333
referral selling 253
regulation of professions 255–7
rehabilitation 76
release 42
relinquishing parents (adoption) 346
remand 44, 85, 112
remedies, consumer 240, 247–8, 257–64
remorse (as mitigating factor) 78
remuneration (workplace) 406–8
reoffending *see* recidivism
reporting crime 33–4
rescinding (of a contract) 245–6
residual powers 194, 313
resignation 416
resolutions 182–3
resources
  access to, as source of conflict 436–7
  global environmental protection and 319–22
Responsibility to Protect (R2P) 184–5, 456–8
restorative justice 88–9
retirement 416
retrenchment 418, 419
retribution 75–6
Rich v Price Waterhouse Coopers 2014 410
right to peace 167–8
right to silence 105–7
Rio Declaration (1992) (Earth Summit) 166, 294–5, 303, 309
Rio+20 Earth Summit (2012) 309–10
riots 20
robbery 15
Rome Statute of the International Criminal Court (1998) 444
  Australia's involvement with 135, 193, 452
  on child soldiers 222
  on crimes against humanity 131–2
  definition 129
  on environmental rights 167
  on extradition 140
  on genocide 130
  on ICC jurisdiction 128, 144–5
  peace rights and 168
  ratification of 445
  on war crimes 132
Russell v Trustees of the Roman Catholic Church [2007] NSWSC 104 391

Safe Work Australia 405, 411, 415
safety, workplace 411–16
Sale of Goods Act 1932 (NSW) 247, 263
same-sex relationships 334, 338–9, 355, 361–4, 371, 420
search and seizure 33, 37–8, 40
searches of young people 105–6, 108
security classification 90
sedition 14–15
self-determination 164–5
self-interest (criminal behavior) 23, 25
sentencing
  alternative methods of 88–9
  appeals 80–1
  considerations for young offenders 111–14
  decisions 74–80
  guidelines 72–4
  mandatory 73–4
  post-sentencing considerations 90–3
  punishments 72, 74–7, 82–8, 111–13
  types of penalties from 41, 82–93, 111
separation of powers 193–4
Sex and Age Discrimination Legislation Amendment Act 2011 (Cth) 410
Sex Discrimination Act 1984 (Cth) 196, 361, 405, 407–8, 410–11
sexism 408
sexual offenders registration 92
sexual slavery 207–8, 212–13
single-parent families 336–7
situational crime prevention 26–7
Slave Trade Act 1807 (Great Britain) 156
slavery 155–8, 207–9, 211–16
social crime prevention 27–8
social factors (criminal behavior) 23–5
soft law 170, 302
solicitors 56
specific deterrence 74–5
standard of proof 5, 59–60
standards, product safety and information 267–8
state, definition of 4, 179, 297
state courts 48–9
state sovereignty
  human rights and 179–81, 184–5, 456–7
  in response to global environmental protection 298–9, 317–19, 324–5
  world order and 431–2, 437–8
statehood 179–80
states, UN member 180–1, 440–2
Status of Children Act 1996 (NSW) 336, 340, 344, 367–9
statute law 196
statutory guidelines 72–4
statutory protection 248–50
Stockholm Declaration (1972) 166, 308–9
Student Assistance Act 1973 (Cth) 254
subpoena 42
Succession Act 2006 (NSW) 337, 338, 345
suffrage/suffragettes 160–1
Summary Offences Act 1988 (NSW) 18–19, 22, 105
summons 42
superior courts 48–9, 52–3
supranational organisation 447
Supreme Court of NSW 49, 51–2
surety 43
surrogacy, family law and 368–71
suspended control orders 111
suspended sentences 84

Tasmania v Commonwealth (1983) 158 CLR 1 315
tax evasion 16
technology
  birth 367–8, 371
  consumers and 275–7
  law-enforcement 35–7
Telecommunications Act 1997 (Cth) 276–7
termination of employment 416–19
territory courts 48–9
terrorism 25, 92, 435, 469–70
Terrorism (Police Powers) Act 2002 (NSW) 92
testator 344
Toonan v Australia, CCPR/C/50/D/488/1992, UN Human Rights Committee (HRC), 4 April 1994 189–90
torture, use of 469–70
Trade Practices Act 1974 (Cth) 248, 250–1, 260
trade unions 159, 385–7, 404
Trade Unions Act 1871 (UK) 159, 386
trafficking, drug 9, 18–19
trafficking, human 137, 158, 208–16
Trafficking in Persons Report (TIP Report) 211, 215–16
Trafficking Victims Protection Act of 2000 (US) 215
Trail Smelter Case (United States v Canada) 3 RIAA 1905 (1941) 305
transnational crimes 126, 132–8, 140–3
treason 14
treaties
  bilateral 140, 443, 459
  definition 443
  into domestic law 289–90, 451
  extradition 139–41
  framework 302
  global interdependence and 431
  human rights 189, 194, 222–3
  for international humanitarian law 467–9
  multilateral 289, 302, 443, 459
  nuclear threat addressed by 458–9
  ratification of 171–2, 193, 289–90
  UN registration requirements for 443–4
Treaty of Rome (1967) 447
Treaty on European Union (Maastricht Treaty) (1992) 447
TRIAL (Track Impunity Always) 139

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tribunals
ad hoc 305
consumer-focused 261–2
for global environmental protection 305
for human rights 188, 196
for international crimes 130–1, 138–9, 143–4, 188
for workplace law 402, 410–11
for world order 445–6, 469
Trusteeship Council 181–2, 440

UN Climate Change Conference (2015) 166
UN Conference on Environment and Development (UNCED) 309
UN Conference on the Human Environment 289
UN Convention against Transnational Organized Crime 142, 208
UN Convention on Biological Diversity (1993) 294–5
UN Convention on International Trade in Endangered Species of Wild Fauna and Flora (1975) (CITES) 303, 318–19, 319, 323, 324
UN Convention on the Law of the Sea (1982) (UNCLOS) 289, 446
UN Convention on the Prevention and Punishment of the Crime of Genocide (1948) 435, 444
UN Convention on the Rights of the Child (1989) (CROC) 101, 104, 107–8, 111, 222, 340–1, 343, 354, 452
UN Convention Relating to the Status of Refugees (1951) 292, 444
UN Framework Convention on Climate Change (1994) 294, 302, 304, 308–9, 320, 324–5
unanimous verdicts 68
unconscionable conduct 245–7, 251
unfair dismissal 416–17
unilateralism 456
Unions NSW 404
United Nations
Australia and 184, 451–2
charter *see Charter of the United Nations (1945)*
Children's Fund (UNICEF) 227
Commission on Human Rights 170–1
Development Programme (UNDP) 300
East Timor and 463–7
Economic and Social Council (ECOSOC) 182–3
Educational, Scientific and Cultural Organization (UNESCO) 297, 301–2
Environment Programme (UNEP) 297, 300, 308–9
Food and Agriculture Organization (FAO) 300
formation of 167, 432, 439
General Assembly (UNGA) 170, 182, 300
global environmental protection and 299–302, 324–5
human rights and 182–5, 187–8, 189, 438
Human Rights Committee (HRC) 189–90
Human Rights Council (UNHRC) 182–4
International Court of Justice (ICJ) 182–3, 187–8, 305–7, 444–5, 470–1
International Maritime Organization (IMO) 300
Intervention and the Responsibility to Protect (R2P) 184–5, 456–8
member states 180–1, 440–2
Millennium Development Goals 163, 184, 186
Mission in East Timor (UNAMET) 464
Mission of Support in East Timor (UNMISET) 464
Office of the UN High Commissioner for Human Rights (OHCHR) 182–3
organs of the 181–4, 187–8, 299, 440
peacekeeping 434, 439, 442–3, 452
postwar record 439–40
role of 181–2
Secretariat 182
Security Council (UNSC) 182–3, 184–5, 223, 434, 441–2, 455–6, 460–1
structure 440
Sustainable Development Goals (SDGs) 184, 186
Transitional Administration in East Timor (UNTAET) 464–5
world order and 436, 438–43
United States 215, 225, 364, 436, 469–70
United States v Libellants and Claimants of the Schooner Amistad 40 U.S. (15 Pet.) 518 1841 157
Universal Declaration of Human Rights (UDHR) 444
on the abolition of slavery 155, 157, 207
on child vulnerability 218
creation of 169–71
influence of 188
on labour and trade union rights 158, 160
on the media 192
on self-determination 164–5
on sexuality-based discrimination 190
on universal education 162–3
on universal suffrage 160–1
universal education 162–3, 343
universal jurisdiction 127
universal suffrage 160–1
unlawful termination 417
unsolicited and unordered goods 253
uranium and nuclear energy 321

Vasiljkovic, Dragan 140–1
verdicts 66, 68
vicarious liability 389
victim (role in sentencing process) 78–9
victim impact statement 77, 79–80
Victims Rights and Support Act 2013 (NSW) 79
Vienna Convention for the Protection of the Ozone Layer (1985) 303–4, 317
violence, domestic *see* domestic violence
voluntary manslaughter 11

Wallace v Kam [2013] HCA 19 8
war
causes of 436–7
crimes 128–9, 132–3, 145, 220, 435
international humanitarian law and 467–71
types of 432–5
UN Charter on 432–4, 436
War crimes Act 1945 (Cth) 135
warnings 115
warranties 244, 263
warrants 38–40
Water Act 2007 (Cth) 316
weights and measures law 240
white-collar crime 15–17
wildlife smuggling 323
witnesses 60–1
Wood v R [2012] NSWCCA 21 61
Work and Development Order (WDO) 83
Work Health and Safety Act 2011 (Cth) 413–15
WorkCover NSW 413–14
Workers Compensation Act 1987 (NSW) 413
workplace bargaining 393, 399–400
Workplace Gender Equality Act 2012 (Cth) 407–8
workplace law
awards and agreements 391–8
changing nature of 384–8
contemporary issues 407–22
contracts 388–91
courts and tribunals 402–3, 410–11
discrimination 407–11
dispute resolution 400–3
early 384–5
employer associations 405
government organisations 403–4
industrial relations 386–8, 398–400
Industrial Revolution and 385
laissez-faire capitalism and 385–6
leave 419–22
media and 405–6
in the Middle Ages 384
negotiations between employer and employee 385–6
NGOs and 405, 409, 419
regulations within 398–404, 416
remuneration 406–7
safety 411–16
statutory framework 396–8
termination of employment 416–19
trade unions and 159, 385–7, 404
Workplace Relations Act 1996 (Cth) 392–3, 402
workplace surveillance 398
world order 430
Australia federal government 451–3
conflict within, reasons for 436–7
contemporary issues 456–71
courts and tribunals 444–6, 469
development of 431–2
dispute resolutions and 454–6
IGOs and 446–8
interdependence and cooperation in 430–1, 463–7
international humanitarian law 467–71
international instruments 443–4
jus cogens 444
media and 453–4
nature of 430
need for 430–1
NGOs and 448–50, 457, 462, 466, 469
nuclear threat and 458–62
R2P 184–5, 456–8
responses to 437–9
state sovereignty and 431–2, 437–9
treaties contributing to 431, 443–4, 458–9, 467–9
UN and 436, 438–43
wars and 432–5
World War I 432, 444, 451
World War II 432
written and oral contracts 240–1
wrongful dismissal 416

young offenders
age of criminal responsibility 100–4
alternatives to court 82, 114–17, 354–5, 360
criminal justice system's effectiveness with 117–19
criminal proceedings for 109–11
legal approaches to 98, 100
penalties for 111–12
reoffending of 117–19
rights when questioned and arrested 104–8
sentencing considerations for 112–14
statistics on 98–9, 109–10, 112, 116
Young Offenders Act 1997 (NSW) 82, 108, 111, 114–19, 340, 354–5, 360
youth justice conferences 111, 115–16, 118

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Additional resources

Chapter 7
The nature and development of human rights

7.10 Early development of domestic and international documents and treaties

Domestic documents and treaties

Magna Carta (1215) (UK)

The *Magna Carta* is a document that certain rebellious nobles forced King John of England to sign in 1215, limiting the king's power in a number of ways. The king promised that there would be no interference from the king in the running of the Church, that no new taxes would be imposed without agreement, that no free man would be imprisoned without a trial, that all free men could travel anywhere they wished, and that towns would keep all the privileges that they had built up over the years. 2015 was the 800th anniversary of the *Magna Carta*.

Habeas Corpus Act 1679 (UK)

The *Habeas Corpus Act* declared that the lawfulness of detention must be tested quickly by the courts. This means that people could not be held indefinitely without being charged or facing trial.

English *Bill of Rights* (1688) (UK)

The English *Bill of Rights* was part of the agreement for reinstating the monarchy in England after the popular overthrow and expulsion (from England) of King James II in 1688. In his place, William of Orange and his wife, Mary, were invited to take the throne of England on the condition that William agree to a bill of rights. This was to prevent a return to the anti-parliament policies of James II and two earlier kings: Charles I and Charles II. The English *Bill of Rights* forbade the king from raising an army or levying taxes without the consent of parliament. It also guaranteed freedom of speech for those who spoke in parliament and ensured that no one would be imprisoned without trial. This represented an important transfer of power from the monarchy to parliament.

United States *Declaration of Independence* (1776)

The US *Declaration of Independence* was really a declaration of war against the repressive British Government. The most important statement in the declaration, which was primarily written by political philosopher Thomas Jefferson, was that 'all men are created equal'. The foundation of this declaration is the concept that rights are seen to exist because we all think and feel them. In other words, all citizens are entitled to basic rights and freedoms. Furthermore, they should be entitled to fight in order to preserve these rights. In short, the *Declaration of Independence* stipulated that we do not have to be told that we have the right to freedom – instead, we believe it instinctively.

United States Constitution (1787)

After winning the War of Independence (1776–83) against Britain, a constitution was written by the newly independent government of what would become the United States. The constitution created a federal union of the existing 13 states. This union came into

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existence in 1789 and was called the United States of America. What was then a novel idea was contained in the constitution: the separation of powers of the three branches of government (legislative, executive and judicial). The concept originated from the thinking of the French philosopher Montesquieu and was designed to prevent any branch of government from becoming too powerful.

United States *Bill of Rights* (1789)

The US *Bill of Rights* is in fact the original 10 amendments to the US constitution. Due to concern that the new constitution did not provide safeguards against a future government violating the rights of its citizens, it was amended. These 10 amendments included such rights as the freedom of assembly, speech, religion and the press.

The Fifth Amendment may be familiar to students. Part of this amendment states that a defendant should not be compelled to take the stand in a court case and, in so doing, be a witness against themselves. This is popularly referred to as 'taking the Fifth'.

Another part of the US *Bill of Rights* that may be known to students is the Second Amendment, which states '[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed'. The original intention of this amendment was to prevent any future government from becoming too powerful and taking away the rights of its citizens by allowing the population to arm itself. Today, however, the 'right of the people to keep and bear arms' is used by powerful US pro-gun lobby groups, such as the National Rifle Association (NRA), to oppose limitations on the right of citizens to own or use guns.

Since 1791 another 17 amendments have been added to the constitution.

One of the most famous amendments is the Thirteenth Amendment, which brought about the abolition of slavery after the Civil War in 1865.

Another interesting amendment was the Eighteenth Amendment. Passed in 1919, it forbade the sale of alcohol in the United States. However, it is now generally agreed that this legal attempt to discourage the use of alcohol backfired, and in fact encouraged the growth of organised crime. In 1933, the Twenty-first Amendment repealed the Eighteenth Amendment.

In 1920 the Nineteenth Amendment was passed. It prohibits denying any person the right to vote on the basis of their gender – paving the way for women being granted the vote.

Many of the rights enshrined in the US *Bill of Rights* are based on the principles of the historic documents discussed above, from the *Magna Carta* onwards. Therefore, the US *Bill of Rights* is viewed as a significant landmark in the development of human rights.

It represents the most advanced thinking in the area of human rights up to that time in history. The US *Bill of Rights* has become the cornerstone of the US legal system, and has heavily influenced later human rights documents all round the world.

Declaration of the Rights of Man (1789) (France)

In 1789, after the French Revolution, the French National Assembly proclaimed the *Declaration of the Rights of Man*. This declaration is similar to the US *Bill of Rights*. In 1791, some of the rights from this declaration were written into the short-lived French Constitution. However, many of the freedoms stated in the *Declaration of the Rights of Man* were violated in the chaos of the revolutionary years that followed and were curtailed under the rule of Napoleon Bonaparte (1799–1812). Nevertheless, the ideas contained in this French document spread to the European states that were conquered by the French during Bonaparte's rule and served to inspire their own political progress and sense of nationalism.

'Four Freedoms' speech (1941) (US)

This speech was given to Congress by US President Franklin Roosevelt on 6 January 1941. World War II had been raging in Europe for nearly one and a half years and it looked as if Hitler's dream of conquering all Europe to form a Third Reich would come about. At this stage the United States was not at war. Despite the fact that President Roosevelt felt that military force was now the only way to stop Nazi aggression, the US Congress would not allow the United States to join the war. It was in this context that Roosevelt made this speech, in which he laid down the values that the world should hold dear. These values were incorporated in the *Universal Declaration of Human Rights* (UDHR) seven years later:

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- freedom of speech
- freedom of belief
- freedom from want
- freedom from fear.

International documents and treaties

Treaty of Versailles (1919)

In 1919, the countries that emerged victorious from World War I held a peace conference at Versailles in France. The result was the establishment, for the first time in history, of a world body with the primary aim of preventing war – the League of Nations.

This focus on prevention of war can now be described as a collective right to peace. When the treaty was signed, the concept of individual human rights was still in its infancy. The framers of the League of Nations were more focused on the rights of states and peoples to be able to rule themselves, free from the threat of oppression by more powerful states. This is now called the collective right to self-determination. Concern for the right to self-determination did not extend beyond the continent of Europe. In other words, the countries that signed the *Treaty of Versailles* were not very interested in self-determination for those peoples of Africa, Asia and the Pacific who lived in the colonies ruled by the imperial powers of Europe.

League of Nations (1920)

The main aim of the League of Nations was the prevention of war. It upheld the notion that all states have the right not to be threatened or attacked. All member nations pledged to stick by the principle of collective security, which meant that all members would protect any country that was being attacked by an aggressor. However, it was the league's dramatic failure on this very point that led to its being discredited and ignored by the international community. In the 1930s, the league was ineffective in preventing the aggression by Germany, Japan and Italy against weaker nations, which ultimately led to the outbreak of World War II in 1939. The League of Nations was formally dissolved in 1946.

Atlantic Charter (1941)

In August 1941, President Roosevelt of the United States and Prime Minister Winston Churchill of Great Britain signed an agreement, known as the *Atlantic Charter*, designed to act as a blueprint for the world after World War II. At this time, the United States was still not part of the war. Britain was under threat of being invaded by Germany, which had conquered most of Europe over the previous two years. Roosevelt and Churchill placed issues of human security at the forefront of plans for a post-war peace, stating that:

- territorial changes should only occur with the 'freely expressed wishes of the people'
- the 'right of all peoples to choose the form of government under which they live' should be respected, so that
- 'all the men in all lands may live out their lives in freedom from fear and want'.

The *Atlantic Charter* was the first official step in the development of an international organisation to guarantee peace and security. Barely three weeks after the attack on Pearl Harbor, on 1 January 1942, the United States, Britain, the Soviet Union and 22 other nations allied against Hitler endorsed the *Atlantic Charter* in the *Declaration of the United Nations*. This declaration pledged the signature countries to use their full resources against the Axis powers and to agree not to make a separate peace.

Some commentators argue that the *Atlantic Charter* was a visionary document which laid the foundations of the United Nations, the European Union, NATO, the UDHR and all human rights treaties.

The two treaties examined below were written at about the same time as the UDHR. They have a different origin from the UDHR, but overlap in their concerns for the welfare of all human beings.

Genocide Convention (1948)

The *Genocide Convention* was adopted by the UN General Assembly in 1948 and came into force in 1951. The main reason for the drafting of this convention was the widespread condemnation of the war crimes perpetrated against the Jews in the concentration camps of Nazi Germany – particularly information that became available at the trials of the Nazi leaders in the case *USA, France, UK, and USSR v Hermann Goering et al.* (1945–46 IMT, Nuremberg).

This declaration has been described as the 'high-water mark' for human rights because it was the first time in history that genocide was officially made a crime. The treaty was developed at around the same

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time as the UDHR, though by a separate committee and with no collusion between the two committees. It differed from the UDHR in that it is the first piece of hard law drawn up by the United Nations. This means that, theoretically, it can be enforced.

Although the *Genocide Convention* was effective in securing nearly universal condemnation of genocide, it failed to motivate politicians and diplomats to take concrete measures to ensure that these crimes could not occur in the future. Also, by the time the convention was written, the Cold War was just beginning. During the Cold War (1947–91) there was very little cooperation between the superpowers – including taking steps to give enforceable powers to the *Genocide Convention*. It was not until the creation of the International Criminal Court in 2002 that the *Genocide Convention* was made legally enforceable.

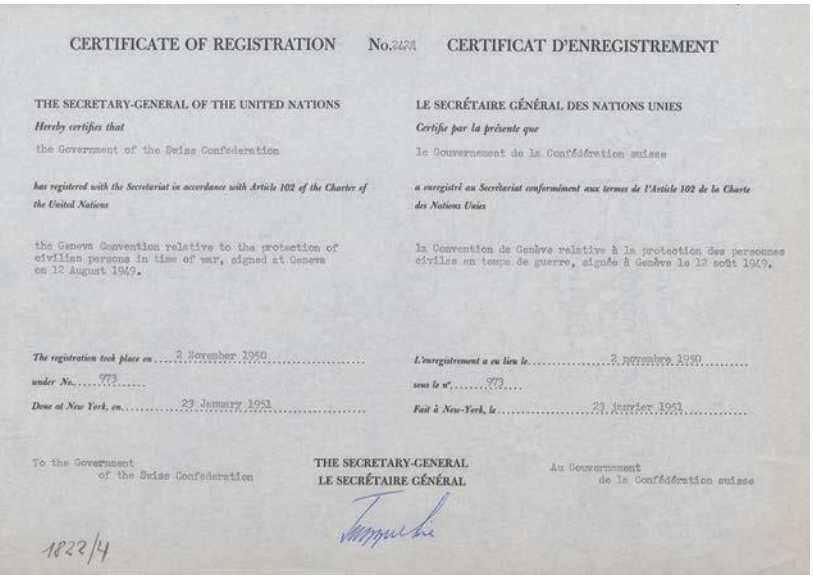
Geneva Conventions (1949)

Another major development in human rights that has its origins in the 19th century was the establishment of laws of war. *Jus in bello* is Latin for 'law in war'. These laws define the conduct and responsibilities of warring states in terms of treatment of non-combatants and civilians in wartime. Examples of the laws of war include not firing on someone who is carrying a white flag and not attacking a building, truck or ship with a red cross on it. Henry Dunant, who founded the organisation that was to become the Red Cross in 1863, played a pioneering role in the establishment of the rules of war.

The Red Cross was one of the first global NGOs to be formed. Not only did the Red Cross pioneer humanitarian work to alleviate the suffering of wounded soldiers and prisoners of war, but it also championed the development of rules of war, which today we refer to as international humanitarian law.

The Red Cross sponsored an international conference in St Petersburg in 1868 and the resulting convention outlawed the use of exploding bullets and poison gas. There was further development of the rules of war at the Hague Conferences of 1899 and 1907. International humanitarian law was also furthered by the Geneva Conventions of 1864, 1906, 1929 and 1949. All the decisions of the earlier conferences were ratified in 1949 and are now simply called the Geneva Conventions.

Nearly all states of the world today are signatories to the four treaties that make up the Geneva Conventions of 1949 and to the three additional protocols to the Geneva Conventions that were added in 1977.



CERTIFICATE OF REGISTRATION No.2474 CERTIFICAT D'ENREGISTREMENT

THE SECRETARY-GENERAL OF THE UNITED NATIONS
Hereby certifies that
the Government of the Swiss Confederation
has registered with the Secretariat in accordance with Article 102 of the Charter of the United Nations
the Geneva Convention relative to the protection of civilian persons in time of war, signed at Geneva on 12 August 1949.

LE SECRÉTAIRE GÉNÉRAL DES NATIONS UNIES
Certifie par la présente que
le Gouvernement de la Confédération suisse
a enregistré au Secrétariat conformément aux termes de l'Article 102 de la Charte des Nations Unies
la Convention de Genève relative à la protection des personnes civiles en temps de guerre, signée à Genève le 12 août 1949.

The registration took place on 2 November 1950
under No. 973
Done at New York, on 23 January 1951

L'enregistrement a eu lieu le 2 novembre 1950
sous le n° 973
Fait à New-York, le 23 janvier 1951

To the Government of the Swiss Confederation

THE SECRETARY-GENERAL
LE SECRÉTAIRE GÉNÉRAL

Au Gouvernement de la Confédération suisse

1822/4

Figure 7.16a Nearly all states of the world today are signatories to the four treaties that make up the Geneva Conventions of 1949.

Review 7.10

1. How did the *Magna Carta*, the *Habeas Corpus Act* and English *Bill of Rights* limit the sovereign's power?
2. What introductory statement in the US *Declaration of Independence* is mirrored in Article 1 of the UDHR?
3. What amendment in the US *Bill of Rights* is referred to repeatedly by the US pro-gun lobby today?
4. What post-war international organisations, treaties or documents did the *Atlantic Charter* lay the foundations for?
5. What area of international law do the Geneva Conventions belong to?
6. How has the *Genocide Convention* been strengthened in recent years?

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Additional resources

Chapter 9
Contemporary human rights issues

Issue 3
Exploitation of workers

Key terms/vocabulary

Atlanta Agreement
award
Bachpan Bachao Andolan
exploit
Human Rights Watch
International Labour Organization (ILO)
union

IMPORTANT LEGISLATION AND TREATIES

Forced Labour Convention, 1930 (No. 29)
Atlanta Agreement 1996
Worst Forms of Child Labour Convention, 1999 (No. 182)
Right to Children to Free and Compulsory Education Act 2009 (India)
Hospitality Industry (General) Award 2010

SIGNIFICANT CASES

Ex parte H.V. McKay (1907) 2 CAR 1 (Harvester case)
Minister for Immigration v Sahan Enterprises Pty Ltd [2012] FMCA 619
Ram v D&D Indian Fine Food Pty Ltd & Anor [2015] FCCA 389 (27 March 2015)

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9.8 Defining the issue of exploitation of workers

Although the world has made progress in the identification and eradication of human rights problems and abuses, there remains today a range of issues that need to be addressed. Despite the best efforts of governments to legislate against abuse, educate their citizens about equality and enforce a range of international conventions, human rights violations such as the exploitation of workers remain commonplace and widespread. Organisations such as the United Nations (UN), Amnesty International and the **International Labour Organization** (ILO), to name a few, have played an important role in raising awareness of human rights concerns. They have also assisted in creating conventions that pressure governments to introduce tougher legislation or to ratify conventions that have been negotiated over many decades.

International Labour Organization (ILO)
an international agency of the UN, created with the aim of improving conditions for workers around the world

The nature of work

What do you do for a living? What do you want to be when you grow up? These are questions so often asked by people when they first meet. Parents and teachers seem to be constant in their enquiries about what we want to do when we leave school. The notion of 'what we want to be' when we leave school is really about what work, job or career we wish to pursue.

For the majority of workers across the globe, 'working' implies an employer–employee relationship. This concept emerged during the time of the Industrial Revolution – the capitalist ideology was that workers sold their labour to the owner of a factory in exchange for payment or wages. Another aspect of this exchange involves the conditions of the workplace. Conditions in many factories in early industrial times were not favourable to the health of workers. There was little concern about the safety and physical health of workers, or entitlements such as sick leave, annual or recreation leave, and retirement savings. Even today, wages and conditions remain the central focus for employers and their associations, and for employees and their **unions**.

Figure 9.19 Conditions in many factories in early industrial times were not favourable to the health of workers.

union
a united group of workers who are able to use the power of numbers to negotiate with their employers, usually for better wages and conditions

Unions were established during the Industrial Revolution in response to exploitation and a sense that workers were not receiving fair wages or were not being provided with appropriate conditions.

The ILO was formed in 1919 in response to an alarming rise in the exploitation of workers in industrialising nations. Today, the ILO assists with creating decent employment opportunities and promoting workers' rights and conditions. The ILO defines forced labour in the *Forced Labour Convention, 1930 (No. 29)* as 'all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'. Forced labour and/or exploitation of workers may include any or all of the following combinations:

- abuse of vulnerability
- deception
- restriction of movement
- isolation
- physical and sexual violence
- intimidation and threats
- retention of identity documents
- withholding of wages
- debt bondage
- abusive working and living conditions
- excessive overtime.

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Figure 9.20 A child worker in India.

In Australia, the conditions in which the majority of workers work and the payment they receive are protected by law. Punitive action may be taken against employers for failing to provide the negotiated wages and conditions. Overseas, there are millions of workers in a range of industries who are being exploited. Usually this involves children or women workers or under-educated men who are unaware of international conventions or domestic laws and how they may be enforced. This chapter investigates the nature of the exploitation of workers in Australia, Cambodia and India. Legal and non-legal responses are analysed, with judgments made on the responsiveness of the law in protecting the rights of workers and eradicating exploitation.

9.9 Extent of the issue

***Universal Declaration of Human Rights* (1948)**

Article 23

1 Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
2 Everyone, without any discrimination, has the right to equal pay for equal work.

Unfortunately, across the globe, many workers are exposed to unscrupulous employers who attempt to **exploit** workers, for a host of reasons.

exploit
the act of using another person's labour without offering adequate compensation; often the work is not voluntary and is obtained through the threat (real or perceived) of violence

Domestic situation

Australia is not immune to worker exploitation. Since wages represent approximately 70% of costs to most businesses, whether large or small, employers who are able to reduce their wages bill can create greater profits for themselves and/or their shareholders. For the majority of Australians, wages and conditions have been negotiated over many years and are set in contracts known as **awards**. Such awards are protected by legislation, and serious penalties can be handed out in the form of fines to employers that don't adhere to the terms and conditions of the award. The Fair Work Commission (formerly Fair Work Australia, and prior to that the Australian Industrial Relations Commission) is the legislative body that resolves disputes between employers and employees.

award
a legal agreement, made between federal and state industrial commissions, employers and employees, which sets out the workers' wages and conditions

In Australia, the hospitality industry has the unenviable reputation of exploiting workers in the form of underpayment, in particular the restaurant industry.

Legal Links

In a 2013 article published in the *Sydney Morning Herald* entitled 'Wages of sin', numerous examples of restaurants underpaying workers were highlighted. Based on the ILO definition, excessive wage reductions based on previous arrangements is an example of exploitation. You can access this article at http://cambridge.edu.au/redirect/?id=6296.

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Review 9.7

1 Outline your understanding of the term 'exploitation'.
2 List some of the key reasons employers may seek to exploit workers.
3 Read the article, 'Wages of sin'. Describe two examples of exploitation of workers.

International situation

Universal access to education until the minimum age for employment (which, according to the Millennium Development Goals (MDGs) of the United Nations, should be 13 years) is an important part of the fight against the economic exploitation of children. The second MDG is to achieve universal primary education – that is, education to the end of Year 6. The UN estimates that there are currently 75 million primary school-aged children who are not receiving an education. Many of these are most likely being exploited within a workplace. Since education is important in preventing child labour, and child labour functions as a hindrance to children attending school, forcing children to work rather than attend school is a serious human rights issue.

In many countries, unfortunately conventions, awards, negotiations and anti-discrimination legislation are not as pronounced or explicit as in Australia. Although exploitation clearly occurs in Australia, exploitation of workers in India tends to overshadow instances that occur here. The most recent national census of India estimated the total number of child workers aged 5–14 years to be 29 million. Children having to work is not a problem unique to India; it is estimated that 150 million children aged 5–14 worldwide work full-time. More recently, child worker exploitation has become an issue in Cambodia, particularly in the garment industry.

The next media article outlines the shocking conditions experienced by mostly child workers in sweatshops of Cambodia working for wages that do not provide for basic living needs and comfort. Many

Figure 9.21 Access to education is an important part of the fight against economic exploitation of children.

Review 9.8

1 Read the article, 'West's fashion industry on sweat of Asia's teenagers'. Name some of the brands associated with the Cambodian workers. Do you wear any of these brands?
2 Outline the wages paid to the workers (including the minimum monthly wage) and compare them to your own part-time work or that of a class member who works for an employer.
3 Explain what you think a minimum wage should provide a worker (see the *Ex parte H.V. McKay* (1907) 2 CAR 1 (Harvester case) discussed below).
4 Why does the term 'Made in Cambodia' give consumers of fashion brands reason to cringe?
5 Describe the conditions that workers in Cambodian sweatshops must endure. Why would employers create such harsh working environments? What do employer groups such as the Garment Manufacturers' Association argue in their defence of the workers?
6 Describe the union representative Ath Thorn's response to the Garment Manufacturers' Association's claims of Cambodia 'setting the standard'.
7 Discuss the issues of reducing exploitation in Cambodia in light of other options in countries like Myanmar.

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News

West's fashion industry relies on sweat of Asia's teenagers

Lindsay Murdoch

Sydney Morning Herald, 14 July 2015

[Below is an edited version of the article.]

Across Asia, millions of children are toiling for long hours, often in stifling conditions, earning barely enough to live on while they sew garments for fashion brands in the West.

In a stifling hot factory in Phnom Penh supervisors scream abuse at child worker Vien Dyna as she struggles to stitch clothes for fashion brands sold in Western countries including Australia.

'My body aches. I cannot do it,' she says.

To earn 65 cents an hour, Vien is supposed to sew 50 garments every hour – but she can manage only about 30.

She is one of thousands of under-age children working in Cambodia's more than 700 factories which employ an estimated 700,000 mostly young Cambodian women.

Across Asia, millions of poor and desperate garment and footwear workers are toiling for long hours up to seven days a week for as little as $100 a month.

Buyers of 'Made in Cambodia' garments around the world have reason to cringe about the conditions forced on Cambodian clothing makers in an industry that generates $7.8 billion each year and provides 80% of the country's export earnings.

Human Rights Watch has documented the use of child labour in violation of local and international laws in at least 11 factories, including workers as young as 12.

According to the March report, one woman at a factory supplying H&M clothes 'estimated that 20 of the 60 workers are children'.

Others told Human Rights Watch that 'children work as hard as adults' and would stitch long hours into the night.

Figure 9.22 Workers in Cambodian factories produce clothing for brands such as H&M.

The New York-based organisation has also documented serious labour rights abuses, including forced overtime, pregnancy-based discrimination and anti-union practices that fail to protect workers producing brands such as Adidas, Armani, Gap, H&M, Joe Fresh, and Marks & Spencer.

Australian retailers that source from Cambodia – including Coles, Kmart, Target, Big W and Pacific Brands – say they comply with international standards and the number of garments supplied to Australian brands remains small, compared with other supplier countries such as China and Bangladesh.

continued ...

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News

continued …

In November last year – more than eight months after Cambodian security forces opened fire on workers to crush industry-wide protests – the government of Prime Minister Hun Sen set a minimum monthly wage of $167, an amount unions say is not enough to live on.

David Welsh, country director in Cambodia of Solidarity Centre, a Washington-based international worker rights group, says no worker can survive on the minimum wage without working illegal overtime hours, effectively meaning long hours, six days a week.

'The minimum wage should provide a degree of basic needs and comfort,' he says.

Oem Mom, 33, sleeps on a wooden bench with four others in a tiny room made of scrap timber and cardboard off a dank alleyway near the Phnom Penh factory where she works sewing designer jeans.

'Life is very hard … the wage is not enough to live on. I have to keep borrowing from loan sharks,' she says.

Cambodia's garment industry, dominated by foreign investments from Hong Kong, China, Singapore, Malaysia and South Korea, insists that attendance bonuses and housing and transport allowances make Cambodia's garment workers some of the best paid in the region.

The Garment Manufacturers' Association of Cambodia, representing 600 factories, says Cambodia sets the standards for other countries with an industry that accounts for 15 per cent of the economy.

The government insists its monitoring of the industry is transparent and competent, dismissing claims of systematic labour law violations and corruption as 'groundless'.

But Ath Thorn, president of the 100,000-member Cambodian Labour Federation, says many factories force workers to work Sundays, on weekdays until 9 pm and sometimes overnight until 6 am – all without overtime and with workers in fear of losing their jobs if they do not comply.

He says union representatives and workers who complain face dismissal and threats of legal action in politicised courts.

In mid-May, workers striking over the dismissal of a union representative at a Phnom Penh factory were attacked by up to 50 thugs.

'Cambodia has been painted as a model for the global industry – the claim is that factories are properly monitored for abuses and conditions,' he says.

'But that myth was destroyed in early 2014 when Cambodia security forces shot more than 60 protesting workers, jailed prominent union leaders and sacked hundreds of workers,' he says.

Welsh says many of the 200 apparel brands that source garments from Cambodia became 'skittish' following the turmoil, making the industry vulnerable to companies turning to other cheap labour markets such as Myanmar.

Myanmar now employs more than 200,000 workers, a tenfold increase since 2010, with an average of two new factories opening every week.

A garment worker in Yangon is typically paid an average $US80–100 a month, including overtime. There is no minimum wage.

'Brands chase jurisdictions where there is extreme poverty, the rule of law is weak and it is easy for them to skirt labour laws,' he says.

'The only way to stop that is for there to be basic global standards that apply in every country.'

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major global brands are involved from both Australia and the United States, but they often claim they are not breaking any laws. Indeed, it is extremely difficult to determine reality when both sides of the debate paint such diverse scenarios on the conditions of the workers.

9.10 Responses to the issue of exploitation of workers

Legal responses

One of the first important judicial decisions addressing the exploitation of workers was the Harvester case of 1907 (*Ex parte H.V. McKay* (1907) 2 CAR 1). Judge Higgins ruled on a case brought by the employees of an agricultural machinery company – Sunshine Harvester Works. The judge ruled that Sunshine should pay its employees at a level that ensured adequate standards of living. Such standards were best described as paying an employee enough to live a simple existence. The judgment achieved international significance. It was 10 years prior to the formation of the ILO, and it set a benchmark for many future decisions on basic wage cases across the globe.

Throughout the following 60–80 years, awards began to emerge. Employers could not legally pay their workers below the award rate or provide conditions that did not meet negotiated standards. The *Hospitality Industry (General) Award 2010* is an example of an award and can be accessed at http://cambridge.edu.au/redirect/?id=6297.

In Court

***Ram v D&D Indian Fine Food Pty Ltd & Anor* [2015] FCCA 389 (27 March 2015)**

In 2015, a restaurant owner in Sydney was ordered to pay one of his 'workers' $186 000 in back pay. Mr Trivedi forced Mr Ram to work for him seven days a week, up to 16 hours per day for approximately seven years. The Federal Circuit Court ruled that Mr Dam was a 'slave' because he was forced to live in a room next to the kitchen and his bathing facilities consisted of a bucket of water, rather than a bath or shower. His pay was less than $3 per day.

Mr Ram's conditions are protected by the *Restaurants Employees (State) Award*, but his employer was able to evade authorities for so long by falsifying tax and immigration documents and forcing Mr Ram to lie to authorities when they came to check on the restaurant. Mr Ram eventually managed to go to the police and, through legal processes, the court ordered that Mr Trivedi and his company pay $125 431.22 for wages, superannuation and annual leave, as well as a further $60 607.81 in interest on the judgment sum.

In Court

***Minister for Immigration v Sahan Enterprises Pty Ltd* [2012] FMCA 619**

According to the evidence presented to the Federal Magistrates' Court, Mr Azazim should have been paid $45 000 per year, or $731 per week, for his job as head chef at the Roks restaurant in St Kilda, Melbourne. The employer, Mr Sahan, was questioned over Mr Azazim's pay and produced a document stating that Mr Azazim had in fact been paid this amount for the 2009–10 financial year. The court found that this document had been falsified. Mr Sahan then claimed that he was unaware of his obligations in relation to the correct pay for a head chef. Action was taken against this employer in the form of fines totalling $35 000 plus court costs of $10 000. Mr Azazim was not compensated for unpaid wages of $14 000 as the fines the company was forced to pay sent the business into bankruptcy. Legally he could commence a claim for lost wages in a civil court but would be unlikely to receive his payment since the company no longer exists.

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Review 9.9

1 Describe the wages and conditions experienced by Mr Ram in the case of *Ram v D&D Indian Fine Food Pty Ltd & Anor* [2015] FCCA 389 (27 March 2015).
2 Evaluate the effectiveness of the law in achieving fairness for Mr Ram.

Non-legal responses

In 1997, the **Atlanta Agreement** was formed between the ILO, the Sialkot Chamber of Commerce and Industry and UNICEF. It was announced at the Sports Super Show in Atlanta, United States, with the clear goal of reducing high rates of worker exploitation in the football manufacturing industry. In addition, the ILO established eight key conventions throughout the 20th century to deal with exploitation of workers and to gain ratification from all member states. Some of these conventions are listed at the start of this chapter and can easily be found online. Of these eight, the *Worst Forms of Child Labour Convention, 1999 (No. 182)* was ratified by 175 of 183 member countries. India was one country that did not ratify this convention until 2013.

Atlanta Agreement
an agreement between the ILO, the Sialkot Chamber of Commerce and Industry and UNICEF to abolish child labour in Sialkot, including the manufacturing of commercial products for the Pakistani football industry

Figure 9.23 The Atlanta Agreement had the goal of reducing high rates of worker exploitation in the football manufacturing industry.

Human Rights Watch (HRW), a United States-based non-government organisation, was formed in 1978 to monitor the integrity of various governments and their treatment of citizens. Its website summarises its mission below as:

MISSION STATEMENT
Human Rights Watch defends the rights of people worldwide. We scrupulously investigate abuses, expose the facts widely, and pressure those with power to respect rights and secure justice. Human Rights Watch is an independent, international organization that works as part of a vibrant movement to uphold human dignity and advance the cause of human rights for all.

HRW has been monitoring working conditions in the Cambodian garment industry over the past few years. In March 2015, HRW published a comprehensive report on the exploitation of workers entitled *Work Faster or Get Out*. Over 300 people were interviewed, including workers and their bosses, union and government representatives, across 73 different factories. HRW made a series of recommendations to a range of stakeholders including the Cambodian government, major international brands, and union and employer representatives. HRW calls for multi-party wage fixing bodies (as is the case in Australia), the disciplining of those responsible for violent attacks on protesting workers and the disclosure by leading brands of their use of sweatshops. HRW claim that boycotting the purchase of leading brands may hurt the workers of Cambodia by forcing brand name companies to simply 'switch countries', thus creating unemployment for already desperate workers struggling for basic wages and conditions.

Bachpan Bachao Andolan (BBA) translated means 'Save the Children Movement'. It is a non-government organisation based in India with the

Legal Links

The *Work Faster or Get Out* report is available online at http://cambridge.edu.au/redirect/?id=6298.

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aim of creating 'a child-friendly society, where all children are free from exploitation and receive free and quality education'. Through the work of BBA and other non-government organisations pressure has been created and international awareness of the plight of workers exploited has been raised.

Bachpan Bachao Andolan
an organisation created by the Indian government to enforce the criminalisation of child labour and forced labour

Legal Links

The Bachpan Bachao Andolan website (http://cambridge.edu.au/redirect/?id=6299) details the response of the Indian government to worker exploitation.

Research 9.5

Choose and then research two conventions of the ILO. Find out which countries have not yet ratified these conventions and explain why you think this is the case.

Effectiveness of responses

Despite awards and legislative protection, workers continue to face exploitation in Australia. Many restaurant owners argue that, with intense competition between restaurants and issues of compliance with workplace safety regulations, superannuation payments and a host of other costs, paying casual and part-time staff the award wage is too expensive and risks forcing them to close their business. They argue that 'closing the doors' of a restaurant would leave all their workers unemployed, and that by receiving a rate below the award at least workers have employment and an adequate wage.

The Fair Work Ombudsman (http://cambridge.edu.au/redirect/?id=6297) provides information to workers about their rights and obligations. Its most recent comprehensive research, in which 52 000 enquiries and complaints were received, was conducted in 2011–12. Of these, over 3000 complaints were dealt with, and led to $2.7 million in underpaid wages being directed to exploited workers.

The plight of Mr Ram in *Ram v D&D Indian Fine Food Pty Ltd* clearly demonstrates that workers with poor English skills who are in desperate situations are being targeted by unscrupulous employers looking to make higher profits by paying their workers as little as possible.

According to Amnesty International, at an international level it is difficult to see rapid change and decline in the exploitation of workers. Three key reasons for this are:

- lack of resources for government and non-government organisations to identify and expose exploitative employers
- sociocultural factors such as long-held traditions of underpaying workers and a willingness of people living in poverty to accept whatever wage is offered – in a sense that something is better than nothing
- state sovereignty, which implies that nations can set their own minimum wages that cannot be legally challenged by other nations.

Legal Links

There have been numerous cases of immigrants being exploited in the workforce. Despite the awards system and other legislation enforcing fair pay and working conditions, these problems are still prevalent today. An example of the effectiveness of the legislation is highlighted in the article entitled 'Visa sponsor taken to court for underpaying foreign worker'. You can access this article at http://cambridge.edu.au/redirect/?id=6301.

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Issue 3 summary

- The exploitation of workers across the globe is a long-standing human rights issue that is being addressed by organisations such as the ILO, Amnesty, BBA, Human Rights Watch and UNICEF.
- While there has been progress in reducing the number of workers being exploited, many major global brands continue to use seemingly exploited labour in developing nations.
- Legislative reform, such as international conventions and domestic laws, has created hope for millions of workers, and law enforcement agencies have been able to prosecute or sanction many employers.
- With the exploitation of workers being a centuries-old phenomenon, it is difficult to see rapid progress being made to completely alleviate the problem in the next few years. Boycotting major clothing labels may not necessarily be the best strategy to curb the exploitation of workers. Lobbying of national governments and fighting for the rights of unions to protect worker rights and conditions may be the best strategy.

Issue 3 questions

Multiple-choice questions

1 The exploitation of workers can be defined as:
- **A** illegal activities carried out by organised groups, usually for financial gain
- **B** legal activities carried out by employers, usually for financial gain
- **C** activities such as rallies and protests organised by workers without a permit
- **D** the act of using another person's labour without providing them adequate compensation

2 The country with the largest number of children exploited through work is:
- **A** Pakistan
- **B** Australia
- **C** India
- **D** Cambodia

3 In Australia, the industry in which most exploitation appears to be occurring is:
- **A** Agriculture
- **B** Media
- **C** Hospitality
- **D** Education

4 Two key reasons for the exploitation of workers are:
- **A** lack of resources and sociocultural factors
- **B** lack of legislation and conventions
- **C** lack of conventions and sociocultural factors
- **D** lack of conventions and resources

5 BBA is an Indian non-government organisation that stands for:
- **A** Building Better Agreements
- **B** Bilateral Business Arrangements
- **C** Save the Children Movement
- **D** Better Businesses Associations

Short-answer questions

1 Discuss the problems of exploitation of workers in Australia. What consequences are there of enforcing awards and agreements?

2 Outline the origins of the ILO. Evaluate the effectiveness of the ILO in achieving fairness for workers worldwide.

3 Describe some of the wages and conditions for workers around the world who have been exploited. What are the reasons for this occurring?

4 Describe some of the key legislative reforms that deal with the exploitation of workers. Are they effective?

5 Do you think the ILO should have increased powers? What would they involve and how could exploitation be reduced?

6 Discuss the tactic of boycotting major brand labels and its impacts on workers in developing nations.

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Additional resources

Chapter 13
Option 4: Indigenous peoples

25% of course time

Principal focus

By examining current issues and examples, students will gain an understanding of how legal and non-legal processes attempt to achieve effective justice for indigenous peoples around the world.

Themes and challenges

Themes and challenges to be incorporated throughout this option include:

- how state sovereignty attempts to encourage cooperation and resolve conflict for indigenous peoples
- the problem of non-compliance in the international law sphere
- how changing values and ethical standards affect laws relating to indigenous peoples
- the recognition of the rights of indigenous peoples through law reform
- the role of legal and non-legal responses in effectively achieving justice for indigenous peoples.

Chapter objectives

In this chapter students will:

- identify and apply legal concepts and terminology
- communicate legal information using well-structured and logical arguments
- define what is understood by 'indigenous peoples'
- detail the loss of rights of indigenous peoples globally
- outline how legal recognition of indigenous people is an effective means of rights protection
- describe the obstacles lying in the way of self-determination for indigenous peoples
- examine how the idea of sovereignty has both assisted and impeded the recognition of the rights of indigenous peoples
- assess how effective legal and non-legal measures have been in achieving justice for indigenous peoples
- describe how Australia's federal structure has responded to the needs of indigenous peoples
- name and research contemporary issues affecting the rights of indigenous peoples and assess the effectiveness of legal and non-legal responses to these issues.

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Key terms/vocabulary

assimilation
bipartisan
colonisation
customary law
governance
historical continuity
native title
negotiation
pastoral lease
point of law
referendum
self-determination
self-identification
sovereignty
Stolen Generations
terra nullius

Relevant law

IMPORTANT LEGISLATION

Aboriginals Ordinance 1911 (Cth)
Universal Declaration of Human Rights (1948)
Declaration on the Granting of Independence to Colonial Countries and Peoples (1960)
International Covenant on Civil and Political Rights (1966)
International Covenant on Economic, Social and Cultural Rights (1966)
Constitutional Alteration (Aboriginals) Act 1967 (Cth)
Native Title Act 1993 (Cth)
Declaration on the Rights of Indigenous Peoples (2001)
Northern Territory National Emergency Response Act 2007 (Cth)

SIGNIFICANT CASES

Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141
Commonwealth v Tasmania (1983) 158 CLR 1
Guerin v the Queen (1984) 2 S.C.R. 335
Mabo v Queensland (No. 2) (1992) 175 CLR 1
Wik Peoples v Queensland (1996) 187 CLR 1
Delgamuukw v British Columbia [1997] 3 S.C.R. 1010
Sesana and Others v Attorney General (52/2002) [2006] BWHC 1

Legal oddity

Kumanjayi Langdon, aged 59, from Yuendumu died in May 2015, three hours after being taken into police custody under the Northern Territory Government's paperless arrest system for 'drinking in a regulated place'. The paperless arrest system was introduced in 2014 and allows the police to arrest and detain people for up to four hours for offences such as making too much noise, swearing or drinking in public. In August 2014, coroner Greg Cavanagh said the laws were 'manifestly unfair', unduly targeted Aboriginal people and should be scrapped. However, the High Court has ruled the laws as valid.

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13.1 Definition of indigenous peoples

The UN Permanent Forum on Indigenous Issues recognises that there are indigenous peoples living in nearly every part of the world. There are the Yanomami tribes of the Amazon jungle; the Chittagong hill tribes of Bangladesh; the First Nations, Métis and Inuit peoples of Canada; the Aboriginal and Torres Strait Islander peoples of Australia; the Ainu on the island of Hokkaido; the Sámi of Northern Scandinavia and Russia; and the hundreds of peoples indigenous to the rainforested highlands of Papua New Guinea, to give just a very short list. Indigenous peoples form an incredibly vital part of the world's cultural, historical, moral and scientific heritage. The UN Permanent Forum on Indigenous Issues gives us the following information:

> It is estimated that there are more than 370 million indigenous people spread across 70 countries worldwide. Practicing unique traditions, they retain social, cultural, economic and political characteristics that are distinct from those of the dominant societies in which they live. Spread across the world from the Arctic to the South Pacific, they are the descendants – according to a common definition – of those who inhabited a country or a geographical region at the time when people of different cultures or ethnic origins arrived. The new arrivals later became dominant through conquest, occupation, settlement or other means.
>
> Among the indigenous peoples are those of the Americas (for example, the Lakota in the USA, the Mayas in Guatemala or the Aymaras in Bolivia), the Inuit and Aleutians of the circumpolar region, the Sámi of northern Europe, the Aborigines and Torres Strait Islanders of Australia and the Māori of New Zealand. These and most other indigenous peoples have retained distinct characteristics which are clearly different from those of other segments of the national populations.

The word 'indigenous' has been used as a blanket term for many years. Some countries tend to use other terms, such as aboriginals, first nations/peoples, tribes and ethnic groups; or more specific terms such as *adivasi* and *janajati*, referring to the indigenous populations of India and Nepal respectively. There are other terms that reflect location or occupation, such as hill people, nomads, hunter-gatherers and peasants. These are also used to mean the same thing as 'indigenous peoples'.

The United Nations (UN) hasn't adopted an official definition of 'indigenous', because of the enormous diversity shown by indigenous groups worldwide. Instead, it gives the following list of factors to consider when thinking about indigenous groups:

- Self-identification as indigenous peoples at the individual level and accepted by the community as their member
- Historical continuity with pre-colonial and/or pre-settler societies
- Strong link to territories and surrounding natural resources
- Distinct social, economic or political systems
- Distinct language, culture and beliefs
- Form non-dominant groups of society
- Resolve to maintain and reproduce their ancestral environments and systems as distinctive peoples and communities.

The last point in the UN document, that an indigenous person has 'resolve to maintain and reproduce their ancestral environments as distinct peoples and communities', has perhaps a more pragmatic importance than any of the other criteria. Without such resolve an indigenous person or people would not be able to pursue any of the legal remedies or redresses available to them.

Figure 13.1 Ainu marriage ceremony.

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Australian law

There is no single criterion under Australian law to identify an individual as an indigenous person. In the early 1980s, the then Commonwealth Department of Aboriginal Affairs proposed the following definition: 'An Aboriginal or Torres Strait Islander is a person of Aboriginal or Torres Strait Islander descent who identifies as an Aboriginal or Torres Strait Islander and is accepted as such by the community in which he [or she] lives.' This definition was also followed in a decision of the High Court (*Commonwealth v Tasmania* (1983) 158 CLR 1). Subsequent judicial decisions have posited that all three of these elements need not be satisfied. They have stressed the inherent problems involved when a body of outsiders, as found in parliament and the courts, make decisions regarding indigenous identity. Ideally, an indigenous body would make these decisions.

One way to assess who is, and who isn't, a member of the dominant group in society is by examining the level of a particular people's participation in politics, in the media, in business and in culture. In the case of Indigenous Australians, we can see that no Indigenous language is the dominant language in Australian society (it is obviously English), there are very few Indigenous Australians sitting in the parliaments of Australia (at the time of writing there were six Indigenous Australians in total – five in the Senate and one in the House of Representatives), and Indigenous participation in the media and the broader cultural landscape is very limited. Clearly, an individual who *does* belong to the dominant group in society has far less need for the sort of rights protection offered by the UN agreements on indigenous peoples. Sadly, the very fact that indigenous people have a distinct culture, a distinct language and distinct beliefs from the 'mainstream' (the majority, dominant population) means that they are pressured to abandon these markers of distinction – and that legal protection and support become necessary to save the knowledge and history stored within these individual cultures.

Review 13.1

1. Explain why the UN hasn't adopted an official definition of 'indigenous'. What has it done instead?
2. List reasons that make it clear Indigenous Australians are not the dominant group in Australian society.

13.2 Rights and legal recognition

Loss of rights of indigenous peoples over time

Since the beginning of the modern age, the rights of indigenous peoples worldwide have been under attack. The rapacious **colonisation** of technologically advanced powers, the overconsumption of the world's natural resources in the modern economic system, world wars, and the complicated politics and independence movements of the decolonisation process have all taken their toll on indigenous peoples globally.

colonisation
the establishment of colonies; settlement, as in 'the British colonisation of Australia'

To understand what kind of rights they have lost, we should first discuss the concept of **sovereignty**. If a people, a government or a political system holds sovereignty over a certain area or territory, it means that they hold supreme authority within that area. In Australia, the Australian system of government holds sovereignty over the territory of Australia (with powers divided between the federal, state and municipal governments, as well as the courts). This means that this system of government has the ability to make laws with respect to all aspects of our lives, including, but not limited to, schooling, taxation, crime, punishment and terms of doing business. The powers of this system derive from the *Constitution*, which in turn derives its power from the tacit agreement of all citizens of Australia. Importantly, there is no body within Australia that can make laws or regulations that supersede the laws of the Australian parliaments. Even international treaties operate in Australia only with the permission of the government and even then only when they have been signed, ratified and enacted into domestic legislation.

sovereignty
complete legal and political control; supreme authority

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Prior to contact with settler/colonial cultures, indigenous peoples maintained sovereignty over themselves and their land, in many cases coming to a delicate understanding with the environment they lived in. For example, the Inuit peoples were able to live by following the migration patterns of the bowhead whale, the fur seal and the fish species of the Arctic. Desert peoples, like many of the Indigenous peoples of Australia and the San people of the Kalahari Desert, survived by developing a detailed knowledge of the plants, animals, sources of water and sources of shade in their territory. Some of the knowledge of these peoples is only now being understood and used globally.

Many indigenous peoples developed legal and political traditions in line with the demands of their own environment. The Yanomami tribe, in the remotest reaches of the Amazon, lived in a complexly communal society; Australian Indigenous peoples possessed their own legal systems, and their own systems of crime and punishment; and the Iroquoian-speaking tribes in the north-east of what is now the United States formed intricate inter-tribal alliances and arrangements, involving the contracting of agreements and treaties, as well as the conduct of war with and against other tribes.

Colonisation and loss of land

As the colonising powers – first Portugal and Spain, and then later The Netherlands, the United Kingdom, France and the remaining European powers – spread out through South America, North America, South-East Asia, India and Africa, many of these pre-existing legal codes came into conflict with the legal codes of the Europeans, backed by spear, sword and gun. Predictably, armed with these weapons, pride and ignorance, the European settlers typically ignored the legal and political traditions of indigenous peoples.

Gradually, in the wake of settlement of the new worlds by European governments, European and European-descendant businessmen, explorers, furriers, trappers and miners expanded the European footprint deeper into the territory of indigenous peoples. This accelerated the effective destruction of the sovereignty of indigenous peoples. In Australia, farmers pushed the frontier further and further north, stripping the Indigenous inhabitants of the ability to hunt and live off the land, and severing their cultural and spiritual connection to the land.

Figure 13.2 South American indigenous peoples were forced off their land to make way for sugar cane plantations.

Another example is in South America, where farmers and miners, clearing the vast stretches of the Amazon for sugar cane plantations and grazing land, forced indigenous people off their native habitats and into the most remote reaches of the Amazon. This both disrupted their food supply and caused inter-tribal conflict with the established residents of the land they were encroaching on, dramatically affecting the tribes' wellbeing. The state of starvation and the desperation these tribes were reduced to perhaps helped settler societies to justify the imposition of settler culture, religion and law upon indigenous peoples, seeing the lack of these things as the cause of the hunger and poverty, rather than the massive dislocation caused by the settlement process.

Ideological differences

In addition to environmental destruction or appropriation, ideological differences – differences in legal, political, commercial and ethical systems – have led to conflict and injustice for indigenous peoples. The settler/colonial societies were, with occasional exceptions, essentially commercially focused, mercantile, capitalist empires. Think of, for example, the industrialised United Kingdom of the 19th century, built from the exploitation of foreign markets by northern cotton spinners – or the gold-transporting trading empires of Spain and Portugal. Their meeting with the traditional tribal societies

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led to the clash of two different systems of property ownership, with exploitation and injustice the sadly predictable result.

Another example can be found in the early history of contact between the Māori people of New Zealand and European settlers. The Māori, living in communal organisations known as *iwi*, owned all property communally. The British, as they bought property or land from the Māori owners, sought to assign property rights by dividing them up among individual members of the *iwi*, as is customary under British law. However, as the *iwi* weren't set up for this kind of property arrangement, it led to the Māori being in a far worse bargaining position than they would have been had the British recognised their system of property ownership. Consequently, the *iwi* received far from the proper return for their property. Similar impulses to convert traditionally communal societies have occurred in many other places – notably among the communally living Yanomami tribe in the Amazon and among the San of the Kalahari Desert.

Remote regions

In the early history of the interaction between settler and colonialist societies and indigenous peoples, those peoples who lived in remote regions – for example, the Inuit of the High Arctic, particularly Greenland, the indigenous tribes of Northern Russia and the highland tribes of New Guinea – were largely untouched by the expanding shadow of colonialism. Although settler societies knew of the existence of these peoples, the land was too unforgiving for easy settlement, and resource companies were deterred by the enormous expense involved in building mines in these areas. This state of affairs continued until the outbreak of World War II, which could be seen as the first truly global conflict. World War II led to an enormously intensive use of resources, such as oil and steel, for the construction and operation of the machinery of war. Nations also felt the imperative need to protect previously disregarded stretches of land from invasion by enemy forces. Therefore, marginal borderlands – vast stretches of far northern Europe, South-East Asian jungle and the islands north of Japan where native peoples had been allowed to live and govern themselves, essentially autonomously – now played host to troops, armaments and, consequently, the laws and regulations of these powerful nations.

The experience of the Greenlandic Inuit in World War II is a good example of these developments. The Inuit settled in Greenland in approximately 1300 CE, just as a hopeful Scandinavian settlement on the island perished, and continued to live there without any contact with Europe for the next 400 years. This was until Denmark once again sent settlers to the island in the middle of the 18th century. Even then, the Danish settlers largely confined themselves to the trading post of Godthaab (modern day Nuuk, the capital of Greenland), and the Inuit population was left largely undisturbed. However, during World War II, secret German outposts were built and detected on Greenland. In response the United States itself built a number of outposts there, flushing the Germans out of the country. Though a minor incident in the greater scheme of the war, this highlighted the importance of Greenland as a waypoint between northern Europe and North America. Not only was it an ideal place due to its proximity to the North Pole but it was also excellent for radar-based missile detection systems, which were to assume great importance in the post-World War II and Cold War years.

After making an offer to purchase Greenland, which was rejected by the Danish government, the United States negotiated to build Thule Air Base, the most northerly air base in the world. The construction of this base in 1953 required the forced relocation of many Inuit from their traditional lands to the urban centre, Nuuk. This partly forced urbanisation of the Inuit population led to many farcical results, such as the construction of Blok P. Blok P was built between 1965 and 1966 and housed approximately 1% of the entire country's population in the building. The large communal housing building failed to cater for the needs of its inhabitants, especially the Inuits. The doorways were too narrow to squeeze through wearing the thick clothes needed to survive in Greenland's cold climate; there were frequent plumbing failures because pipes were clogged with blood – caused by fishermen cutting up their catch in their bathtubs; and numerous fire exits were blocked because of the storage of their belongings. Blok P was demolished on 19 October 2012, a sign of a growing understanding of the damage that the imposition of settler ideas onto indigenous peoples can cause.

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Figure 13.3 Blok P in Nuuk failed to cater for the needs of its inhabitants, especially the Inuits.

Review 13.2

1. Outline the basic human rights that indigenous peoples lost during the period of colonisation.
2. Describe some of the ideological differences between colonising nations and indigenous peoples.
3. Compare and contrast the effect of World War II on indigenous peoples.
4. Recall what percentage of Greenland's population was housed in Blok P.

Legal recognition of indigenous peoples

So far in this chapter, we've looked at the various ways indigenous peoples have been deprived of their sovereignty through the intervention of settler societies. In this section, we examine how a legal discussion has developed around the issue of the loss of indigenous rights – both initially as a support to the political and ideological programs of settler cultures, and, in recent times at least, as a form of protection for indigenous peoples against further loss of rights.

Views of the early European legal scholars

From the 16th to the 20th centuries, powerful European countries such as Spain, Portugal, France, Holland and England were engaged in extensive voyages of discovery and the colonisation of new lands in a quest to maintain their influence and expand their empires. As these empires added more and more countries to their portfolios, rules of international law that partly governed these growing empires developed. These rules were shaped and formalised by scholars of the day. Examples of such scholars include Emmerich de Vattel, who wrote *The Law of Nations* in 1758, and Hugo Grotius, regarded as the 'father' of international law, as well as the Spanish thinker Francisco de Vitoria, who wrote at the time of the development of Spain's settlement of South America.

De Vattel's view was that a country could take possession of another country that was 'vacant' and claim both its 'empire' and sovereignty, and its 'domain' or use of land. De Vitoria thought that if no one held sovereignty, colonisation could be justified. Applying these ideas, the Europeans developed the rule that any discovered land could be claimed if it was uninhabited. However, even if it was inhabited, it still could be claimed, provided the original inhabitants were not cultivating the land.

The philosopher John Locke also was of the view that cultivation of the land was an important condition of a claim to ownership over it. He argued that cultivation of land was a 'law of nature' and a precondition to sovereignty. He believed that labour was needed to establish ownership of land by the

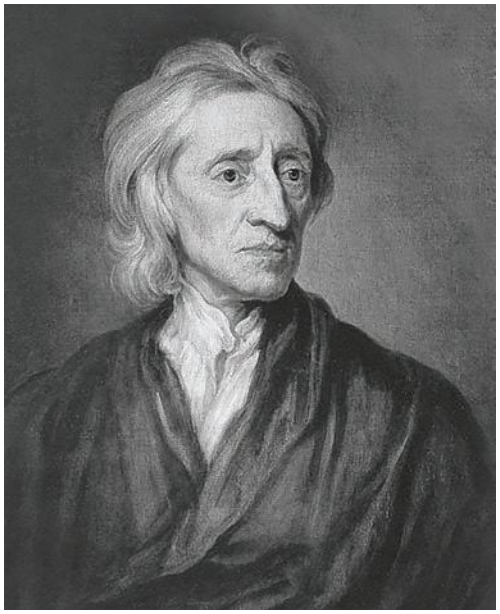

Figure 13.4 The philosopher John Locke, 1632–1704.

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cultivation of that land, presumably by the farming and clearing of it to make way for villages and towns, as the British were used to doing.

A legal issue, however, lay in how cultivation of the land was defined.

Additionally, Francisco de Vitoria thought there should be limits on the assumption of sovereignty by an external power. One such limit was that such power should be given up once the indigenous peoples concerned had shown themselves capable of self-government. The other limit was that any assumption of sovereignty be for the benefit of the indigenous peoples, not the colonisers.

In other words, if a country was considered vacant, it could be 'settled' and the laws of the colonising nation would apply immediately. However, if the indigenous peoples were recognised as having sovereignty, through self-government or cultivation of the land, the colonising nation would need to 'conquer' the country, or at least enter into a treaty with the indigenous peoples.

Two colonisation case studies

This legal distinction can be seen in action by comparing the European powers' treatment of Australian and New Zealand indigenous peoples. In the 1760s, before Captain James Cook set sail on his first voyage of discovery to the Pacific, British King George III gave specific instructions regarding the discovery of land. These instructions provided Cook with his responsibilities concerning British law, should he discover land that was either occupied or uninhabited. Should the land be occupied, Cook was required to **negotiate** with the indigenous peoples encountered, before claiming the land in the name of the King.

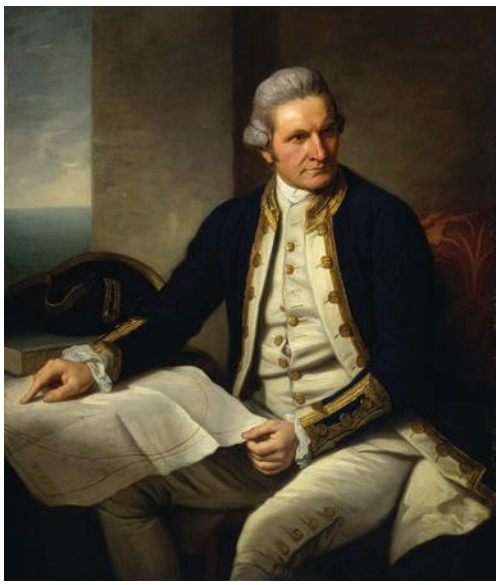

Figure 13.5 Portrait of Captain James Cook.

negotiation
discussion aimed at reaching an agreement

Australia

The treatment of Australia by the British partially resulted from a meeting of two very different systems of land management: one developed on the rainy meadows of England, and the other in the much hotter and drier Australian climate. To the British, 'cultivation' meant clearing the land to make way for farming and towns based upon ownership of property and land (property rights). But to the early Indigenous Australians, cultivation of the land meant managing the land in such a way that it was not overused and was maintained in trust for future generations. The nomadic lifestyle of the Indigenous Australians was part of this process. Their choice to live in a certain area for only a limited time gave the land a chance to rejuvenate itself and not have lasting damage.

The stark difference between this system and British farming also explains why the British failed to see the land as being cultivated. De Vattel also argued that the obligation of inhabitants to cultivate the land in order to claim sovereignty over it might not apply to a land in a desert state. In this case, a country could claim title to its possession only if this claim was followed by real possession of it. What can be assumed by what de Vattel said was that the land should be settled. Grotius was of a similar view, believing that 'discovery' was only possible if the land discovered was vacant.

Furthermore, the nomadic lifestyle of the Indigenous Australians was very different from the British notion of **governance** and law, leading to an argument that they were not capable of – or at least had not enacted – self-government.

governance
a method or system of government

Thus, Captain Cook did not recognise the Indigenous Australians' sovereignty over the land,

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even though he was aware of their presence. On 22 August 1770 he took possession of the entire eastern half of the continent, claiming it in the name of King George III without seeking or obtaining the consent of the Indigenous Australians. This act by Cook was followed in 1788 by the settlement of Sydney Cove by Captain Arthur Phillip. Ninety years later, the British colony of Queensland would claim the Torres Strait Islands.

These three land claims by the British represent significant points in the history of Australia. The first dispossessed Indigenous Australians of their land. The second began the British 'settlement' of Australia and imposed the laws of the British Government and the King of Great Britain upon all the inhabitants of the land. The third dispossessed the Torres Strait Island peoples of their lands.

At the time of the arrival of Captain Phillip and the First Fleet, there was no uniform standard of land law in the new colony, and as the British colonists spread out from Sydney to other parts of the continent, ad hoc land negotiations were sometimes carried out between the colonists and the Indigenous inhabitants. One famous example of this is John Batman's 'purchase' of the land around Melbourne and the Bellarine Peninsula in exchange for some axes, handkerchiefs, looking glasses and other sundry items. Seeking to quash these precedents, the governor of New South Wales at the time, Richard Bourke, issued a proclamation which determined that no one had ownership of the land before British possession, thus establishing the notion of ***terra nullius***. This proclamation was later followed by a British Colonial Office proclamation to the same effect.

terra nullius
a Latin expression meaning 'land belonging to no one', which is used in international law to describe territory that has never been subject to the sovereignty of any state

This legal position lasted for over 100 years. But in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1, the High Court finally accepted that **native title** existed at the time of European settlement and as a result ruled that the doctrine used to claim the land – *terra nullius* – was flawed. Therefore, it could be argued that an Indigenous Australian legal and governance system was in place when the British arrived, even though the invading British failed to recognise the sovereignty of Indigenous Australians.

native title
recognition under Australian law of the traditional laws and customs of Aboriginal and Torres Strait Islander people, as they apply to their interests and rights in land and waters

New Zealand

Before reaching Australia, Captain Cook had mapped the complete coastline of New Zealand, and had also encountered the Māori people. To the European eye, the Māori society seemed organised, unlike that of the nomadic Indigenous Australians. Thus, in terms of the King's instructions, Cook could not simply claim this land for Great Britain.

The initial settlement by Europeans after Captain Cook's survey of the islands occurred at a very slow pace, and was limited almost completely to rogue soldiers and sailors. However, in 1839, after a campaign by an organisation known as the New Zealand Company, the British Captain William Hobson went to New Zealand to convince Māori chiefs to grant sovereignty to the British. Spurred by the desire to protect themselves from other European powers, the Māori chiefs signed the *Treaty of Waitangi*, which, according to the English-language version at least, gave Britain sovereignty over New Zealand in return for protection, the rights of British citizens, and ownership of their own lands and possessions.

However, the pace of settlement was much greater than initially anticipated by the Māori chiefs. Nearly half a million Europeans arrived in New Zealand soon after the signing of the treaty in 1840. The enormous pressure this rapid population growth put on the land resources led to a bitter conflict in the North Island known as the Land Wars, which were caused by illicit land grabs made by European colonialists. Although the Māori population suffered many abuses at the hands of the European settlers of New Zealand, the very existence of the treaty has provided the Māori with the ability to access legal redress and compensation for these wrongs, which they have been doing since the second half of the 20th century. Compensation for breaches of the treaty has amounted to several hundred million dollars. The doctrine of *terra nullius* was not applied

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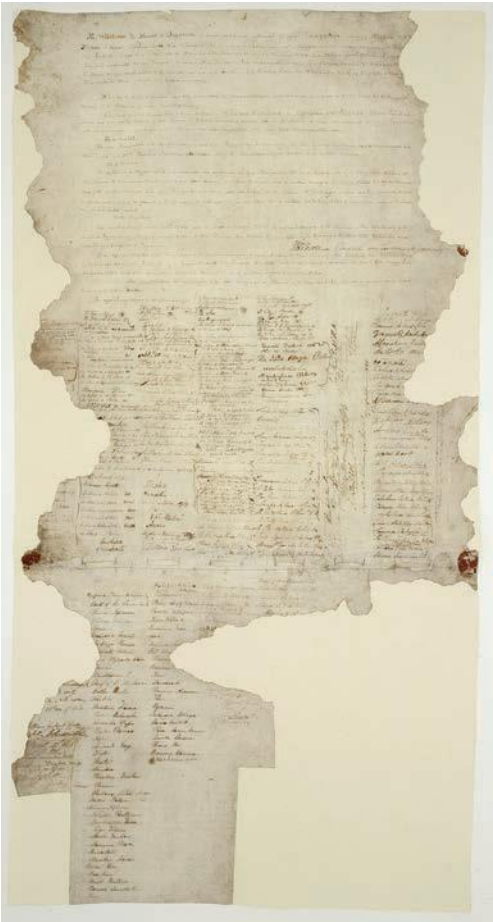

Figure 13.6 The *Treaty of Waitangi*.

to New Zealand as it was in Australia. The interesting legal point here is why the British did not also offer Indigenous Australians a treaty, instead of deciding to 'settle' the continent.

Review 13.3

1. Outline the key purpose of the doctrine of *terra nullius*.
2. Examine the reasons why the British did not recognise the Indigenous Australians as cultivators of the land.
3. Discuss why the Māori chiefs signed the *Treaty of Waitangi*.
4. Identify what has provided the Māori with the ability to access legal redress and compensation, which they have done since the second half of the 20th century.

The end of colonisation and global recognition

Before World War I, many European countries including Hungary, Bulgaria and the Balkan nations were incorporated into either the Austro-Hungarian or the Ottoman Empire. Most of Africa had been swallowed up by Great Britain, France, Belgium and Germany; and South-East Asia by The Netherlands, France, Great Britain and Japan.

During the 20th century, many countries, whether by military action, political negotiation or a combination of the two, threw off the rule of these colonial powers. The initial catalyst for this process was World War I, which caused the dissolution of the great European empires – the Hapsburg and Ottoman empires – and sowed the seed for the fragmentation of the overseas empire of Great Britain. In the years after World War I, the British government passed the *Statute of Westminster*, which granted formal independence to Australia, Canada, New Zealand and the Union of South Africa, as well as granting independence to Egypt, Afghanistan and Iraq. However, Great Britain maintained its rule of India, as well as colonies in the Caribbean, Malaysia and Africa.

Research 13.1

1. Research claims of *terra nullius* in another country of the world. Write a summary of your findings.
2. Research an example of the end of colonialism internationally and write a report expressing your opinion of this example.

The importance of the right to self-determination

Many countries around the world have been colonised, conquered or settled by a foreign power. Over the course of the 20th century, a new body of international law that asserts the right of peoples within these nations to govern themselves developed.

Self-determination refers to the ability of an individual, a group of individuals, or a people to govern themselves. This means that they can make

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decisions about how they are governed, what legal system is put in place, and what is the best and most effective education system and health system – in short, all of the decisions that a government is entrusted with. Control over one's own future is an important human right. Therefore, self-determination puts the legislative power for good or ill in the hands of the indigenous peoples. It is for this reason that in both the *Declaration on the Granting of Independence to Colonial Countries and Peoples* and the *Declaration on the Rights of Indigenous Peoples*, the UN stresses that the right to self-determination is a fundamental right.

self-determination
the right of people to determine how they will be governed, or political status based on territory or national grouping

In 1960, the General Assembly of the UN passed Resolution 1514 (*Declaration on the Granting of Independence to Colonial Countries and Peoples*), which declared that the 'subjection of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights', that '[a]ll peoples have the right to self-determination … they freely determine their political status and freely pursue their economic, social and cultural development', and '[a]ny attempt aimed at the partial or total disruption of the national unity and the territorial integrity of a country is incompatible with the purposes and principles of the Charter of the United Nations'.

Although the UN has declared in both the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) that self-determination is a fundamental human right, there have been a number of political and legal factors, both practical and ideological, which have limited the application of this idea to the circumstances of indigenous peoples. At an international level, there has been a distinction made between societies in which the colonised people make up a majority and those in which they make up a minority of the population. For example, in the former British colonies of India and Kenya, it has been much easier for colonised peoples to achieve self-determination.

Where the colonising culture is well established, as in Australia (also Canada, the United States, Norway and Chile, among others), self-determination is complicated by various factors. The first and most obvious is the sheer diversity of indigenous peoples. In Australia, for example, there are many Indigenous groups that are both culturally and linguistically distinct. Any law or international agreement made in relation to these peoples must take into account this diversity. Despite this great variety, what all these indigenous peoples have in common is that they existed – and had formed a close relationship with the environment and their land – prior to the arrival of settler or colonial societies.

Two of the UN's factors to consider with indigenous groups are particularly pertinent in the context of self-determination: **self-identification** and **historical continuity**.

self-identification
the principle that indigenous people themselves perform the determination of their indigenous identity

historical continuity
the existence of social, cultural, linguistic or spiritual links with past practices

The principle of self-identification ensures that those who are most knowledgeable about indigenous peoples – the indigenous peoples themselves – make the identification. This principle also has the effect of ensuring that indigenous peoples are not subject to having their identity stripped away by outsiders, through prejudice, ignorance or political calculation. This is particularly important in light of the many **assimilation** policies that have been put in place

Figure 13.7 In Australia, there are many Indigenous groups that are both culturally and linguistically distinct.

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throughout the history of indigenous contact with settler/colonial peoples.

assimilation
a policy based on the idea that the minority group should adopt the language and traditions of the majority group

An assessment of historical continuity requires an understanding of the significant variation among the histories of indigenous peoples. For example, the Indigenous peoples of Australia have been settled on the continent for tens of thousands of years, but the indigenous people of New Zealand, the Māori, are estimated to have arrived in that country in only the 13th century CE. Similarly, the Inuit of northern Canada and Greenland probably only settled in that area around 1300 CE. The Chittagong hill tribes of Bangladesh offer another contrasting experience. They have lived alongside the dominant Bengali population, living in the flatlands of the country, for centuries.

Deliberate or inadvertent attempts to disrupt historical continuity – whether demonstrated by the continuation of cultural practices and indigenous languages, or continued traditions of food production – have been made by many settler societies. One of the most well known of these policies is the collection of legislation executed by Australian state and federal governments referred to as the '**Stolen Generation**' policies.

Stolen Generations
Indigenous Australian children who up until the 1960s were removed from their families and tribal lands by federal and state governments and church missions under Acts of the respective parliaments

Another example of this type of policy can be seen in the attempt of the Canadian and American governments to seek assimilation of the First Nations, Inuit and Métis people by establishing boarding schools. This was an attempt to educate the indigenous children from those countries. However, in the attempt to achieve education the government removed the children from their families and hindered any chance of cultural continuity in traditions, language and practices. In some cases, these residential schools and settlements were also sites of physical and sexual abuse perpetrated against indigenous people.

Another prominent example that took place in Canada was the High Arctic relocation. This saw Inuit families transported to islands far north of where they had previously lived, taking them away from the food sources they had known and into a much harsher environment. Some scholars have suggested that this relocation was performed to shore up Canada's territorial claims in that region, but officials have justified the displacement on the basis that the land the Inuit people were then occupying was overpopulated and therefore couldn't sustain the traditional methods of food collection. Although these relocated people eventually adapted to the difficult conditions, it took them many years. They had to adapt to the new climate, specifically much longer and darker winters, which resulted in much sparser food sources for them.

The Canadian government eventually felt compelled to apologise for the displacement and removal of the Inuit peoples. On 18 August 2010 in Inukjuak, Nunavik, John Duncan apologised on behalf of the Government of Canada for the relocation of the Inuit to the High Arctic: 'Today's ceremony is an important step towards healing and reconciliation … The relocation of Inuit families to the High Arctic is a tragic chapter in Canada's history that we should not forget, but that we must acknowledge, learn from and teach our children.'

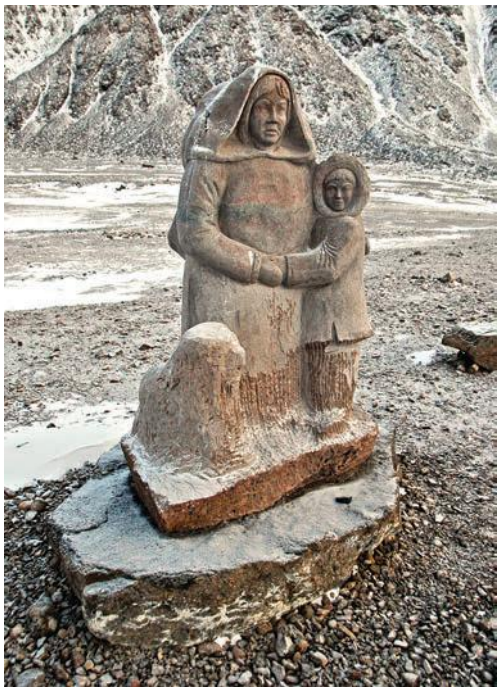

Figure 13.8 Monument commemorating the Inuit of the High Arctic relocation.

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Unfortunately, these episodes of the separation of children from their traditional families, and the dislocation of indigenous people from their land and country, have echoes in many global histories of contact between settler societies and indigenous peoples. The world has seen numerous cases of displacement and forced relocation. It is an all too familiar theme for indigenous peoples.

Review 13.4

1. Define self-determination in a legal sense.
2. Define the principle of self-identification.
3. Outline what the principle of historical continuity establishes for indigenous peoples.
4. Examine why the Canadian and American governments established boarding schools for the First Nations, Inuit and Métis children. Discuss the effect on the cultural continuity and suggest steps they could have implemented instead.

13.3 Responses to indigenous peoples

The role of the nation state and state sovereignty

As discussed earlier, many indigenous peoples' sovereignty over their lands was taken away from them during the period of colonisation.

Though it is a highly contestable term, 'sovereignty' can be taken to mean the absolute legal power to make and enforce laws within a certain territory. This means that, within the boundaries of the nation, the state is able to exclude laws made by all other nation states. Thus, there is often a conflict of interest between a sovereign state and an indigenous community located within that state.

Even though the importance of the right to self-determination is now recognised, it raises issues of territorial integrity or sovereignty. If a group of people residing within the borders of a country effectively leaves the political administration of that country and forms their own self-determined government, this poses questions for the territorial integrity of the nation. The encompassing nation state provides administration and services, such as hospitals and roads, as well as a legal system that generally does not encompass traditional laws. The nation state will also have a global presence, such as a seat at the UN General Assembly. Thus, while there may be a culturally distinct group of people within the nation, they cannot form their own sovereign state.

For this reason, the concept of self-determination for indigenous peoples has come to have a more limited meaning. Many states have attempted to reconcile the competing demands of respecting the rights of indigenous peoples regarding self-determination and maintaining political stability, by giving greater decision-making power to indigenous groups.

In Australia, the autonomy granted to Indigenous Australians has waxed and waned since the 1970s, when many Indigenous people formally petitioned the government for decision-making power over their own communities. This eventually led to the establishment of the Aboriginal and Torres Strait Islander Commission (ATSIC), which facilitated the sharing out of federal funds and coordinated negotiations between the federal government and Australia's Indigenous communities over funding priorities. However, ATSIC was plagued by difficulties over funding concerns, and the Howard federal government, responding to this, passed the *Northern Territory National Emergency Response Act 2007*, which, among other reasons, has been criticised because it takes away autonomy, and therefore the limited level of self-determination that had been available, from Indigenous communities.

Aside from funding issues, there are other areas in which traditional customs may be incorporated into other systems (for example, circle sentencing as an alternative court for sentencing adult Indigenous Australians).

In Norway, Sweden and Finland, Sámi parliaments have been established to represent the indigenous populations of these countries. However, in each of these countries the effectiveness and powers of these parliaments vary dramatically. In Norway, home to the largest proportion of the Sámi population and a country where until World War II the Sámi population were subjected to a century-long

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Figure 13.9 The Sámi Parliament of Norway in Karasjok, Norway.

assimilation policy, the parliament has responsibility for the preservation of the Sámi language and culture. A ballot of the Sámi population elects members of the parliament. Control of the Finnmark Estate, a large area of land in the northernmost part of Norway (the area where the Sámi population is concentrated), is shared between the Norwegian Sámi parliament and the Finnmark Council.

The Sámi parliament is also responsible for the protection of Sámi heritage sites and the creation and provision of educational materials. In Sweden, a country with a much smaller Sámi population, the Sámi parliament has much more limited powers. Although the members of the parliament are elected in much the same way as the members of the Norwegian Sámi parliament, its budget is much smaller and it functions simply to advise the Swedish government, without any autonomous powers of its own. For this reason, the Swedish government has been criticised for allowing only token representation of Sámi interests – the Sámi parliament in Sweden has less power than a municipal council. The Finnish Sámi parliament also has a relatively low budget and limited powers of autonomy. One difference is that votes in the Finnish Sámi parliament elections are cast for individual candidates, not for parties. Moreover, the Finnish are *obliged* to consult with the parliament on any matter that may affect the Sámi's status as an indigenous people. In Russia, the fourth country with a Sámi population, there is no system for indigenous representation.

In North America, the Canadian Department of Indian and Northern Affairs introduced self-government for First Nations people in 1995. This policy crucially recognised that the form of self-government should vary according to the needs of each indigenous people.

The role of the UN and international instruments

Established after the chaos and devastation of World War II, the UN developed in its early years a series of conventions, charters and declarations which safeguarded the rights of first people as a whole, as in the *Universal Declaration of Human Rights*, or of a group of individuals who had difficulty accessing their human rights. Through its legal instruments, the UN has, for example, attempted to protect the rights of children (*United Nations Convention on the Rights of the Child*), women (*United Nations Convention on the Elimination of All Forms of Discrimination against Women*) and refugees (*United Nations Convention Relating to the Status of Refugees*). It wasn't until 2007, however, that the *Declaration on the Rights of Indigenous Peoples* was adopted by the General Assembly of the UN.

International Bill of Human Rights

The International Bill of Human Rights is the name given to the fundamental United Nations instruments on human rights.

The *Universal Declaration of Human Rights*, adopted on 10 December 1948, states that 'the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. This declaration is not a treaty, and so it is not legally binding on countries. However, it was the precursor to a number of treaties, which are legally binding.

Two legally binding treaties are also components of the International Bill of Human Rights:

1. *International Covenant on Civil and Political Rights* (1966)
2. *International Covenant on Economic, Social and Cultural Rights* (1966).

Both of these treaties have the same text in art 1, recognising the right of self-determination:

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1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.

The remaining articles in these treaties, however, protect the rights of the individual, not the rights of groups. Indigenous peoples are able to try to redress perceived wrongs by making a submission to the Committee for the Elimination of All Forms of Racial Discrimination and the Human Rights Committee. These committees then bring these concerns to the attention of the nations involved.

ILO Convention 107

Subsequently, the International Labour Organization (ILO) recognised, for the first time in the area of international law, that the issues facing the indigenous peoples of the world were distinct, in the *Indigenous and Tribal Populations Convention, 1957* (Convention 107), written in 1957.

This ILO response to the needs of indigenous peoples was written with its chief focus on work, concerned that indigenous peoples were being used as slave labour or being paid wages not equal to those of the non-indigenous population. However, the ILO convention didn't pay any attention to the issues of self-determination, autonomy and self-government. The ILO later revised this convention to recognise a right to the protection of social, cultural, religious and spiritual values, practices and institutions of indigenous peoples; the right to participate freely in the culture of the state; rights to non-discrimination and freedom from oppression; and the right to own land traditionally occupied by the indigenous people. However, because this convention doesn't recognise a right to self-determination, many indigenous groups have argued it should be ignored or repealed. The ILO re-examined the convention and concluded that 'the integrationist approach of the convention was obsolete and that its application was detrimental in the modern world'. Thus, the convention was revised and renamed *Indigenous and Tribal Peoples Convention, 1989* (Convention 169). At present Convention 107 is still in force in 18 countries.

Wide swathes of indigenous peoples' rights have been protected within the articles of the convention. The most important are the reiteration of the principle that indigenous peoples have the right to enjoy all of the rights enumerated in the *Universal Declaration of Human Rights*; the right to self-determination (political status and economic, social and cultural development); the right to autonomy and self-government; the right not to be forced into assimilation or have their culture destroyed; and the right not to be forcibly removed from their lands.

The Working Group on Indigenous Populations

Gradually, more formal protection for indigenous peoples began to be developed at an international level. In 1994, the UN founded the Working Group on Indigenous Populations. This is one of the most accessible bodies for indigenous peoples as it enables them to share their concerns and experiences with the UN. With the implementation of the UN *Declaration on the Rights of Indigenous Peoples* in 2007 the Working Group on Indigenous Populations declared that it had achieved its major goal. The Working Group on Indigenous Populations met for the final time in July 2007.

Coming out of the working group were the First and Second International Decades of the World's Indigenous People, the first from 1994 to 2004 and the second lasting from 2005 to 2015, playing a tremendous role in raising awareness of indigenous issues. During these two decades, the UN initiated

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projects that addressed a wide range of concerns, including education, employment and health.

Declaration of the Rights of Indigenous Peoples

These achievements laid the groundwork for the *Declaration of the Rights of Indigenous Peoples*. This declaration relates to self-determination, cultural integrity (the right and the practicalities of preserving a distinct culture), as well as land and resource rights. Articles 3 and 4 of the declaration adapt the principle of self-determination for indigenous people, and art 4 states that indigenous peoples have the right to self-government in matters relating to their internal and local affairs – and, importantly, the right to be provided with the means with which to finance this autonomous governance.

Once again, however, this treaty places firm limits on the right to self-determination. Article 46 (1) states that the declaration should not be 'construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity, or political unity of sovereign and independent States'. Indigenous peoples must therefore still struggle for the kind of negotiated autonomy discussed earlier in the discussion of the Sámi parliaments of Scandinavia.

The *Declaration of the Rights of Indigenous Peoples* was adopted on 13 September 2007. Only four nations voted against the adoption of the declaration – the United States, New Zealand, Canada and Australia. All four countries have subsequently signed the declaration, with the Australian Rudd government doing so in 2009.

However, it must be remembered that the declaration is soft international law, not hard international law. The nation states that have signed it are morally bound, but not legally bound. In the future, a good step would be to use this declaration as the basis of a treaty, thus making it legally binding hard law.

The agreements made by the UN help to limit the power of sovereign nations. Even non-binding agreements, such as the *Declaration of the Rights of Indigenous Peoples*, help to create behavioural norms that establish guidelines by which the actions of states towards, for example, indigenous peoples can be judged, and in this way influence the actions of states.

Review 13.5

1. Discuss why the effectiveness and powers of Norway, Sweden, Finland and Sámi parliaments vary dramatically.
2. Explain why ILO Convention 107 was revised and renamed *Indigenous and Tribal Peoples Convention, 1989 (No 169).*

The role of courts

The courts offer an important avenue for indigenous peoples to attempt to regain rights they have lost.

In the 1990s, the Botswana government began a campaign to relocate the San people from their long-term home in the Kalahari Desert. Despite the fact that the San people (often known as the Bushmen) had lived in that area for hundreds, if not thousands, of years, the Botswana government stated that the continued habitation of the central Kalahari threatened the wildlife stocks and environmental sustainability of the area. The Botswana government stated that the San people had moved away from a hunter–gatherer lifestyle to a settled agricultural one – a lifestyle inconsistent with the current environmental conditions. However, some people, particularly opponents of the relocation, have suggested that the motivation of the Botswana government was not the protection of the environment, but instead clearing the land for tourism and diamond mining.

In the case heard before the Botswana High Court, *Sesana and Others v Attorney General* (52/2002) [2006] BWHC 1, the applicants – Roy Sesana, Keiwa Setlhobogwa and others – sought an order stating that the Botswana government's termination of essential services, such as 'the provision of drinking water on a weekly basis', 'the maintenance of the supply of borehole water', 'the provision of rations to registered destitutes', 'the provision of rations for registered orphans', 'the provision of transport for the Applicants' children to and from school' and the 'provision of healthcare to the Applicants through mobile clinics and ambulance services' was 'unlawful and unconstitutional'. After a lengthy trial of over two years (130 court days!), the court found by a 2:1 majority that the termination of these services was not unconstitutional, but they did find

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Figure 13.10 Indigenous people of the Kalahari, Botswana.

(by 2:1 majority once again) that they were deprived of legal possession of their land by the government 'forcibly or wrongly and without their consent', and (by 2:1 majority) that a 'refusal to issue special game licenses to the Applicants is unconstitutional'.

Despite this court decision, the Botswana government has been slow to permit the San people back into the Kalahari, thereby attracting criticism from the UN. Furthermore, the San people have been forced to fight further for their rights, winning another High Court battle in 2011 over access to vital wells. In 2013 the San people were forced to go back to court to clarify the decision of the court in the Sesana case. On 12 February there was a formal UN Human Rights Council session to find a resolution. The government has claimed that the Sesana decision only applied to the original applicants named in that case (189 individuals) – all other San peoples have been denied access to the Kalahari. And, contrary to the original court order, no San people have been given hunting permits in the reserve, an outcome that makes the subsistence hunting lifestyle of the San impossible. Since this time there has been constant battle with the Botswana government claiming that the verdict only applies to the 189 individuals named in the original case. This is one of the longest ongoing cases for indigenous peoples worldwide.

The court system of Canada, a common law country like Australia, has intervened on a number of occasions to support the rights of Canada's indigenous peoples. As Canada was settled, the growing settler society made a number of agreements with Canada's indigenous peoples – the most important of which was the *Royal Proclamation* of 1763, which explicitly preserves the right of Canada's indigenous peoples to the land not ceded to or purchased by the British. As the states came together and Canada was confederated, a further series of treaties, which guaranteed the continuation of hunting and fishing rights, as well as regular payments and land reservation, and the supply of such bounty as ammunition, was signed. These treaties were ignored in many ways, however. First Nations children were taken away from their families to live and be educated in residential schools, and land was forcibly occupied. In the 1984 case of *Guerin v the Queen* (1984) 2 S.C.R. 335, the Canadian Supreme Court found that (1) the Canadian government held the land in trust for the First Nations, Métis and Inuit peoples, and (2) reserve land should not be allowed to be used in such a way as would interfere with the cultural rights of indigenous peoples.

News

Sweden's indigenous Sami people win rights battle against state

David Crouch

The Guardian, 4 February 2016

Sweden's nomadic reindeer herders have won a 30-year battle for land rights in a court case that has seen the state accused of racism towards the country's only indigenous people.

continued ...

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News

continued ...

A decision in Gällivare district court on Wednesday granted the tiny Sami village of Girjas, inside the Arctic Circle, exclusive rights to control hunting and fishing in the area, restoring powers stripped from the Sami people, or Laplanders, by Sweden's parliament in 1993.

'It is a symbolic step towards getting Sami rights acknowledged, and we hope that this verdict can shape policies towards Sami issues in Sweden, that was the main goal,' said Åsa Larsson Blind, vice-president of the Sami Council, which represents Sami people in Sweden, Norway, Finland and Russia.

After a long struggle during which the Swedish Sami Association petitioned the European Commission and the Court of Human Rights, the case came to court in Sweden last year.

Lawyers for the state claimed that the indigenous status of the Samis was irrelevant to the case. 'Sweden has in this matter no international obligations to recognise special rights of the Sami people, whether they are indigenous or not,' they said.

In an open letter, 59 academic researchers, including ethnographers and anthropologists at the Sami Research Centre at Umeå University, condemned the lawyers for using the 'rhetoric of race biology' and revealing 'a surprising ignorance of historical conditions'.

The Sami-Swedish artist and singer Sofia Jannok wrote: 'The state wants to erase us from history.'

Larsson Blind said she was relieved that the court had seen through the 'colonial speech' of state representatives. 'By getting this verdict, many Sami individuals will feel strengthened after hearing the harsh wording used in the court,' she said.

Although the case concerned only a small geographical area, it came out of a far more general frustration that Sami issues were getting nowhere in the political arena, where they were debated endlessly but no decisions were taken, Larsson Blind said.

The attorney general, Anna Skarhed, defended the state's legal position last year and said there was 'no question that the Sami are an indigenous people, but that is not the issue'. Lawyers may yet appeal, meaning the case could drag on for many more years, Larsson Blind said.

Welcoming the verdict, the chairman of Girjas village, Matti Berg, told Swedish media: 'It is a long struggle and we have been victorious, I am so happy and relieved.' Berg faced threats of violence after the case was launched last year.

Some local Swedes are suspicious, however. 'The next step will be restrictions on snowmobiling and moose hunting,' said Robert Björk, a hunter from Kiruna.

'The court's decision is worrying for the hunters up here, but I assume that the verdict will be appealed [against],' Birgitta Isaksson from the Swedish Hunters Association in Kiruna told SVT.

Sweden does not register the ethnicity of its citizens, so exact numbers are not known, but about 20,000 Sami are estimated to live there, with a minority continuing the traditional reindeer-herding way of life. The Sami language was recognised as an official minority language in 2000.

Sweden's Sami are also battling plans by Britain's Beowulf Mining to mine iron ore in the country's far north. 'The verdict has no direct effect on mining plans, but it is one piece of the puzzle to get Sami land rights acknowledged so we can get more influence on mining,' Larsson Blind said.

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The role of intergovernmental organisations

There is a substantial number of intergovernmental organisations around the world. Some of these organisations are members of other organisations.

In Australia, the Department of Foreign Affairs and Trade (DFAT) provides foreign, trade and development policy advice to the government. In 2015 DFAT launched the DFAT Indigenous Peoples Strategy 2015–2019:

> The strategy will be guided by four pillars to achieve this vision:
> - DFAT will work with its partners to influence international policy to advance the interests of indigenous peoples in the international community.
> - DFAT will strive to deliver international programs that improve outcomes for indigenous peoples.
> - DFAT will encourage Indigenous Australians to apply for DFAT-funded opportunities to engage in and develop people-to-people links with the international community.
> - DFAT will ensure an inclusive workplace culture across the department.

The role of non-government organisations

The various state and federal governments and international intergovernmental organisations, such as the UN, are not the only organisations that have an influence on the conditions of the lives of indigenous peoples. There are many organisations that work outside the apparatus of government, attempting to alleviate some of the issues facing indigenous communities today. Important non-government organisations (NGOs) include Native Planet, First Peoples Worldwide and the Indigenous People's Network. Within Australia, some notable charities and organisations that work closely with Indigenous communities are Oxfam Australia, the Fred Hollows Foundation and the National Heart Foundation of Australia.

These organisations carry out valuable work in indigenous communities, particularly in the field of health. Communities may be more receptive to these organisations than they would be to government organisations working in the community as they restrict the autonomy of the communities far less.

The role of the media

The media plays an important role in communicating the often-ignored difficulties that many Indigenous peoples face, particularly those in remote locations. They also play a key role in framing public discussion and influencing public perception of indigenous peoples and their issues. The manner in which a news story is reported can be just as important as the facts which are being told.

Another important area is the growth of indigenous media, such as television programs, community radio, newspapers and entire broadcast networks. In Canada, the Aboriginal Peoples Television Network (APTN) began broadcasting in 1992; other indigenous broadcasters include Māori Television, NRK Sápmi and Taiwan Indigenous Television. In 2008 the World Indigenous Television Broadcasters Network (WITBN) was formed to develop collaboration between indigenous broadcasters.

Australian Indigenous media includes National Indigenous Television (NITV), *The Koori Mail* and the SBS current affairs program, *Living Black*.

Review 13.6

1. Evaluate the effectiveness of the Botswana High Court in its protection of the San people and the rights of indigenous peoples. Make a prediction of what might occur if a similar case were brought before the High Court in Australia.
2. Read the news item, 'Sweden's indigenous Sami people win rights battle against state' and consider how the reporter has chosen to present the story.

Research 13.2

1. Write a report about an international government organisation or NGO that works to protect indigenous rights.
2. Find out about an indigenous media organisation or association.

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13.4 Australia's federal structure

The federated nature of Australia's government means that legislative power is shared out by the *Australian Constitution* between the federal government and the governments of the various states and territories. Sovereignty is to some degree shared out to members of the electorate, who have the ability to change the government at elections.

The *Constitution* provides for certain powers to be allocated to the federal government, with all legislative power granted to the states. This structure of government has had enormous ramifications for Australia's Indigenous peoples.

In this section we consider three key events in the history of the Australian Government's response to the needs of indigenous peoples.

The 1967 referendum

In the 1960s, the general public grew increasingly aware of the plight of Indigenous Australians, and activists campaigned determinedly for change. On 27 May 1967, a federal **referendum** was held to decide whether two references in the *Australian Constitution*, which discriminated against Indigenous Australians, should be removed:

> 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: (xxvi) The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.
> 127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

(See http://cambridge.edu.au/redirect/?id=6482 for source information.)

referendum
the referral of a particular issue to the electorate for a vote

Because Indigenous Australians were exempt from these sections of the *Constitution*, the federal government was not able to amend legislation in an attempt to improve their situation. The removal of the two sections in the *Constitution* also had great symbolic importance. It meant there was now no legislative difference between Indigenous Australians and non-Indigenous Australians. It also drew the attention of the 'other half' of Australians – the majority, European, urban population – to the plight of Indigenous Australians.

The referendum was greeted with a resounding 'yes'. In fact, it is the highest 'yes' vote in any Australian referendum held so far, with 90.77% of people supporting the amendment. The changes were brought into effect on 10 August 1967 by the *Constitutional Alteration (Aboriginals) Act 1967* (Cth), and while the day-to-day lives of Indigenous Australians were largely unchanged, it was seen as a symbolic step on the road towards recognition and equality.

The Stolen Generations

It is estimated that approximately 100 000 Indigenous Australian children were removed from their parents and traditional lands under state and federal policies of assimilation. This process did not end in Australia until the 1960s. Most of these children were placed in government or church-run institutions while others were adopted or placed into the care of white families. There was an assumption that the children would be better cared for living in dormitories on missions and reserves. But for most, the loss of their culture and identity was worse than poverty and living in substandard housing with their families. It can be seen as even more traumatic when considered within the context of Indigenous Australian traditions and kinship ties.

The removal by various governments throughout Australia of Indigenous Australian children from their families, based upon their race and culture, was allowed under a range of laws that were passed by the respective parliaments. The *Aboriginals Protection Act 1869* (Vic), for example, gave the Aborigines Protection Board lawful authority over the care and control of any Indigenous Australian child or child of mixed race, if it was determined to be in the best interests of that child. The *Aboriginal Protection Amending Act 1915* (NSW) established the

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Figure 13.11 The Stolen Generations were deprived of relationships with elders.

Board of Protection of Aborigines, which had the power to assume full control and custody of any child of any Indigenous Australian. The *Northern Territory Aborigines Act 1910* (SA) established the Chief Protector as the legal guardian of any Indigenous Australian child in the Northern Territory. Offices of the Chief Protector of Aboriginals were also set up in Western Australia and Queensland. The men who held these positions, most notoriously the West Australian A.O. Neville, held extraordinary power over the lives and fates of Indigenous Australians. All of these Acts have since been repealed.

In 1997, following an inquiry that had begun two years earlier, the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) released *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*. The report documents the issue commonly referred to as the 'Stolen Children' or the 'Stolen Generations'. It is available in libraries and on websites such as that of the Australian Human Rights Commission (see http://cambridge.edu.au/redirect/?id=6483).

The issue of the Stolen Generations was presented in the 2002 film *Rabbit-Proof Fence*, which was based on the true story of three Aboriginal girls who in the early 1930s were forcibly removed from their families in Western Australia.

In 2008, then Prime Minister Kevin Rudd delivered a national apology for the wrongs of Australia's past. This apology symbolised the changing values of the Australian Government, which had previously refused to accept responsibility for this dark past.

The Northern Territory Intervention

As health, education and crime continue to be major issues for large numbers of Indigenous Australians, governments of recent years have introduced and supported legislation that attempts to resolve some of these issues. One of the most well-known is the Howard government's *Northern Territory National Emergency Response Act 2007*, commonly referred to as 'the Intervention'. This Act introduced measures such as additional police officers in Indigenous Australian communities, restrictions on alcohol, and the provisioning of welfare payments to parents based on their child's school attendance.

The changes were a response to *Little Children Are Sacred*, a report commissioned by the Northern Territory Government to assess child sex abuse in Indigenous Australian communities. However, only two of the 97 recommendations in the report were implemented. Because of this, some feel that launching the Intervention as a response to the report was disingenuous. Many Indigenous Australian leaders, the Northern Territory Government and the Australian Human Rights Commission have all expressed criticism of the program, stating concern that it demonstrates further discrimination against Indigenous Australians. Action groups like Stop the NT Intervention work hard to show the true damage

Figure 13.12 The Northern Territory Intervention purportedly has the improvement of the welfare and future of Indigenous children as one of its primary goals.

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and statistics associated with the government initiative. On the other hand, the Intervention has received support from some Indigenous Australian leaders and community welfare groups, and the legislation received **bipartisan** support in federal parliament.

bipartisan
having the support of the two major political parties

Review 13.7

1 Identify the legal effect and recognition given to the Indigenous Australians in the 1967 referendum.
2 Evaluate why a compensation scheme is necessary for Stolen Generations victims.
3 Describe what the Intervention is and how it came about.

13.5 Contemporary issue: Loss of cultural rights including language

Language is more than just a method of communicating: it links people with their history, and forms a basis for their emotional, spiritual and social wellbeing. Language preserves a vast amount of cultural and historical information, and presents fresh and vitalising ways of being in the world. It is a key element of group identity and vital for the support of a culture.

Aboriginal and Torres Strait Islander peoples

When we talk about Australia's indigenous peoples, it is important to remember that we are not talking about one unitary people, but an enormous number of cultures, traditions, histories and, indeed, languages.

Some indigenous languages include an entirely separate set of nouns for use in front of your in-laws. Other languages use cardinal directions (north, east, south, west) instead of 'left' and 'right' – so you might talk about your 'east' hand' – and the almost extinct Dyirbal language from north-eastern Queensland classifies its nouns not just into masculine and feminine categories like many European languages, but also into four separate classes:

1 most animals, men
2 women, water, fire, violence and strange animals
3 edible fruit and vegetables
4 miscellaneous objects.

These examples give just a mere sketch of the diversity and freshness offered by Indigenous languages. Sadly, the long history of violence and disease suffered by Indigenous Australians at the hands of European settlers has had devastating effects on the Indigenous languages and the communities of their speakers. Even more significantly, the forced separation of young language learners from their best language teachers (parents, grandparents, elders) as part of Stolen Generations-era policies has meant that many Indigenous Australians have lost contact with the language, and therefore the culture and history, of their ancestors. Only now are government programs attempting to preserve Indigenous languages.

Legal Links

The preservation of Indigenous Australian languages is a vital aspect of ensuring Indigenous Australian culture and linguistics are remembered and passed on to future generations. Follow the link at http://cambridge.edu.au/redirect/?id=6484 and read the article, 'Australia tries to halt loss of Aboriginal languages', which focuses on the dangers of letting Indigenous Australian languages die out and the ways in which people are trying to preserve them.

The Sámi people in Norway

Many indigenous communities around the world have faced similar challenges. The languages of the Sámi in Norway were threatened by a long, concerted linguistic assimilation, or 'Norwegianisation', policy, which lasted until the outbreak of World War II. The Sámi language was prohibited from being used in public schools and in churches, and Sámi culture was denigrated as inferior. Additionally, Sámi were prevented from claiming agricultural land unless they could prove they spoke Norwegian.

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After World War II, the nationalism that had fuelled the Norwegianisation policy fell out of favour, and Sámi language broadcasts resumed on the radio. However, use of the Sámi language continued not to be supported in the contexts of education and business. It was not until the 1980s that the Sámi School Board, which influenced the government about Sámi education, was established.

From the latter half of the 20th century, the Sámi language has gradually attracted more support from the Norwegian government. One of the most important of these was the inclusion in the Norwegian Constitution of article 110a, which states '[i]t is the responsibility of the authorities of the State to create conditions enabling the Sami people to preserve and develop its language, culture and way of life'. Another significant moment was the official apology to the Sámi people made by King Harald V in 1997:

> [t]he state of Norway was founded on the territory of two peoples – the Sámi people and the Norwegians. Sámi history is closely intertwined with Norwegian history. Today, we express our regret on behalf of the state for the injustice committed against the Sámi people through its harsh policy of Norwegianisation.

Today, in Sweden, Sámi children have the opportunity to attend, up to the ninth grade, one of six public educational facilities that offer Sámi language.

Research 13.3

1. Research another country with a range of indigenous language groups, such as Canada, and explain the extent to which they are surviving in the present day.
2. Investigate the role of the Māori Language Commission in New Zealand.
3. Outline the initiatives globally created to preserve the indigenous peoples' languages. Make a list of the positive implications from the preservation for future generations.
4. Investigate other indigenous cultural rights that have suffered, such as social arrangements or spiritual beliefs.

13.6 Contemporary issue: Land rights

The initial seizure of Indigenous lands by colonising nations has resulted – decades or centuries later – in the indigenous peoples taking legal actions to regain rights to their traditional lands.

Aboriginal and Torres Strait Islander peoples

When the British settlers first arrived in Port Jackson in 1788, they did not sign any sort of treaty with the Indigenous inhabitants of that area. Though the reasons for this are unclear, it may have been because the Indigenous inhabitants of those areas didn't have a form of government or political administration that the British settlers could recognise as analogous to their own. There was, at this stage, no attempt at a legal legitimisation of British settlement. However, after Batman attempted to 'purchase' the land that would become Melbourne and the Bellarine Peninsula from the Kulin nation, Governor Bourke and the British Colonial Office firmly established the notion of *terra nullius*, which was developed further by Australian courts in the early decades of the 19th century. This concept, which can be translated as 'empty [*nullius*] land [*terra*]', derives from the ideas of de Vattel and Grotius discussed earlier in the chapter. A series of cases heard in the Sydney courts in the 1820s and 1830s relied on the idea of *terra nullius* to establish the principle that the Indigenous inhabitants of Australia were not subject to English law unless they interacted with the settlers. Interestingly enough, this was because the Indigenous inhabitants were thought (accurately) to be governed by their own legal systems.

Later, this notion was used to justify provisions whereby Indigenous inhabitants could not sell, transfer or acquire land, except when granted it by the Crown. It wasn't until 1971 that formal land rights litigation by an Indigenous group was pursued in Australian courts. This case, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, otherwise known as the Gove land rights case, concerned the Yirrkala people in Arnhem who sued the mining firm Nabalco Corporation in an attempt to prevent bauxite mining taking place on their traditional lands. The presiding judge in that case, Justice Blackburn, found that native title could not exist because of the principle

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In Court

***Mabo v Queensland (No. 2)* (1992) 175 CLR 1**

Facts: Eddie Koiki Mabo was a Torres Strait Islander man. He and four other Torres Strait Islanders, who lived on the Murray Islands, took the state of Queensland to court seeking a declaration on whether they had native title over the Murray Islands. The case was first heard in the Supreme Court of Queensland and then in the High Court of Australia, where a decision was brought down in 1992.

Issues: At the time of the arrival of the British, did Indigenous Australians have sovereign power over their lands? If so, was the doctrine of *terra nullius,* which had been used to settle the continent, incorrectly applied? Specifically, was there a form of Indigenous ownership of the land such that the Torres Strait Islanders of the Murray Islands had lawful native title? If so, should that title be legally recognised by the Australian courts?

Decision: Ten years after Eddie Mabo and the four other Torres Strait Islanders commenced legal proceedings against the state of Queensland, the High Court of Australia brought down its judgement. The full court of seven High Court justices had heard the case. Six justices ruled that the Murray Islanders did have a legally recognisable native title over their lands and that the land was not uninhabited on settlement. They also ruled that the use of the doctrine of *terra nullius* by the British to claim sovereignty of Australia was flawed and that it did not extinguish the ownership of the land by the Murray Islanders. One High Court justice did not agree. However, because a majority was achieved and no appeal exists for a decision of the High Court, the case was won by Eddie Mabo.

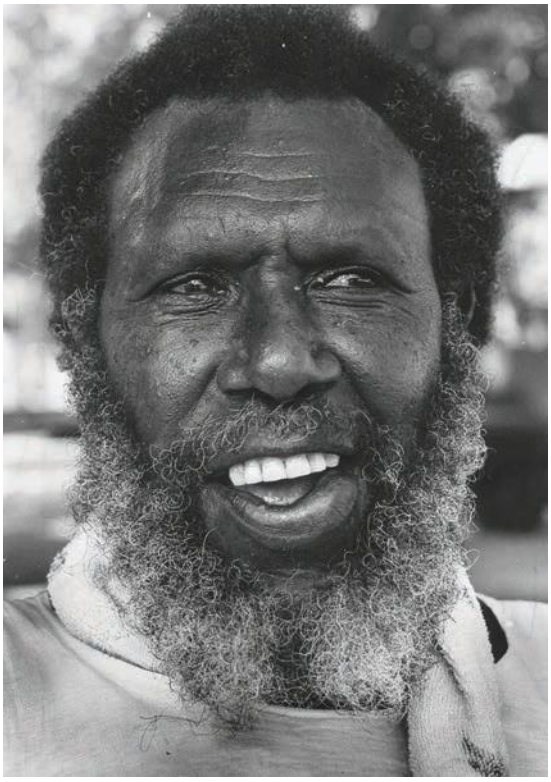

Figure 13.13 Eddie Koiki Mabo.

of *terra nullius,* which operated in Australian law. This position froze the progress of native title for over 20 years, until the momentous case of *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

Since the *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 decision, the process of Indigenous land rights reform has seen many landmarks. The *Native Title Act 1993* (Cth) was passed by the federal parliament one year after the High Court brought down its judgement in the Mabo case. Whereas the Mabo decision acknowledged the existence of native title of Indigenous Australians, and that the doctrine of *terra nullius* had not extinguished that title, it was not until the introduction of the Native Title Act in 1993 that native title was formally recognised, protected and regulated. The Act sets out the content and nature of the rights that may be enjoyed by the owners of native title determined by the traditional laws and customs (**customary law**) observed by the original inhabitants of that land.

customary law
principles and procedures that have developed through general usage according to the customs of a people or nation

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In Court

***Wik Peoples v Queensland* (1996) 187 CLR 1**

The Wik people of Cape York in Queensland were able to use the landmark *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 decision of the High Court as a precedent for claiming native title over the land that had previously been leased by the Queensland Government for pastoral use. The **point of law** that needed to be considered was whether the issue of a **pastoral lease** by the state government extinguished a claim to native title. The matter was heard in the High Court of Australia and a decision was brought down in 1996, four and a half years after the *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 decision.

point of law
a question which must be answered by applying the relevant legal principles and by an interpretation of the law

pastoral lease
a government lease that allows Crown land to be used, generally for farming; exists under Australian Commonwealth law and also under state jurisdictions

For a native title claim to be recognisable under Australian law, there must be a continuous acknowledgement and observance of the Indigenous Australian clan or tribe's traditional laws and customs since British sovereignty. Whereas native title may be surrendered to the Crown voluntarily, it is not available to people who are not members of the particular clan or tribe claiming native title over an area of land – put simply, you must belong to, and have a kinship tie to, the clan or tribe. The land claimed must be of traditional and cultural significance to that clan or tribe.

The High Court of Australia sat as a full court in the Wik case. Four justices decided that the existence of a pastoral lease did not necessarily extinguish a native title claim to the parcel of land being contested. Three justices were of the opinion that it did. However, as it was still a majority decision, the Wik people narrowly won their claim of native title over Cape York. The *Wik Peoples v Queensland* (1996) 187 CLR 1 decision meant that, in some cases, the native title rights of Indigenous Australians could coexist with the rights bestowed upon pastoralists by a pastoral lease. On the other hand, the decision also meant that native title did not override the rights of pastoralists to the use of the land granted to them under the pastoral lease. The legal issue now was to decide how the two would coexist and what form of compensation would apply, if any, for the original owners.

By 2017, the Native Title Act has been in force for 24 years. During this time there have been more that 301 native title determinations. Out of these determinations, native title has been found to exist in its entirety in 96. The others have either been found to be part native title determinations or there are no native title determinations for the area being claimed.

Figure 13.14 Pastoral leases allow Crown land to be used, generally for farming.

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Research 13.4

1. Explain the effect the landmark decision in *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 had on *all* Indigenous Australians.
2. Research the *Native Title Act 1993* (Cth). Explain what the introduction of the Act did for the protection of the Indigenous people and their native title claims.
3. Outline the reasons why the Wik people challenged the pastoral leases of the land in Queensland. Was this challenge evidence of a growing awareness by Indigenous Australians of how to use the Australian legal system to obtain justice for their people? Justify your answer with evidence.
4. The High Court of Australia can hear a case before it with one, three, five or seven justices. Explain how the court decides the number of justices hearing a case. Why did the High Court decide to hear both *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 and *Wik Peoples v Queensland* (1996) 187 CLR 1 as a full court (seven justices)?

The First Nations people in Canada

In Canada, the 1995 introduction of self-government for First Nations people led to the negotiation and renegotiation of treaties old and new. Crucially, these negotiations recognised that the right to use and occupy the land held by indigenous people could be updated to modern uses. This was confirmed in 1997 by the court case *Delgamuukw v British Columbia* [1997] 3 S.C.R. 1010, which recognised 'Aboriginal title'. As with the Mabo case in Australia, the Delgamuukw decision recognised that Aboriginal or native title is not alienable to anyone except the Crown (thus the land is prevented from being exploited commercially), that it is fundamentally of a different nature to private property and that it is held communally. However, in contrast to the state of the law in Australia, non-traditional or modern uses of the land are proof of Aboriginal title (if they don't contradict traditional uses), the Crown owes the possessors of the title a fiduciary duty, and the possessors of the title over the land also have a right to whatever is below the land – giving them an interest in whatever is dug up by resource companies.

The Mapuche people in Argentina and Chile

The experience of the Mapuche people living in the southern-most parts of South America makes an important contrast with that of Australia's Indigenous peoples. Unlike the European settlers of Australia, who did not acquire the land through treaty, Spanish colonists actually did contract an agreement with the Mapuche, who lived in the southern part of the continent. The *Treaty of Quillian* was primarily the result of the Spanish not being able to defeat the Mapuche in battle. This treaty (the forerunner of many subsequent treaties) meant that, unique among the indigenous peoples of South America, they held sovereignty over their land. However, when Argentina and Chile became independent from Spain in 1810, the situation reversed quickly. These new governments, eager to expand their territories, launched devastating military campaigns against the Mapuche. By 1885, Argentina and Chile had taken the Mapuche land, over 100 000 Mapuche had been killed, their farming land had been redistributed to Argentinean and Chilean farmers, and many Mapuche children were stolen to be servants for settler families. The attempts to suppress the Mapuche culture have continued to the present, and a strong Mapuche action group has developed in response. The persistent refusal of the Chilean government, in particular, to grant land rights to the Mapuche, as well as the destruction of their territory by large resource companies, has meant that the Mapuche have resorted to destroying buildings, fields and other facilities – leading the Chilean government to use anti-terrorist legislation against them. This situation continues despite UN requests for the two parties to negotiate a settlement.

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Review 13.8

1. Identify the Canadian Supreme Court case that recognises Aboriginal title. Create a case study.
2. Compare and contrast the differences in the state of native title law in Canada and Australia.
3. Consider whether you agree that the Mapuche had to resort to destroying buildings, fields and other facilities due to the persistent refusal of the Chilean government to grant land rights.

Research 13.5

New Zealand is another country where land was acquired by treaty. Research the effect of the *Treaty of Waitangi* on the land rights of Māori people.

13.7 Contemporary issue: Legal rights to natural resources

The principle of historical continuity also relates to the concept that indigenous peoples have a strong and traditional link to territories and surrounding natural resources. Many indigenous peoples have had their connection to the land interrupted by the exploitation of natural resources by other parties. In particular, resource companies such as mining and logging enterprises have destroyed traditional lands and sacred sites.

Indigenous peoples of Papua

Near the vertiginous heights of Puncak Jaya, the highest mountain in Papua (formerly known as Irian Jaya) and also the highest mountain in Oceania, is the world's largest goldmine. Puncak is a place of cultural and spiritual significance for the indigenous peoples of Papua. Instead of a spiritual and traditional focus the mine, Grasberg, has become a focal point for armed resistance to the Indonesian settlement of Papua by the Free Papua Movement. Attacks by this group have cost many lives (an estimated 500 000 to date) and tens of millions of dollars in damages to the mining operation. The protests and attacks have taken place against a background of enormous profits being made by the mine (approximately $4.1 billion in operating profit on a revenue of $6.4 billion). The Free Papua Movement presents the argument that the indigenous peoples of Papua are not receiving sufficient compensation for the destruction of their environment. There is also a large issue concerning the human rights of all the innocent victims killed, kidnapped and tortured at the hands of the Indonesian security forces.

Aboriginal and Torres Strait Islander peoples

Australia's strong economy over the past decade has been driven by strong demand for the natural resources lying in the rocks of Western Australia, the Northern Territory, Queensland and South Australia. The enormous mines that are digging up these resources are built on the ancestral lands of the traditional landowners, Indigenous Australians.

When the industry first boomed in the 1960s, it had very poor relations with Indigenous communities, with no recognition of traditional owners, widespread racism, exploitation and ignorance. Indigenous workers, if employed (which they usually weren't) were paid far less than their European counterparts, and communities were denied any share of profits that came from the minerals being dug out of their land.

Figure 13.15 Enormous mines in areas such as Western Australia are built on the ancestral lands of the traditional landowners.

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However, in recent times – since the Mabo decision, and particularly since the Wik decision and the Native Title Act – mining companies have changed their behaviour regarding Indigenous communities and traditional landowners. For example, mining companies will pay royalties to communities, offer training and employment opportunities to Indigenous people, and involve communities in land-use decisions.

However, different companies keep to different standards, and remote Indigenous communities are ever vulnerable to economic downturn. Any change in prevailing economic conditions could devastate these communities – it is likely that legislation offers the only hope for long-term stability.

The San people in the Kalahari Desert

Recognising the importance of the environment in the traditions of many indigenous peoples is vital in gaining a proper understanding of the legal challenges facing indigenous peoples today. Many indigenous peoples possess a unique knowledge of their environment – a knowledge borne of long acquaintance with the desert, plains, sea and jungle – and their understanding of medicinal plants, natural remedies and even energy conservation techniques is beginning to become very valuable in many areas of modern life. This is specifically evident with medical research and the medicinal strategies used by pharmaceutical companies. The San people, living in the Kalahari Desert, reached a profit-sharing agreement with the pharmaceutical company Phytopharmin in 2003 over the commercialisation of *Hoodia gordonii,* a plant traditionally used to suppress appetite. The agreement meant that the San people would receive 6% of all royalties received by the Council of Scientific and Industrial Research, which was the governing body overseeing the project. However, in 2010 the development was left in question after the pharmaceutical company abandoned its research.

Unfortunately, this is one of the first and rare examples of this type of arrangement. Far more commonly, indigenous peoples have not received appropriate compensation or acknowledgement for the alteration and/or destruction of their environment by settler societies. Protection of the environments that indigenous peoples have relied on for so long, as well as finding ways to compensate indigenous peoples appropriately for the exploitation of their environments, are two pivotal legal challenges facing the international community today. They will continue to remain a legal concern until global environmental protection and appropriate resource efficiency protocols are enacted. Environmental issues like climate control and global warming will continue to emphasise the need to protect the indigenous peoples' environments for many years to come.

Research 13.6

1. Evaluate the current protection mechanisms for rights to natural resources and suggest law reform initiatives for the government to better protect the Indigenous peoples.
2. Compare and contrast the relationship between mine operators and owners and indigenous peoples. Examine the nature of the land, usage and damage, and the implications of these for future generations.

13.8 Contemporary issue: Intellectual property rights

A people's cultural and spiritual identity finds expression in a range of artistic forms, such as narrative, dance, music, textiles and artwork. These forms embody the culture, but members of other cultures may also appreciate them for a variety of reasons, and this gives the works value on the open market.

The *Declaration on the Rights of Indigenous Peoples* explicitly recognises indigenous peoples' right to intellectual property over traditional cultural expressions:

Article 31

1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences,

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technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.

2. In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.

There have also been many international conferences and declarations relating to indigenous intellectual property rights, such as the 1993 *Mataatua Declaration on Cultural and Intellectual Property Rights of Indigenous People*.

As with all intellectual property, international copyright and patent laws offer some level of protection of the artists' rights, with the World Intellectual Property Organization making particular reference to traditional knowledge and traditional cultural expressions.

Exploitation of artists

In recent years, the work of Indigenous artists has become very popular. Paintings by artists such as Emily Kngwarreye, Clifford Possum Tjapaltjarri and Rover Thomas have become renowned throughout the world and have been sold at auction at prices in excess of one million dollars.

However, as the prices fetched by paintings by these artists (and many others) grow ever higher, the issues start to increase for the artists themselves. Indigenous artists, who are often vulnerable because of their age, remote location and linguistic difficulties, have been preyed upon by 'carpetbaggers.' Carpetbaggers are people who exploit the vulnerability of these artists by offering trivial cash payments, cars (which turn out to be wrecks), and food and alcohol in return for work which they then on-sell for a much greater amount of money, keeping the profits. One of the most well-known Indigenous artists, Emily Kngwarreye, was besieged at the end of her life by these 'carpetbaggers'. They all came begging for carloads of paintings.

Investigations by media organisations throughout the 2000s led in 2007 to a Senate inquiry into the exploitation of Indigenous artists. Recommendations coming from this inquiry have led to increased government funding for community art centres, which act as disinterested collectives for Indigenous artists, and the shutting out of private dealers from the market. Though some fear that these policies will lead to the oversupply and devaluation of Indigenous art, it may be that this is the only way to prevent vulnerable Indigenous artists from being exploited.

Legal Links

Artists in the Black (see http://cambridge.edu.au/redirect/?id=6485) offers specialist free or low-cost legal support to Aboriginal and Torres Strait Islander artists.

Counterfeiting

When a particular style of art becomes popular, people may begin to counterfeit it. In Australia, for example, paintings which copy the basic style of the famous Western Desert school may be passed off as belonging to this school. These counterfeiters not only make unearned profit from the existing reputation of Indigenous artists, but also damage the value of their existing paintings.

One method of addressing this is by way of trademarking. In 2002 the New Zealand Government's arts body, Creative New Zealand, launched the Toi Iho trademark. This trademark may be used only by registered Māori artists: it signifies the authenticity and quality of a work.

Cultural appropriation

Expressions of an indigenous culture may be appropriated by another culture and used to generate revenue. Frequently, the cultural item is used in a manner the traditional owners find inappropriate or offensive. A prominent example of this is North American and Canadian sports teams using mascots or names that refer to Indigenous

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Figure 13.16 'Chief Wahoo' is the logo of the professional baseball team, the Cleveland Indians.

culture, such as professional baseball team the Cleveland Indians, with their logo 'Chief Wahoo'.

Challenges to acts of cultural appropriation may be successful. In 2001, Lego agreed to change some of the names in its 'Bionicle' line of toys, after conceding that the names had been appropriated from the Māori culture.

Review 13.9

1. Identify and outline three forms of intellectual property rights held by Indigenous peoples.
2. Define the term 'carpetbaggers'.
3. Recall what the World Intellectual Property Organization makes particular reference to.

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Chapter summary

- The UN hasn't adopted an official definition of 'indigenous', due to the enormous diversity shown by indigenous groups worldwide, but it gives a list of factors to consider when thinking about indigenous groups.
- Colonisation by European powers took land away from many indigenous peoples. Examples include Indigenous Australians, who lost their ability to hunt and live off the land, and indigenous people of South America, where loss of land disrupted their food supply and caused inter-tribal conflict.
- Ideological differences have led to conflict and injustice for indigenous peoples, for example, the communal property ownership of the Māori placed them in a poor bargaining position with the British, who had a different approach to property ownership.
- Some remote indigenous peoples such as the Greenlandic Inuit were not affected by colonisation, but suffered loss of rights later in the 20th century.
- Colonising powers said that an inhabited country could be declared *terra nullius* if there was no sign of cultivation or self-government. Australia was declared *terra nullius*, but New Zealand was not.
- Self-determination – the ability of an individual, a group of individuals, or a people to govern themselves – is a fundamental right under the *Declaration on the Granting of Independence to Colonial Countries and Peoples*, and is prominently included in a number of other UN declarations and covenants.
- Only in 2007 was the *Declaration on the Rights of Indigenous Peoples* adopted by the General Assembly of the United Nations.
- Deliberate or inadvertent attempts to disrupt historical continuity have been made by many settler societies. An Australian example is the 'Stolen Generations' policy, and a Canadian example is the High Arctic relocation.
- There is often a conflict of interest between a sovereign state and an indigenous community resident within that state, as there are issues of territorial integrity.
- In Norway, Sweden and Finland, Sámi parliaments have been established to represent the indigenous populations of these countries. In North America, the Canadian Department of Indian and Northern Affairs introduced self-government for First Nations people in 1995.
- Indigenous peoples can use the courts to regain rights they have lost. Examples include the Mabo and Wik cases in Australia, *Sesana and Others v Attorney General* (52/2002) [2006] BWHC 1 in Botswana and *Guerin v the Queen* (1984) 2 S.C.R. 335 in Canada.
- Three key events in the history of the Australian Government's response to the needs of indigenous peoples are the 1967 referendum, the Stolen Generations policy and the Northern Territory Intervention.
- Many indigenous people have lost contact with the language, and therefore the culture and history, of their ancestors. Sometimes this was a result of deliberate government policy, such as the Stolen Generations policy in Australia or the 'Norwegianisation' policy. More recently, we are seeing government programs attempting to preserve indigenous languages.
- Many indigenous peoples have taken legal actions to regain rights to their traditional lands, such as the First Nations people in Canada, the Mapuche people in Argentina and Chile, the Sámi people in Sweden and the Māori people in New Zealand. In Australia, *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 led to the introduction of the *Native Title Act 1993* (Cth), and was followed in 1996 by the Wik decision.
- Many indigenous peoples have had their connection to the land interrupted by the exploitation of natural resources by other parties. Examples include the Grasberg gold mine in Papua and the mines built on the ancestral lands of Indigenous Australians. A contrast is the San people of the Kalahari Desert, who reached a profit-sharing agreement with a pharmaceutical company. The *Declaration on the Rights of Indigenous Peoples* explicitly recognises indigenous peoples' right to intellectual property over

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traditional cultural expressions. Some issues are exploitation of indigenous artists, counterfeiting of indigenous work and cultural appropriation.

Questions

Multiple-choice questions

1 For what reason were the Greenland Inuit forcibly relocated in the 1950s?
- **A** To make way for a United States Air Base
- **B** To shore up Denmark's territorial claims in the region
- **C** Because their land was overpopulated and couldn't sustain the traditional methods of food collection
- **D** Because they had allowed German outposts to be built during World War II

2 Which of the following is *not* a reason that colonial powers legally allowed themselves to take possession of another country?
- **A** The land was uninhabited.
- **B** The original inhabitants were not cultivating the land.
- **C** The indigenous people demonstrated self-government.
- **D** The original inhabitants refused to negotiate.

3 Identical wording stating the right to self-determination is use in art 1 of which two documents?
- **A** *Universal Declaration of Human Rights* and *International Covenant on Civil and Political Rights*
- **B** *Indigenous and Tribal Peoples Convention* and *International Covenant on Economic, Social and Cultural Rights*
- **C** *International Covenant on Civil and Political Rights* and *International Covenant on Economic, Social and Cultural Rights*
- **D** *Declaration of the Rights of Indigenous Peoples* and *Universal Declaration of Human Rights*

4 The *Treaty of Waitangi* was signed with:
- **A** the Mapuche of South America
- **B** the Māori of New Zealand
- **C** the San of the Kalahari
- **D** the Sámi of Sweden

5 When did Australia sign the *Declaration on the Rights of Indigenous Peoples*?
- **A** 2009
- **B** 2010
- **C** 2011
- **D** 2012

Extended-response questions

1 Explain the issues with giving indigenous people sovereignty when they are resident within an existing nation state.

2 What has been the role of the *Australian Constitution* regarding the rights of Indigenous Australians? Should the *Australian Constitution* be amended to include reference to Indigenous Australians as the 'First Australians'?

3 Evaluate the importance of the apology speech. In your answer, you should consider:
- **a** the position of the government and Indigenous Australians
- **b** the legal ramifications
- **c** future generations.

4 Research one aspect of intellectual property. Compare and contrast the experiences of two indigenous peoples in this area.

GO

In Section III of the HSC Legal Studies examination you will be expected to complete an extended response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended response questions can be found at http://cambridge.edu.au/redirect/?id=6486. Refer to these criteria when planning and writing your response.

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Themes and challenges

The themes and challenges should be integrated throughout the teaching of this topic. The following are some suggestions as to how the content covered is related to themes and challenges.

The role of the law in encouraging cooperation and resolving conflict regarding indigenous peoples

- International law sets international benchmarks with respect to the rights of indigenous peoples and encourages states to work proactively in providing adequate support and cooperation.
- The legislative framework that exists with respect to indigenous peoples is aimed at encouraging cooperation and resolving conflict. An emphasis on non-government support encourages greater levels of cooperation.
- The growing awareness of the plight of Indigenous Australians was brought to light by the 1967 referendum in which the *Australian Constitution* was amended to reject any form of discrimination against Indigenous Australians.
- International mediation in the form of the UN *Declaration on the Rights of Indigenous Peoples* places an emphasis on protecting the rights and liberties of indigenous peoples.

Issues of compliance and non-compliance

- The push for self-determination in relation to indigenous peoples is supported by the UN *Declaration of the Granting of Independence to Colonial Countries and Peoples*. The UN believes that self-determination is a fundamental right for indigenous peoples.
- Both the *International Covenant on Economic, Social and Cultural Rights* (ICESCR) and the *International Covenant on Civil and Political Rights* (ICCPR) say that self-determination is a fundamental human right.
- The UN *Declaration on the Rights of Indigenous Peoples* was subject to delay due to the non-compliance of Australia and Canada.
- Unlike the two international covenants, the *Declaration on the Rights of Indigenous Peoples* is soft international law, not hard international law. The nation states that have signed it are morally bound, but not legally bound.

Laws relating to indigenous peoples as a reflection of changing values and ethical standards

- Pre-20th century colonising powers said that an inhabited country could be declared *terra nullius*, and open for settlement, if there was no sign of cultivation or self-government.
- Even in the 20th century, governments have implemented policies that are detrimental to indigenous peoples, with children taken from their families and forced relocations.
- In Australia, the *Aboriginals Ordinance 1911* (Cth) allowed Indigenous Australian children to be forcibly removed from their parents or kin under the assumption that this was in the best interest of the child. In Canada and America, indigenous children were removed from their families and sent to boarding schools.
- The 'Norwegianisation' policy, which lasted until the outbreak of World War II, prohibited the Sámi language from being used in public schools and in churches, and Sámi culture was denigrated as inferior.
- In 1953, the Danish government forced many Inuit to relocate from their traditional lands, to make way for the building of a United States air base. In Canada, the High Arctic relocation saw Inuit families transported to islands far north of where they had previously lived.
- The late 20th and early 21st centuries have seen governments making attempts to redress the wrongs of the past.
- In 1988, the Norwegian Constitution was amended, giving explicit recognition of the rights of the Sámi people.
- In Australia, indigenous land rights were formally recognised in legislation with the *Native Title Act 1993* (Cth).
- In October 2012, Blok P was demolished – a sign of a growing understanding of the damage that the imposition of settler ideas onto indigenous peoples can cause.

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- A number of governments have made formal apologies to indigenous peoples, such as the 1997 apology for the Norwegianisation policy, the 2008 apology to the Stolen Generations and the 2010 apology for the High Arctic relocation.

The role of law reform in protecting the rights of indigenous peoples

- In Australia, the *Mabo v Queensland (No. 2)* (1992) 175 CLR 1 case ignited the issue of land claims and initiated land claim reform. It was followed by the *Native Title Act 1993* (Cth), which formally recognised, protected and regulated native title.
- In Norway, the nationalism that had fuelled the 'Norwegianisation' policy fell out of favour after World War II, and ultimately the Norwegian Constitution was amended to protect the rights of the Sámi people.

The effectiveness of the legal and non-legal responses in achieving just outcomes regarding indigenous peoples

- Non-legal measures are featured throughout the indigenous peoples topic. Non-legal measures need to be discussed in the light of their ability to pressure governments, highlight issues, undertake research and publicise issues concerning indigenous peoples. These measures can promote greater compliance, initiate law reform, educate the wider community and promote indigenous rights.
- Non-legal measures can be ignored, in particular, if mainstream society is uninterested in the area of focus they are promoting. Governments are more likely to respond, depending on how the issue is tracking in the electorate.
- The media plays an important role in communicating the often-ignored difficulties faced by indigenous peoples, particularly those in remote locations. It also plays a key role in framing public discussion and influencing public perception of indigenous peoples and their issues.

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Additional resources

Chapter 14
Option 5: Shelter

25% of course time

Principal focus

By examining current issues and examples, students will gain an understanding of how shelter is secured and how the law attempts to achieve justice for those seeking and offering shelter.

Themes and challenges

Themes and challenges to be incorporated throughout this option include:

- how the legal system attempts to encourage cooperation and resolve conflict with respect to shelter
- compliance and non-compliance
- how changes in values and ethical standards cause law reform relating to shelter
- protecting the rights of people in need of shelter through law reform
- the effective and just provision of shelter through legal and non-legal responses.

At the end of this chapter, you will find a summary of the themes and challenges relating to shelter. The summary draws on key points from the text and links them to each of the themes and challenges. This summary is designed to help you revise for the external examination.

Chapter objectives

In this chapter, students will:

- identify the key legal concepts and terminology that relate to shelter and its different forms and purposes
- evaluate contemporary issues such as affordability, discrimination, homelessness and the provision of social housing that challenge the legal system's ability to provide justice for all citizens
- explain the different legislation and their roles in renting/leasing and purchasing shelter
- analyse why some people may be less likely to be given accommodation than others and why anti-discrimination laws exist
- evaluate the effectiveness of social housing in relation to people with housing needs and low incomes, and the difference between this and community housing
- discuss the process of purchasing property and the use of a mortgage
- describe the interrelationship between the legal system and society in relation to shelter and the response to issues with housing and shelter in New South Wales.

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Key terms/vocabulary

accommodation bond
accommodation charge
auction
chain of title
common law
common property
community housing
condition report
conveyancing
covenant
Crown land
deed
easement
exchange of contract
executive committee
gazump
good root of title
Housing Affordability Index
indefeasible title
LEP (Local Environment Plan)
mortgage
Old System title
owners' corporation
private treaty
residential lease
settlement
social housing
standard contract for sale
strata scheme
Torrens title

Relevant law

IMPORTANT LEGISLATION

Real Property Act 1900 (NSW)
Conveyancing Act 1919 (NSW)
Landlord and Tenant (Amendment) Act 1948 (NSW)
Racial Discrimination Act 1975 (Cth)
Anti-Discrimination Act 1977 (NSW)
Landlord and Tenant (Rental Bonds) Act 1977 (NSW)
Environmental Planning and Assessment Act 1979 (NSW)
Sex Discrimination Act 1984 (Cth)
Australian Human Rights Commission Act 1986 (Cth)
Privacy Act 1988 (Cth)
Community Land Management Act 1989 (NSW)
Crown Lands Act 1989 (NSW)
Home Building Act 1989 (NSW)
Privacy Amendment Act 1990 (Cth)
Disability Discrimination Act 1992 (Cth)
Strata Schemes Management Act 1996 (NSW)
Aged Care Act 1997 (Cth)
Residential Parks Act 1998 (NSW)
Retirement Villages Act 1999 (NSW)
Housing Act 2001 (NSW)
Age Discrimination Act 2004 (Cth)
Retirement Villages Amendment Act 2008 (NSW)
Commonwealth State Housing Agreement 2009 (Cth)
National Consumer Credit Protection Act 2009 (Cth)
Retirement Villages Regulation 2009 (NSW)
Civil and Administrative Tribunal Act 2013 (NSW)
Australian Consumer Law 2010 (Cth)
Conveyancing (Sale of Land) Regulation 2010 (NSW)
Residential Tenancies Act 2010 (NSW)
Strata Scheme Management Act 2015 (NSW)
Strata Scheme Development Act 2015 (NSW)

SIGNIFICANT CASES

Rowley v Isley [1951] 3 DLR 766
Gronau v Schlamp Investments (1975) 52 DLR (3d) 631
Anderson v Daniels (1983) NSW ConvR 55-144
Barber v Keech (1987) 64 LGRA 116
Vasilikopoulos v New South Wales Land and Housing Corporation [2010] NSWCA 91
Doran v Lia, GEN 10/57830, 20 April 2011
Groth v Kantipudi (Tenancy) [2012] NSWCTTT 410 (10 October 2012)

Legal oddity

A covenant is a legal obligation written into a property deed that allows the seller to force the buyer to do, or not do, something with that land. Often, these covenants relate to planning guidelines. For example, the buyer may not be able to erect buildings over a certain height. In the first half of the 20th century, however, covenants were sometimes used in the United States to enforce racial segregation – buyers could be forbidden to lease or sell property to African-Americans. Fortunately, in 1948 the US Supreme Court, in the case of *Shelley v Kraemer*, found such covenants to be legally unenforceable, and they faded from use.

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14.1 The nature of shelter

The definition of shelter

The purpose of this option is to explore people's legal rights – internationally and domestically – to acquiring shelter, and the various forms of shelter that exist within Australia. The legal process that is available for individuals to acquire 'adequate and affordable' shelter, given their socioeconomic status within the community and the extent to which governments are responsible for assisting individuals to achieve, is also examined. At times the rights of individuals are abused or denied with respect to various forms of shelter, and the ability of legal and non-legal measures to redress this situation is assessed.

Presently, contemporary issues such as affordability, discrimination, homelessness and the provision of **social housing** challenge the legal system's ability to provide justice for citizens.

Shelter is a fundamental human right. The importance of all people being able to acquire 'adequate and affordable' shelter is paramount to individuals being able to enjoy and exercise other basic human rights. The *Collins Dictionary* defines shelter as 'something that provides cover or protection, as from weather or danger, a place of refuge'. Adequate and affordable housing is more than simply having a roof over your head. For example, housing that is not secure, is overcrowded and lacks essential facilities such as proper sanitation and running water poses considerable risks to health and safety. There are many people in the world and in some parts of Australia who are confronted with these challenges every day.

social housing
affordable and secure housing provided by Housing NSW for low to moderate income earners who meet specific eligibility requirements

As such, shelter is more than a physical entity to be obtained; it is paramount to ensuring that other essential human rights can also be enjoyed. For example, people who experience homelessness are generally confronted with many disruptions to their rights, such privacy, education, appropriate health care and an adequate standard of living. It is also a challenge for people without shelter to stay safe and to maintain other civil liberties afforded under the law, such as the right to freedom from discrimination, the right to social security and the right to access the legal system when required.

Figure 14.1 Shelter is paramount to ensuring that other essential human rights can be enjoyed.

People who lack adequate and affordable housing are confronted with many other layers of disadvantage that make it difficult to escape a cycle of poverty. An increasing concern within Australia is housing affordability, which has been affected by government policies and a lack of supply of housing, especially in our cities. (This issue is discussed in Section 14.3.) In addition to this, having a fixed address is important for a number of state and federal government authorities that deliver essential services and ensure that the rights and responsibilities of people who cohabit are being met. It is also imperative for such requirements as taxation collection, adherence to motor vehicle and traffic regulations, and enforcement of the criminal law, to name a few. In essence, a socially just and cohesive society strives to ensure that its citizens have shelter that is adequate and affordable.

The extent of laws concerning shelter

The majority of laws pertaining to the acquisition of property and the regulation of the rights and responsibilities of individuals within various types of shelter are state-based. The federal government has no explicit constitutional power to legislate in this area. However, it can, through various funding powers and policy development, influence the types of housing policies the states adopt, as seen in the

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Table 14.1 The main body of legislation concerning the acquisition of shelter and related planning matters

Purpose	Legislation	Provisions
Rental/leasing	*Residential Tenancies Act 2010* (NSW)	This Act outlines the main rights and responsibilities of tenants and landlords. Also covers residents occupying premises provided under public and Aboriginal housing. Boarders and lodgers, in the main, are not covered by this Act. Since 2010, it provides for the responsibilities of the Rental Bond Board of Australia.
	Landlord and Tenant (Amendment) Act 1948 (NSW)	A small number of 'protected tenants' in New South Wales and their premises are not covered under the *Residential Tenancies Act 2010* (NSW), although they might be covered by the *Landlord and Tenant (Amendment) Act 1948* (NSW). Most of these protected tenants are older people who have lived on the premises for a long time. The rights and responsibilities of protected tenants are different from those of other tenants.
	Residential Parks Act 1998 (NSW)	This Act outlines the rights and responsibilities of permanent residents of 'residential parks' in New South Wales.
	Civil and Administrative Tribunal Act 2013 (NSW)	The tribunal adjudicates on a number of areas that were covered by previous tribunals, including the Administrative Decisions Tribunal and the Consumer Trader and Tenancy Tribunal. The Consumer and Commercial division hears matters pertaining to, among other things, excessive rent increases, breaches of lease agreements, the ending of lease agreements, and disputes around the return of rental bonds.
	Housing Act 2001 (NSW)	Under this Act the Minister, acting on behalf of the New South Wales Government, can decide on matters pertaining to rental rebate and eligibility for public housing.
	Australian Consumer Law 2010 (Cth)	Incorporated into the *Fair Trading Act 1987* (NSW) as a part of making consumer protection consistent across Australia. The *Australian Consumer Law* covers many aspects of consumer protection but has specific sections that relate to residential tenancies. For example, 'misleading and deceptive' conduct relating to the sale of properties or the renting of properties that are not 'fit for the purpose intended' is in breach of the law.
	Crown Lands Act 1989 (NSW)	The current Act passed to ensure the administration and management of **Crown land** is undertaken with some provisions for community consultation about this process.
Purchasing	*Real Property Act 1900* (NSW)	This Act establishes registered ownership to **Torrens title** to land and establishes procedures to be followed concerning the process of transferring ownership of land. It also outlines the rights of parties to a **mortgage** and the legal method of establishing caveats and **covenants**. The vast majority of residential properties in New South Wales are held under Torrens title registered under this Act.

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Table 14.1 The main body of legislation concerning the acquisition of shelter and related planning matters

Purpose	Legislation	Provisions
	Conveyancing Act 1919 (NSW)	This Act makes explicit the terms and conditions that must be present and adhered to under a **standard contract for sale** of land and outlines the protections that exist for all parties. It also regulates sales by **auction** and subdivision of land.
	Conveyancing (Sale of Land) Regulation 2010 under the *Conveyancing Act 1919* (NSW)	These rules replaced the *Conveyancing (Sale of Land) Regulation 2005* (NSW). Contracts for the sale of land must now include a warning about the obligations of the landowner under the *Swimming Pools Act 1992* (NSW). Some of the provisions include the documents that must be attached to the contract, statements to be made regarding cooling-off periods and remedies for breaches of vendors' obligations.
	Strata Schemes Management Act 1996 (NSW)	This Act allows a parcel of land to be subdivided into additional lots to be sold as separate titles. Under the **strata scheme** the airspace above is also subdivided, and areas of **common property** must be clearly identified.
	Environmental Planning and Assessment Act 1979 (NSW)	Under this Act, when a contract for sale is prepared it must include documents such as a zoning or planning certificate relevant to the property in question.
	Community Land Management Act 1989 (NSW)	This Act facilitates the setting up of community title in New South Wales. Community title schemes enable lands to be held for community, precinct or neighbourhood use, but still offer secure title to ownership of the neighbourhood property.

Crown land
land held under permit, licence or lease; reserves managed by the community; lands of environmental value kept in public ownership; lands used for Crown public roads; and other unallocated lands

mortgage
a type of loan whereby the property being purchased is used as collateral in case the borrower fails to meet the repayment obligations as set out in the home loan contract

Torrens title
the central registration and transfer of ownership of property

covenant
a restriction on a property that is part of the title; an example is a restriction not to build any structure or fences above a certain height

strata scheme
a detailed pictorial description of lots within a strata complex; this includes the outlines of the buildings, the dimensions of each lot, the details of each unit entitlement and the common property

standard contract for sale
the contract for sale used to buy and sell in New South Wales; contracts must contain minimum standard terms

auction
a public sale in which people bid for goods or property, and the sale is to the highest bidder

common property
the areas in a strata scheme building or property that are owned jointly by all the lot owners, rather than being part of an individual lot

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Commonwealth State Housing Agreement 2009 (Cth). The external affairs power has been used in the past by the Commonwealth to influence or override state laws.

Due to social or economic circumstances, some people obtain shelter by becoming a 'boarder' or 'lodger'. This type of accommodation offers very little protection for those people living in this form of housing tenure. Other people may reside in 'supported' accommodation such as retirement villages and nursing homes. The rights of these people are provided for in the *Retirement Villages Amendment Act 2008* (NSW) and the *Retirement Villages Regulation 2009* under the *Retirement Villages Act 1999* (NSW).

Review 14.1

1. Define shelter, using your own words.
2. Identify five reasons obtaining shelter is considered vital.
3. Explain the influence of the Commonwealth's external affairs power in this area.
4. Outline why the *Residential Tenancies Act 2010* (NSW) does not apply to all tenants.

Figure 14.2 Market conditions and the supply of housing can significantly affect property prices and the cost of renting.

The right to shelter

As mentioned previously, the right to shelter involves more than simply acquiring housing. To conform with the concept of a human right, the housing must be considered 'adequate' and, according to the Australian Human Rights Commission, should satisfy the considerations discussed below.

Residents should be able to enjoy security of tenure, ensuring that the rights of the people occupying various forms of housing are clearly outlined. The availability of services and infrastructure is also essential, as housing that is isolated or not easily accessible can considerably affect occupants' quality of life. Adequate housing must also be 'habitable' and 'affordable', to improve the capacity of people to acquire housing. Market conditions and the supply of housing can significantly affect property prices and the cost of renting. It is also important for some people that their housing be located within an area that allows them to enjoy their culture and to retain links to traditional ways of life.

It is in the interest of every community that certain members or sections of that community are not excluded from the ability to provide adequate shelter for themselves and their families. The long-term costs of increasing numbers of people being outside the housing market are far greater than the recurrent costs incurred by intervening to promote affordability, ensuring discrimination legislation is effective, reducing homelessness and providing sufficient social housing to enable the poorest Australians to acquire shelter and contribute to the community.

International law

The global community has recognised the right to shelter through numerous international declarations and treaties. The ability of nations around the world to ensure their citizens enjoy adequate housing varies greatly, as does their commitment to meet their international obligations. It should be noted that international declarations are regarded as 'soft' international law and hence impose moral obligations to implement them. International treaties are considered 'hard' international law and confer legal obligations to put them into effect.

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Table 14.2 An overview of the right to shelter according to international law

***Universal Declaration of Human Rights* (UDHR)**

Article 25 states:

> Everyone has the right to a standard of living adequate for the health and wellbeing of himself and his family, including food, clothing [and] housing.

***International Covenant on Economic, Social and Cultural Rights* (ICESCR)**

Article 11 states:

> The States Parties to the present Covenant [including Australia] recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

***Convention on the Rights of the Child* (CROC)**

Article 27 states:

> recognise the right of every child to a standard of living adequate for the child's physical, mental, spiritual moral and social development.

Adequate housing is encompassed by these rights.

International Convention on the Elimination of All Forms of Racial Discrimination

Article 5(e)(iii) provides:

> States Parties undertake to prohibit and eliminate racial discrimination in all its forms and to guarantee the right of everyone … to equality before the law. [These rights include] the right to housing.

***Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)**

Article 14(2)(h) states:

> State Parties shall ensure [that women in rural areas] … enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

Australian law

There is no right to shelter within Australian domestic law. Most of the legislative framework within Australia is centred on clarifying people's rights and responsibilities within various forms of housing tenure. It also provides avenues of redress for consumers when conflict arises as a result of acquiring shelter.

Internationally, Australia has signed numerous multilateral treaties that confer shelter as a basic human right. Being a signatory to these treaties, Australia has an obligation under international law to ratify these provisions into domestic law. The federal government faces constitutional constraints that prohibit it from legislating in many areas concerning the provision of shelter and the rights and responsibilities of individuals that flow from this.

Through the Council of Australian Governments

Research 14.1

1. Explain why the right to shelter is not provided for in Australia's domestic law.
2. Summarise the role of the Australian Human Rights Commission.
3. Investigate two policies passed by the federal government that affect the right to shelter in Australia.

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(COAG), the federal government can establish policy frameworks for a consistent approach to areas of concern nationally. The National Affordable Housing Agreement (NAHA), which took effect on 1 January 2009, is such an example and is referred to later in the chapter.

Review 14.2

1. Discuss what is meant by 'soft' and 'hard' international law. Explain how this applies to the right to shelter in respect to housing.
2. Summarise the ways in which the *Universal Declaration of Human Rights* protects the right to shelter.

Obligation to provide shelter

Although there is no responsibility in domestic law to provide shelter, the federal, state and territory governments in Australia all acknowledge that there is an obligation to provide shelter if Australia is to protect the human rights of its citizens and ensure society is inclusive for all. Nationally, this obligation is evident in the body of international law to which Australia is a signatory.

Governments at federal, state and territory levels recognise that there is a significant number of individuals who for various reasons cannot access adequate and affordable housing. Housing policies, therefore, are developed to initiate a number of strategies to assist these people into some form of housing.

The New South Wales Government, through Housing NSW, has developed numerous housing policies. Some of these are centred on:

- public housing
- housing affordability
- social housing.

Governments can provide assistance to first-home buyers, as has been the case in New South Wales. This makes it easier for people to enter the housing market. In addition to this, most governments in Australia are investigating ways to alleviate 'housing affordability' problems, of which one measure is increasing housing supply through planning powers invested in other government departments.

Governments also provide 'public housing' for people on low incomes at a rental rate much cheaper than what they would pay in the marketplace. 'Rental assistance' can also be made available to enable people on low incomes to rent a property on the market that they otherwise would not be able to afford.

Other forms of social housing policy are developed to address the needs of people who are homeless. The New South Wales Government includes the reduction of youth homelessness as one of its 'Making it Happen' Premier's Priorities. A large number of specialist homelessness services operate across New South Wales, providing support to people who are homeless. The 'Making it Happen' priority is to increase by 10% the number of young people who move from these services into long-term accommodation.

Under the National Partnership Agreement on Homelessness (NPAH) 2015–17, the federal government will provide $230 million across Australia to help each state support frontline services. Commonwealth funds need to be matched by funds from the states and territories, but each state/territory will be able to decide for itself which providers, in which areas, will receive funding. A key priority of the NPAH is domestic violence, as this is recognised to be a leading cause of homelessness. Homeless youth is also a focus area. The NPAH funds activities incorporated in the New South Wales Homelessness Action Plan. Under this partnership, the New South Wales and Australian governments have agreed to add an extra $284 million to address homelessness in New South Wales over four years.

Other forms of social policy are developed to address ways of building a sense of community in public housing areas and continually assessing the suitability of such housing and its social impact in the communities in which it is situated.

In essence, governments recognise that they have a responsibility to produce a range of policies that assist people into some form of affordable housing that, due to a number of factors ranging from poverty to disability and other forms of disadvantage, they would not otherwise be able to secure. While the objectives may be the same, political parties vary somewhat on how they plan to achieve their policy goals.

Conservative parties traditionally have introduced policies to make it easier for people to

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Figure 14.3 Wesley College offers residential accommodation for 250 students at the University of Sydney.

enter the private housing market. Labor governments have tended to put more resources into ensuring there is an adequate supply of public housing. Today, however, all parties rely on a combination of measures that range from encouraging entry into the housing market for first-home buyers and increasing the supply of land and housing available, to supporting less-advantaged people into some form of adequate and affordable housing.

Types of shelter

'Shelter' can be categorised as housing that is acquired by individuals (private housing) or housing that is provided by government (public housing). Many types of shelter exist, and the variety of housing types acquired is usually determined by a person's socioeconomic status, income, family size, age, disability and portability.

According to the Australian Bureau of Statistics, in 2011 approximately 98% of Australians were living in 'self-contained' private homes, such as houses, flats and units. Others live in institutional dwellings: residential colleges, staff accommodation, boarding houses, hostels, nursing homes and prisons.

Review 14.3

1. Explain, using examples, why housing policies are needed.
2. Evaluate the strategies, goals and priorities of the New South Wales Government's Homelessness Action Plan. Which solution do you think will be the most effective? Why?
3. Explain why governments are increasingly recognising their responsibility to create social housing policies.

Legal protection and remedies associated with securing shelter

There are a number of avenues available for a person to secure shelter. As mentioned previously, the type of shelter secured will usually depend of levels of income and personal circumstances. There are numerous legal and non-legal responses protecting the competing interests of those parties involved. In addition to these, various dispute mechanisms are available to promote cost-effective and efficient conflict resolution between vendors and buyers, landlords and tenants. The extent to which the law achieves justice for people securing shelter continues to evolve, but at times the competing interests of the parties involved can make this difficult.

14.2 Purchasing shelter

Shelter will more than likely be the most expensive acquisition in a person's life. Decisions that are made

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Figure 14.4 Shelter will more than likely be the most expensive acquisition in a person's life.

as to the types of shelter to be acquired are largely driven by cost, location and family circumstances. The legal process for purchasing shelter is called **conveyancing**. Conveyancing is the legal process followed to transfer title of ownership from one party to another. This process ensures that the new title is registered at the Land Titles Office and that certain obligations are met by the vendor (seller) and the buyer. In New South Wales the conveyancing process can be carried out by a solicitor or a para-legal 'licenced' conveyancer under the *Conveyancing Act 1919* (NSW) and the *Conveyancing (Sale of Land) Regulation 2010 Act* (NSW). Licensed conveyancers must be covered by 'indemnity insurance' and it is illegal for anyone to carry out conveyancing work without being licensed.

conveyancing
the legal process used to transfer title of ownership from one party to another

A third option is that a person can do the conveyancing of the purchase themselves. Such buyers must be aware that they will more than likely bear the costs if anything goes wrong during the conveyancing process. For example, the property being purchased can be affected by limitations put on it by government authorities or local councils through their Local Environment Plans (**LEP**s). An unsuspecting buyer will not find matters affecting a New South Wales property when they do the required checks at Land and Property Information.

LEP (Local Environment Plan)
a document prepared by a local council, and approved by the state government, to regulate the use and development of land within the council's control

The New South Wales Government established the Building Services Corporation within the NSW Fair Trading to provide advice and safeguards for buyers. There are also a number of protections for buyers embedded into the conveyancing process; these are discussed in the section, 'Protection for buyers'.

Separate dwelling or shared space

Historically, the 'Australian dream' was to own your own free-standing home on a traditional quarter-acre block of ground. Separate dwellings are homes on individual lots that do not adjoin other buildings. There is one 'title' to the property, but larger lots at times can be subdivided into separate titles. Separate titles are usually more expensive than shared space when compared in similar locations. They allow the owner greater options to carry out renovations of the existing dwelling, and decide on landscaping and when to undertake necessary maintenance of the property.

While many Australians still reside in separate dwellings, increasingly Australians are living in shared spaces. Usually the dwellings are adjoined, with shared stairwells and other access points; the most common of these are flats or townhouses. Australian cities faced with urban-sprawl problems are looking to increased medium-density housing to ensure a more cost-effective provision of government infrastructure and services.

Data released by the Australian Bureau of Statistics in 2011 revealed there had been little increase in the number of Australians living in separate dwellings as opposed to shared space. The figures revealed that there were 9 117 033 private dwellings in Australia, an increase from the 8 426 559 private dwellings that were counted in the 2006 census.

Between 2006 and 2011, there was a shift towards living in units and townhouses, with the proportion of people living in detached houses dropping by 1%. The census also revealed that the number of private dwellings that were separate houses fell from 76.6% in the 2006 to 75.6% in 2011. The increase in people living in shared space was

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Table 14.3 Proportions of people living in separate dwellings compared to various forms of shared space

Dwelling structure	2011	%	2006	%
Separate house	5 864 573	75.6	5 472 527	76.6
Semi-detached, row or terrace house, townhouse, etc.	765 978	9.9	658 858	9.2
Flat, unit or apartment	1 056 236	13.6	932 862	13.1
Other dwelling	66 666	0.9	76 080	1.1

proportional to the decrease of people living in separate houses.

Private treaty or auction

The process of the buying and selling of property can be carried out in two ways. One is through a **private treaty**; the other is through an auction. Both methods are regulated and require a standard contract for sale to be used in the selling process. A private treaty is when the sale of a property is carried out directly between the vendor and buyer. This is usually completed with the assistance of a registered real estate agent. An auction is a public sale in which goods or properties are sold to the highest bidder.

private treaty
when the sale of a property is carried out directly between the vendor and buyer; usually completed with the assistance of a registered real estate agent

When a property is on sale through private treaty the price of the property will be advertised through a real estate agency, encouraging potential buyers to make an offer on the property. They may inspect the property, ask a number of pertinent questions, carry out inspections and peruse the sale of contract before making an offer. Both the vendor and the buyer can haggle over price before agreeing to an amount, at which time the contracts for sale will be exchanged.

When buying through an auction, the buyer will usually be competing against a number of potential buyers who turn up on the day of the auction to bid on the property. The vendor will set a reserve price, which is the lowest price the vendor is willing to sell the property for. The auctioneer or agent is not required to accept the highest offer if it fails to reach the reserve price once the bidding has ceased. If the highest bid does not reach reserve price, the vendor may wish to enter into negotiations in the form of a private treaty with the highest bidder. If the reserve price is reached, contracts will be exchanged with the highest bidder once the auction is over; the successful buyer must hand over 10% of the purchase price immediately.

There are definite advantages in buying at auction. For example, the buyer will know how the property fared with respect to reaching the reserve price, and at times the bidding process sets a more realistic price when potential buyers understand the nature of the market at that point in time and what a fair price is.

There are important points that the law does not protect against to consider. Potential buyers must ensure they have their finance arranged and need to be prepared for the pressure of the bidding process. It helps if the buyer knows their limit in terms of price and does not bid above it.

The vendor is allowed one bid in the process and the auctioneer must state when this bid has occurred.

Critics of the process argue that potential vendors bear costs that may be wasted if the property is not sold at auction (real estate agents charge a fee for conducting an auction). Some of the recommended checks the buyer may pay for are:

- a property inspection to make sure it is structurally sound
- a pest inspection to check that it is free of pests
- a strata records inspection if the property is a unit.

A potential buyer may also have a valuation done on the property if they want to check what an appropriate price would be.

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There have been calls for some of these checks to be carried by the vendor prior to the auction.

The contract for sale

The contract for sale must be prepared before a residential property can be advertised for sale by either private treaty or auction. This was not always the case, but the widespread practice of gazumping prompted calls for the contract for sale to be pre-prepared to speed up the process. All contracts for sale of land must be in writing under s 54A of the *Conveyancing Act 1919* (NSW).

Some standard requirements contained in contracts for the sale of property include a number of disclosures that must be made by the vendor under s 52A of the *Conveyancing Act 1919* (NSW). Under s 149 of the *Environmental Planning and Assessment Act 1979*, a zoning certificate, available upon application to the local council, must be included. Known as a 'Section 149 Certificate', this provides information about planning controls or property affectations relating to the land.

The contract must also include a copy of the 'property certificate' that will allow the title to be searched at Land and Property Information. A drainage diagram showing the position of sewer lines on the site map will be included, as well as an official plan of the land, which could include a 'subdivision plan' or a 'strata plan' depending on the property being purchased.

Further to this there must be disclosures under the *Conveyancing (Sale of Land) Regulation 2010* (NSW) in relation to easements and covenants attached to the contract for sale. An **easement** is a right of someone other than the property owner to use the property for certain purposes. It could include a shared pathway between two properties or the right to fish in a privately owned pond. A covenant is a restriction on a property that is part of the title (for example, not building any structure or fences above a certain height). Covenants often apply in cases where property has been subdivided. If the courts find that a covenant is prejudiced, or does not afford equal opportunity, then it may be struck down. However, most reasonable covenants will be enforced.

easement
a right of someone other than the property owner to use the property for certain purposes

Also included will be information making the buyer aware of their 'cooling-off' rights, which are discussed in 'buyer protections'. If these types of disclosures are not made, the buyer has the right to cancel the contract within 14 days of signing as these disclosures give an overview of the planning provisions affecting the property.

The buyer must also be made aware if any variations that favour the vendor have been made to the standard provisions in the contract for sale.

Exchange of contracts usually occurs at the point of sale and is the more critical phase of the conveyancing process. Once signed copies of the contract are exchanged, both parties are bound by the terms and it is from this point that a 10% deposit of the purchase price is paid and the 'cooling-off' period applies.

exchange of contracts
when the vendor and the buyer of the property exchange signed copies of the contract for sale

Between exchange and **settlement** there are a number of things that need to be completed. The buyer will need to search the title to verify the seller's warranties and compliance with the conditions

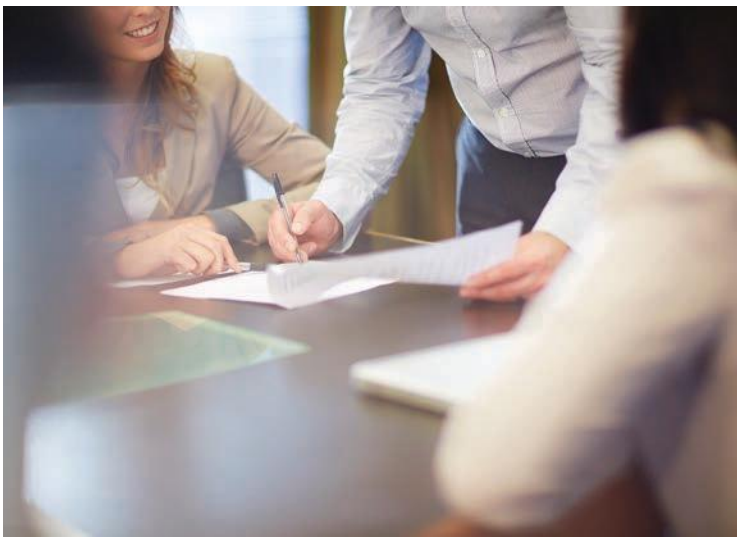

Figure 14.5 At settlement the balance of the price is paid. Unless they are doing their own conveyancing, the vendor and the buyer do not need to be present at the settlement – it will be managed by each party's conveyancer and financial institution.

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contained in the contract. The buyer should also obtain their own zoning certificate (s 149) to ensure that it is accurate and that there have been no changes since the contracts were drawn up. Buyers may also wish to take out insurance at this point as they have an insurable interest once exchange occurs; most buyers will have this arranged at settlement.

settlement
when final payment for the purchase of the property is made to the vendor, and the purchaser receives title

Settlement will usually occur when answers to most of the buyers searches have been satisfied; then the balance of the price of the property will be paid, comprising the other 90% of the purchase price. Land and Property Information will need to be notified about the transfer of the property to the buyer and it will pass this information on to the local council and water suppliers. It is also suggested that a final inspection be carried out prior to settlement to be sure that the property is still in good order and that any inclusions in the contract (such as light fittings and carpets) are still present.

Systems of registration

According to Land and Property Information, the land title system can be defined as 'the means by which ownership of land is recorded, registered and transferred'.

There are three different land titling systems in New South Wales:

1. Crown land
2. Old System title (or **common law**)
3. Torrens title (or Real Property Act).

In addition to these, other properties in New South Wales may be affected by additional types of title for 'shared space' such as:

- company title
- strata title
- community title.

Land and Property Information has outlined the following statistics about the proportion of land in New South Wales registered under each system:

> Approximately 50 per cent of land in NSW is Crown land leasehold (Western and Central Division) and 99 per cent of the remainder is Torrens title (mainly Eastern Division). Only a small residue of Old System land remains, and efforts are underway to convert this to Torrens title.

Crown land

More than half the land in New South Wales is made up of Crown land. According to Land and Property Information, Crown land can comprise:

- lands held under lease, licence or permit
- community managed reserves
- lands retained in public ownership for environmental purposes
- lands within the Crown public roads network
- other unallocated lands.

Many non-tidal waterways across the state also comprise Crown land, as does most tidal waterway land.

The *Crown Land Act 1989* (NSW) is the main piece of legislation that regulates the registering and managing of Crown land. This Act included mechanisms for community consultation about the management of Crown land. It also has clarified and streamlined the system of tenure that exists concerning the use of Crown land.

Old System title (or common law)

The **Old System title** dates back to English common law and was a logical choice of land management used the by colonial authorities to register, record and transfer land ownership. This system was used in the New South Wales colony until 1863 when it was replaced by Torrens title.

Under the Old System title each time a vendor sold land to a buyer, there was a need to establish a **chain of title** that established proof of ownership: that the vendor was the rightful owner of the property prior to purchasing. This was demonstrated by a series of **deeds**, one for every time that property was sold. Each deed would contain a description of the property and the identities of the previous vendors and buyers. If this can be established it is said that a '**good root of title**' exists as the chain has not been broken through the loss of one or more of the previous deeds of sale.

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common law (or Old System title)
a system of registration and transfer of ownership of property in use in New South Wales; under this system an unbroken chain of title is required to be proven to establish title to the property

chain of title
a series of deeds under the Old System title, used to establish the ownership history of a property

deed
documentary proof establishing ownership of a property

good root of title
when the Old System chain of title has not been broken through the loss of one or more of the previous deeds of sale

Under the *Conveyancing Act 1919* (NSW) 'good root of title' need only be established as far back as 30 years ago to allow the sale of the property to go forward. The reality, however, is that it is advisable for a potential buyer to ensure that the root of title is established even further back to provide greater assurance that they are purchasing from the rightful owner. Even so, if any of the documents establishing ownership is challenged, this could result in a 'defect in title', so that the vendor is not declared the rightful owner.

A small percentage of land in New South Wales (such as properties sold before 1900) is still registered this way, but there are increasingly fewer people with the conveyancing skills to confidently carry out the required title searches on properties registered under this system. These processes can be time-consuming and expensive, and ultimately the new owner may still be vulnerable to the ownership being contested as errors can occur even tracing ownership back the statutory period of 30 years. As the last of these properties are put up for sale, the New South Wales Government will transfer the registration of ownership to the Torrens title system.

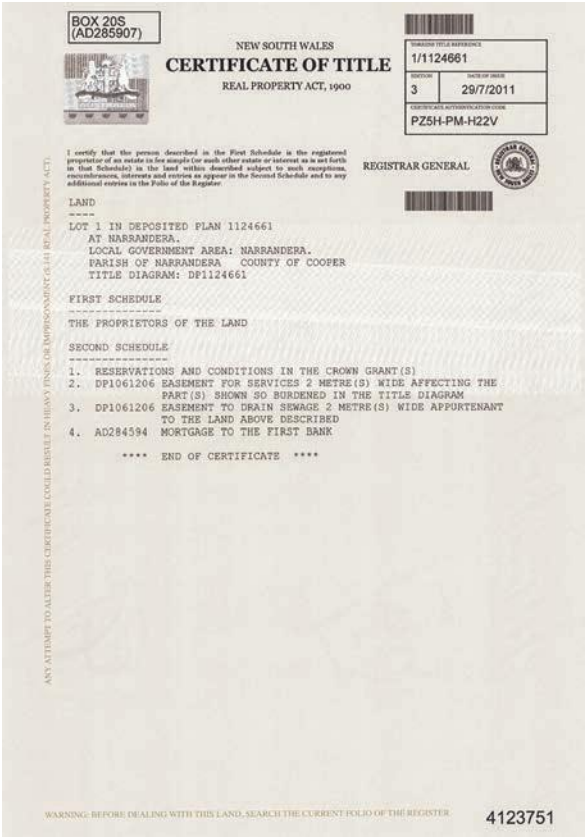
Torrens title (*Real Property Act 1900*)

The Old System title method was uncertain and time-consuming, and there was no guarantee that the state would back your claims to ownership. The introduction of the Torrens title system of registering property ownership in 1863 and the passing of the *Real Property Act 1900* (NSW) greatly improved land management in New South Wales. Transferring ownership, leasing and registering any other legal matters to do with land require certainty and efficiency, which are features of the Torrens title system. Properties registered under this system are assured that the title is recognised by the state and hence people can buy and sell under this system with confidence.

Selling and buying land ownership are completed by transferring the registration of 'title' as opposed to using previous deeds as is done through the Old Title system. Once title has been transferred to the new owner, it is said the buyer now has an '**indefeasible title**'; this means the title is said to be 'perfect' and will not be changed except under very limited circumstances.

indefeasible title
title that has been transferred to the new owner, and will not be changed except under very limited circumstances

The land register is central to the effectiveness of the Torrens title system, and in New South Wales this is carried out through Land and Property Information. The state provides a guarantee that the register is accurate. If an administrative error occurs, and someone's rights are adversely affected,


BOX 20S
(AD285907)

NEW SOUTH WALES
CERTIFICATE OF TITLE
REAL PROPERTY ACT, 1900

1/1124661
3 29/7/2011
PZ5H-PM-H22V

REGISTRAR GENERAL

LAND
LOT 1 IN DEPOSITED PLAN 1124661
AT NARRANDERA.
LOCAL GOVERNMENT AREA: NARRANDERA.
PARISH OF NARRANDERA COUNTY OF COOPER
TITLE DIAGRAM: DP1124661

FIRST SCHEDULE
THE PROPRIETORS OF THE LAND

SECOND SCHEDULE
1. RESERVATIONS AND CONDITIONS IN THE CROWN GRANT(S)
2. DP1061206 EASEMENT FOR SERVICES 2 METRE(S) WIDE AFFECTING THE PART(S) SHOWN SO BURDENED IN THE TITLE DIAGRAM
3. DP1061206 EASEMENT TO DRAIN SEWAGE 2 METRE(S) WIDE APPURTENANT TO THE LAND ABOVE DESCRIBED
4. AD284594 MORTGAGE TO THE FIRST BANK

**** END OF CERTIFICATE ****

4123751

Figure 14.6 A certificate of title.

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the state will compensate them. Compensation claims are very uncommon.

Title searching and conveyancing are much easier under the Torrens title than the Old System, and so are cheaper and more reliable. As well as registering ownership, Torrens title will also include easements affecting the property and any other interests relevant to the property, such as mortgages taken out. Instead of a chain of documents, the landowner receives a current certificate of title, which shows all of the information – ownership, easements, mortgages and other relevant interests.

As mentioned previously, once any property is purchased under the Old System title it will be automatically converted to the Torrens title system free of charge. However, for the first six years after conversion, the title is not guaranteed, as there could still be challenges to ownership because of the problems in establishing 'good root of title' on some properties under the Old System. If the property is sold to another buyer within the six-year period, guarantee of ownership is extended to 12 years.

Company title

Company title is a system of registration used for documenting ownership of shared space such as flats or townhouses and was used prior to the first New South Wales strata title legislation in 1961.

Under company title there was no separate title registration to ownership of specific flats. The owners of the building set up a company in which individual owners possessed shares that allowed them exclusive possession of a particular part of the building, such as their flat or townhouse.

The disadvantage of this system of registration is that a person would have to get the approval of the other shareholders prior to selling their share in the company. In addition to this, banks were reluctant to lend finance to properties registered under this system because it was seen as a share purchase as opposed to a mortgage over a particular piece of real estate, for which it is easier to reclaim money lent in cases of foreclosure. This also makes it more difficult to sell these properties due to these restrictions.

An advantage of this system is that the owners could have some influence over who their neighbours would be every time a shareholder wanted to offload their shares and property.

Strata title

The introduction of the strata scheme management system in 1961 facilitated the development of medium- to high-density housing, particularly in urban areas. The *Strata Schemes Management Act 1996* (NSW) allows a parcel of land to be subdivided into lots to be sold separately. An owner of one of these lots (typically a flat or townhouse) has a separate title to their property registered under Torrens title with the advantage of an indefeasible title. They can live in the property or rent it out, depending on their circumstances.

Under the strata scheme, the airspace above is also subdivided, and areas of 'common property' are to be clearly identified. While individual owners have a separate title to their dwelling, all residents have responsibility for and access to the common property. Common property is the areas that are owned jointly by all the lot owners, rather than belonging to any individual lot. They may include driveways, pools, barbeque areas and green space.

A strata plan is a diagram of the strata complex, showing details of all the individual lots. It includes the outlines of the buildings, the dimensions of each lot, the details of each unit entitlement, and the common property. Any notifications and encumbrances affecting the plan will also be noted.

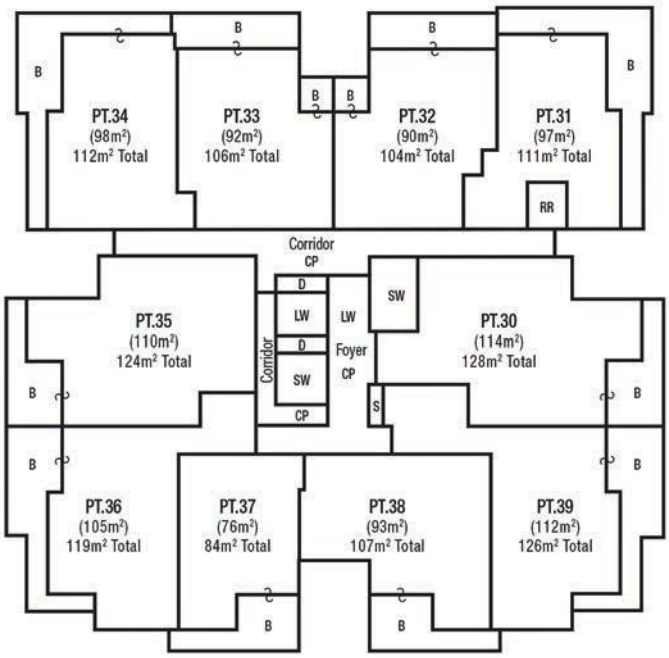

Figure 14.7 A strata plan.

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Importantly, it will also contain the certificate of title numbers for each lot.

Under the *Strata Schemes Management Act 1996* (NSW), the owners of the properties make up what is referred to as the **owners' corporation**. The owners corporation must elect an **executive committee** to make decisions about the management of the common property and other areas of concern that affect all residents.

owners' corporation
a group consisting of all the lot owners within a strata scheme

executive committee
an elected subgroup of the owners' corporation which makes decisions about the management of the common property and other areas of concern that affect all residents

The executive committee has to ensure that the residents contribute to the following funds so the upkeep of the property is maintained and that financial and legal requirements are met:

- *Sinking fund* – this is a fund that must be set by the owners' corporation to ensure there are sufficient finances to cover the costs of ongoing capital works on the property. These include things that all properties will have to attend to over the course of time (for example, painting, upkeep of the common property and repairs to roofs, gutters, driveways). Amendments to s 75A of the *Strata Schemes Management Act 1996* (NSW) mandated that all strata schemes registered in New South Wales must have a 10-year sinking fund to ensure effective planning and manage the needs of the property. This allows the owners' corporation to ensure that adequate funds are progressively provided for in anticipation of any more expensive capital work that will eventually have to happen. The degree of funds required may depend on the age of the property as a newer strata scheme may have fewer capital expenses in the first 10 years compared to older premises, which require more regular and extensive upkeep. NSW Fair Trading says that a 10-year plan must be approved at an annual general meeting (AGM) of the owners' corporation. Any necessary review and adjustments to the plan must happen within the first five years.
- *Administrative fund* – this is a fund to provide for the regular upkeep and recurrent expenses that are incurred day to day on all strata schemes in New South Wales. The fund has to contain sufficient money to ensure that these types of expenses are covered as they fall due. Expenses may include the upkeep of lawns and gardens and other aspects of the common property. It can also include the payment of insurance premiums such as building and public liability policies.

Reforms to strata laws have been introduced through the *Strata Scheme Management Act 2015* (NSW) and *Strata Scheme Development Act 2015* (NSW). The main changes have been introduced to modernise and make more flexible strata schemes; introduce more transparency and accountability; and clarify issues around collective sale and renewal, maintaining the building's condition, owner renovations, proxy voting, by-laws and tenant participation. It also updated regulations concerning levies, capital works funds and dispute resolution.

Legal Links

For more information on these changes go to:

- http://cambridge.edu.au/redirect/?id=6380
- http://cambridge.edu.au/redirect/?id=6376

Commentary on the effect these changes will bring to landlords and tenants in strata schemes can be found at:

- http://cambridge.edu.au/redirect/?id=6377
- http://cambridge.edu.au/redirect/?id=6378
- http://cambridge.edu.au/redirect/?id=6379

Community title

Community title allows for the subdivision of land so that share property can be created within conventional Torrens title. According to the Urban Development Institute of Australia a community title 'is essentially a horizontal form of strata title. Community title is common ground'. Community title

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is regulated under the community titles legislation enacted in 1989 and is a form of title registration and management that is between the traditional land (ground surface) subdivision and a strata scheme (air space) subdivision.

This type of title allows the concept of 'common property' to be utilised within a land subdivision to include amenities that can be used by the owners within that subdivision. This can include the shared use of swimming pools, tennis courts, children's playgrounds and barbecue areas.

The main types of community title schemes are the 'community association' and the 'neighbourhood association'. The community association is the highest level and all owners belong to this based on the proportion of lots owned. The neighbourhood association is the lowest tier and the most popular type of community scheme and is formed when the developer is ready to subdivide and sell the lots in the area that has been earmarked for subdivision.

When buying into a community scheme, the buyer should ensure that the contract for sale includes the types of amenities that are to be provided and the landscaping and architectural design of the scheme. It should also include the type of scheme the development will be based on, such as a retirement style or other common interests that like-minded people may wish to preserve under the contract. Further to this there should be a visual representation to ensure that potential buyers get a feel for what the community scheme will look like.

Review 14.4

1. List what happens at each of these stages of the purchasing process:
   - **a** exchange of contracts
   - **b** between exchange and settlement
   - **c** settlement.
2. Explain why the introduction of Torrens title improved land management in New South Wales.
3. Summarise the differences between company title and strata title.

Sources of finance

Mortgages

Due to the expensive nature of purchasing shelter the use of mortgages is commonplace to ensure financial institutions are willing to lend to buyers. A mortgage is a type of loan where the property being purchased is used as collateral in case the borrower fails to meet their repayment obligations as set out in the home loan contract. The financial institution holds the deed or ownership of the property until the buyer has fully repaid the loan. The buyer occupies the premises as under credit regulation they are considered the owner of the property.

If the owner of the property falls upon financial hardship and cannot make the ongoing repayments, the financial institution has the option of selling the property to recover outstanding debts. Contrary to popular belief, this is the last option that a credit provider may want to take. For it to maximise its profits, it is better for the loan to run its course and the calculated interest be paid.

Historically, many mortgages were fixed interest over 25 to 30 years. The benefits of this were that repayments did not change and this provided some certainty for both parties. Today borrowers have the choice between fixed interest, variable interest or a combination of both. Variable interest loans will go up or down depending on market conditions and the variable rate set by the Reserve Bank of Australia.

Since the Global Financial Crisis in 2008–09, financial institutions have tightened their lending policies, demanding more consistently that potential borrowers provide a 10–20% deposit on the value of the property.

People who take out a mortgage are covered by consumer credit laws and all mortgage contracts must be in writing. The *National Consumer Credit Protection Act 2009* (Cth) covers a range of credit contracts signed after 1 July 2010 and includes mortgages and personal loans, to name but two. Any contracts signed before 1 July 2010 are covered by uniform state credit code legislation and have similar provisions.

Under these laws all credit providers have to be licensed and to belong to an external dispute resolution scheme approved by the Australian Securities and Investments Commission (ASIC).

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Consumers can apply for a variation on a repayment arrangement on the grounds of financial hardship. Before the lender can take court action or repossess the property if the borrower is behind on payments, the lender must issue a default notice giving the borrower at least 30 days to repay the arrears.

In addition to this, the second stage of consumer credit reforms that are relevant to home buyers include the banning of exit fees after 1 July 2011 and the provision of key facts that outline rights and responsibilities.

Credit reporting

Once a person has obtained credit from a financial institution, a personal credit history about their ability to meet their obligations in repaying what they owe is created. A credit report compiled about an individual's credit history generally includes the person's addresses, current and past employment, and any information on credit applications, overdue accounts, court judgements, clear-outs, crossed or linked files, name changes and bankruptcies, and other relevant matters.

The two main credit reporting agencies operating are Veda Advantage and Dun and Bradstreet.

Figure 14.8 Individuals who are refused finance to buy a home because of a problem with their credit history can contact Credit Repair Australia (CRA).

Individuals who are refused finance to buy a home because of a problem with their credit history can contact Credit Repair Australia (CRA).

CRA can, if requested, look at an individual's credit history to ascertain why they may have been refused finance for a home loan and ideally help rectify the situation.

The information collected by credit reporting agencies is subject to the *Privacy Amendment Act 1990* (Cth), which commenced operation in September 1991 and added consumer credit reporting to the matters covered by the *Privacy Act 1988* (Cth). It specifically deals with information collected by credit reporting agencies and credit providers that is to be used fully or mainly for domestic, family or household purposes. It regulates the collection, use and disclosure of this personal information.

Under the Act there are limitations on the types of information that can be held and for how long. The Act also limits who can access a person's credit file and restricts the reasons that allow a credit provider to access someone's credit report.

Legal links

To find the 10 things that will appear on your credit report go to http://cambridge.edu.au/redirect/?id=6607.

Review 14.5

1. Analyse the purpose of a mortgage.
2. Discuss how the Global Financial Crisis of 2008–09 affected home-lending policies.
3. Explain what an individual can do if they are refused finance due to a problem with their credit history.

Protection for buyers

There are a number of buyer protections in place for people purchasing a property. There will always be an element of *caveat emptor* – 'let the buyer beware' – because ultimately the law cannot protect consumers from hasty purchases where appropriate

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searches and checks on properties are not carried out before purchasing.

Essentially, buyer protections aim to ensure that minimum standards are met, especially with respect to the contract for sale, including cooling-off periods and minimising the practice of gazumping.

Exemptions to *caveat emptor*

There are exemptions to the *caveat emptor* rule. According to Tony Cahill in his paper, *Vendor Disclosure and Warranty*, some of these are:

- concealed defects such as structural problems to ensure the sale goes ahead – see *Anderson v Daniels* (1983) NSW ConvR 55-144 where there were papered-over settlement cracks; *Gronau v Schlamp Investments* (1975) 52 DLR (3d) 631 concerning subsidence; and *Rowley v Isley* [1951] 3 DLR 766, which involved a cockroach infestation
- where the contract involved the purchase of a house being constructed with the expectation that it would be fit to be inhabited (see *Barber v Keech* (1987) 64 LGRA 116).

Gazumping

The vendor and seller come to a verbal agreement on the price of a property but at this stage contracts have not been exchanged and the 10% deposit on the sale may not have been paid. It is during this time that the vendor may agree to sell to another buyer at a higher price and the first buyer is **gazumped**.

gazump
buy a property for which the vendor has already reached a verbal agreement with someone else, by offering a higher price

Research 14.2

The NSW Fair Trading website has information on gazumping in its section, 'Tenants & Home Owners'.

1. If a prospective purchaser is gazumped, what refunds or compensation are they entitled to from the vendor or the agent?
2. List four things a purchaser can do to protect themselves from being gazumped.

There is no obligation for the vendor to reimburse the buyer for money lost due to building and pest inspection costs and any other cost such as legal fees or establishment costs for loans. The sale is only binding upon the exchange of the contract for sale.

Cooling-off periods

Once the contract for sale has been exchanged between the vendor and buyer, the buyer has a five-day cooling off period to reconsider if they wish to go ahead with the purchase. This is because the purchase of a property is such a large investment and once the contract is signed there is little protection in place if it was done so in good faith. The cooling-off period is provided for under the *Conveyancing Act 1919* (NSW) and under s 66 the contract can be set aside if the parties agree. This is usually done to speed up the purchase.

The exceptions to this can be found in the *Contracts Review Act 1980* (NSW), which states that a contract may be set aside if the court believes one party may have been in a stronger bargaining position and/or one of the parties may not have fully understood the nature of the contract or its terms. Whether any coercion or duress by one of the parties on the other or any other factors such as language barriers, level of education, and mental capacity have affected the fairness of the agreement can also be examined.

If the purchaser wishes to withdraw from the contract during the cooling-off period they will have to pay 0.25% of the purchase price, which will usually be deducted from the 10% deposit already paid. This is to compensate the vendor for having the property off the market for a period.

Insurance protection

A number of insurance protections are available to home purchasers to ensure against loss in the case of misadventure and changed financial circumstances. Some of these are:

- *Building insurance* – this is taken out by the owner of the property to insure the property against risks such as fire, landslip and storm damage. Once exchange of contracts has taken place it often becomes the buyer's responsibility to insure the property during the conveyancing process. This ensures that the structure is covered at all times.

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Figure 14.9 Building insurance is taken out by the owner of the property to insure the property against risks.

- *Mortgage protection insurance* – this can be taken out voluntarily or may be requested by the financial institution lending money for the purchase of a property. This insurance covers loss of income through a range of factors, such as economic downturn resulting in fewer hours worked, redundancy or a death in the family.
- *Public liability insurance* – this is taken out by home owners to insure against injury or death to anyone on or around their property. People will come into a property for various reasons whether invited or not, and all property owners have a duty of care to ensure it is safe for people to do so.

Additional protections

Under the *National Consumer Credit Protection Act 2009* (Cth) all consumers entering into credit contracts (including home loans) can expect that the loan amounts to 'responsible lending', there is appropriate time for adjustments to repayment schedules to be made in times of financial hardship and, consistent with the Contracts Review Act, that there are protections against unjust contracts. In addition to this, all disputes around credit contracts must be resolved by an external dispute resolution scheme.

Standard contract of sale

The evolution to a standard contract of sale is in itself a form of protection for the parties involved in the purchase of a property. The clearly outlined process from exchange of contracts to settlement ensures a degree of certainty in the rights and obligations of both vendor and buyer. (This is discussed in the section, 'Private treaty or auction'.)

Review 14.6

1. Explain what a cooling-off period is, and why it is important.
2. Outline what the following types of insurance protect against:
   - **a** building insurance
   - **b** mortgage protection insurance
   - **c** public liability insurance.

14.3 Leasing

Not everyone can afford to purchase their own property. They therefore enter into a **residential lease** agreement with the owner (landlord) to rent their property under specific conditions, including the agreed duration and the monthly rent to be paid. Residential leases are also known as 'residential tenancy agreements' and the basic rights and responsibilities are set out in the *Residential Tenancies Act 2010* (NSW). Leases under this Act include some standard terms that cannot be altered.

residential lease
an agreement between the owner of a property (landlord) and the person who is renting it (tenant)

The rights and obligations of landlords and tenants

The *Residential Tenancies Act 2010* (NSW) sets out the main rights and obligations of landlords and tenants. Some of the standard terms and conditions of a residential lease agreement include things such as:

- the right to occupy the premises and have possession and quiet enjoyment of the

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Legal Links

Go to http://cambridge.edu.au/redirect/?id=6380 to download a standard residential lease agreement.

premises with restrictions on the landlord's access to the property
- an agreed level of rent and when this can be increased or decreased
- agreement around repairs including urgent repairs, the tenant's use of the premises and the payment of taxes, water rates and other charges
- alterations and additions to the premises including locks and other security devices
- the right to sub-let and transfer the tenancy
- any relevant strata title information.

All agreements must be in writing and where an agreement is long term (for more than 20 years) some of the mandatory terms may be varied except those around payment of taxes, water, rates and some other terms. The landlord must disclose matters such as if the property is up for sale, if it is subject to foreclosure by a financial institution or if the premises has been subject to fire or flood in the previous five years. If the premises poses some form of health risk, this also must disclosed, as well as if there has been a serious violent crime on the property. Also of relevance may be if the tenant will need a residential parking permit, who will pay for that and if there are any easements that may affect the tenancy.

There are a number of notable areas of rights and obligations of tenants and landlords, discussed below.

Condition reports

A **condition report** is an inspection checklist of the state of the premises signed by both landlord and tenant prior to moving in. Before signing the lease, a condition report must be completed to ascertain the state of the premises with respect to cleanliness, any damage that exists and the condition of fixtures such as lights and appliances prior to the tenant moving in. If the tenant disagrees, they can have this noted on the condition report or they can apply to the NSW Civil and Administrative Tribunal (NCAT) to have the condition report altered.

condition report
an inspection checklist of the state of the premises signed by both landlord and tenant prior to the tenant moving in

Rates, water and electricity

Under s 39 of the *Residential Tenancies Act 2010* (NSW), a tenant will have to pay for water usage only if the premises that they are residing in has a separate meter and the property has water efficiency measures in place. There must be no leaking taps from the commencement of the tenancy and the flow rate must not exceed 9 litres per minute. The tenant must also be provided with the metered bill from the relevant water authority; otherwise, this is a responsibility of the landlord.

The payment of rates is the responsibility of the landlord whereas most tenants will negotiate with the local electricity supplier to have the power turned on and an account made out in the tenant's name. Where there may be more than one tenant using electricity of one meter it is the responsibility of the landlord to pay and seek reimbursement.

Bond money

Tenants will have to pay bond money; this cannot exceed more than four weeks' rent and is paid by the tenant to the landlord prior to the tenant moving into the premises.

Under the *Landlord and Tenant (Rental Bonds) Act 1977* (NSW), money paid as a rental bond on residential property must be lodged with Renting Services in NSW Fair Trading, who holds it as security. If the tenant does not comply with terms and conditions of their tenancy agreement, this money can be used to settle a claim by the landlord.

At the end of the tenancy, the bond money can be claimed back with interest if the landlord is satisfied with the state of the premises. Once this occurs, the landlord must sign the 'claim for refund of bond form' and NSW Fair Trading will transfer the money into an account of the tenant's choice. When there are disputes in the reclaiming of bond money, the tenant may apply to the department to have the bond money returned without the written consent of the landlord. NSW Fair Trading will contact the landlord

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In Court

***Groth v Kantipudi (Tenancy)* [2012] NSWCTTT 410 (10 October 2012)**

In this case the landlord (applicant) claimed bond money to be paid for unpaid water rates and cleaning costs due to the generally untidy state of the premises. The applicant also claimed compensation for carpet cleaning, repair of the kitchen benchtops, removal of graffiti and replacement of some doors and locks. Money was also sought to replace the lino floor in the kitchen and to repair some holes in the walls.

The tribunal was satisfied in this case that the applicant was owed compensation on all of these matters and the respondent (tenant) was ordered to pay $1458.00. Evidence presented by the respondent saw the amounts originally tendered by the applicant adjusted. In this case, the bond money paid at the beginning of the tenancy was required due to the tenant failing to fulfil their obligations to the landlord. However, as the bond money amounted to only $720.19 it remains an issue as to how the landlord might receive all of the compensation owed by the respondent.

and give them 14 days to respond. If they do not do so, the rent money will be returned but if the landlord does respond it will be up to the tenant to apply to NCAT for a decision.

Quiet enjoyment of the property

Once the lease agreement has been signed, the tenant has the right to quiet enjoyment of the premises like any other householder. This means that the landlord must not interfere with this privacy and they, or their agent, must take steps to ensure that neighbours also do not interfere with this right.

As such, landlords cannot enter the premises without the tenant's permission, must give seven days' notice to carry out an inspection and can do so no more than four times a year. If repairs are needed, two days' notice must be given if they are not urgent.

Conversely, the tenant must give the landlord access to the property when permitted and must obtain the permission of the landlord before removing or altering fixtures at their own expense.

Repairs

Under the Act the landlord has an obligation to ensure the premises are habitable, clean, safe and secure. They also have a responsibility to ensure it stays in this state. When urgent repairs need to be completed, the landlord should be notified in writing if possible, but the repairs should be completed immediately. If the landlord cannot be contacted, the tenant can have the repairs carried out and be reimbursed within 14 days up to costs of $1000. For non-urgent repairs the response time will be considerably less, but these will need to be carried out within an agreed deadline. The tenant can apply to have these carried out by the NCAT three months after the deadline.

Rent

The rent can be increased as many times as the landlord wishes. There are, however, limits to when this can happen, especially in the case of a fixed-term lease. The rent cannot be increased during a fixed term of less than two years unless otherwise stated in the agreement. For fixed terms of two years and more, the landlord must give 60 days' written notice but it cannot be increased more than once in a 12-month period. If the agreement becomes a periodic agreement, the rent can be increased with written notice every 60 days.

Figure 14.10 The landlord has an obligation to ensure the premises are habitable, clean, safe and secure.

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Ending a tenancy

Under a fixed agreement, the tenant must give 14 days' notice that they will be ending the tenancy agreement and the landlord is required to give 30 days' notice. Once the fixed term is up and the agreement is not ended, the agreement becomes an ongoing one called a 'periodic agreement' usually for up to a month at a time. When the tenant wants to end this type of arrangement, 21 days' notice is required to be given, but the landlord must give 90 days' notice. In this situation, the landlord does not have to give a reason for ending the agreement.

If the tenant believes the landlord has breached the agreement, they can end the agreement by providing reasons and 14 days' notice. They can also apply to NCAT to have the agreement set aside, and the money owed to the landlord would be determined.

The landlord can end the tenancy if they believe the tenant has breached the agreement and must give 14 days' notice and explain the breaches that have occurred.

If there are goods left on the premises, the landlord can sell these after giving the tenant notice that this is to happen. Assuming the good are not perishable, the landlord has to wait 14 days after giving notice to dispose of or sell the goods. The tenant may be reimbursed for the goods after the landlord's costs are deducted.

It is illegal for a landlord to lock a tenant out of the premises, but if proper notice is given to end the tenancy and the tenant does not move out in the specified time then the landlord can apply to NCAT within 30 days for an order of termination and an order of possession.

Protection for tenants, landlords, boarders and lodgers

There are a significant number of tenants who can be in a vulnerable situation due to poor financial circumstances and poor access to the law. The protections outlined above, mainly with regard to the residential tenancies agreement, are important checks and balances to ensure that adequate housing and appropriate property rights are afforded to tenants.

Landlords in contrast have outlaid significant sums of money for the purchase and upkeep of residential property available for rent. Tenancy serves an important social function given the shortage of housing in many housing markets. They can also experience situations where their properties can be extensively damaged or where it becomes problematic evicting tenants who have breached the tenancy agreement, and they may spend time and resources retrieving money owed as a result.

Research 14.3

Do an internet search to answer the following questions about tenants' rights and obligations under the *Residential Tenancies Act 2010* (NSW). A good starting point is the fact sheet on the Tenants' Union of NSW website.

1. List three tenants' rights, and explain why they are important.
2. List three tenants' obligations, and explain why they are important.

The *Residential Tenancies Act 2010* (NSW), which replaced the 1987 Act, essentially attempts to balance the protections afforded both landlords and tenants. Some of the changes include:

- When fixed term tenancy expires, the landlord has to give 90 days' notice to vacate under s 85 as opposed to 60 days previously.
- The landlord can still issue notice to vacate in 14 days if the tenant is 14 days behind in rent under s 88 and s 89. The landlord must also inform the tenant that they do not have to vacate if they pay the rent and agree to a payment plan in the future. NCAT cannot issue a vacate order if the tenant satisfies this unless they have a history of being behind in their rent. These sections provide better access to the law for tenants as landlords cannot arbitrarily evict them if there is no pattern of rent arrears and the rent is paid up within the specified time frame.
- If a tenant wants to sub-let they must have the landlord's permission, but under s 75 the Act states that the landlord cannot refuse this permission unreasonably.

Critics such as the Property Owners' Association of New South Wales have argued that protection for landlords has been weakened with the balance tipped in favour of tenants' rights, especially in the

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area of security of tenure and the terms of the tenancy agreement. In contrast to this, the Tenants' Union of NSW believes the 2010 Act is an improvement on the 1987 legislation, as it has improved the rights of and protections for tenants.

There is also a suite of state and federal legislation that outlaws discrimination, especially for those seeking rental accommodation. This is examined in the 'contemporary issue' sections.

Boarders and lodgers

Boarders and lodgers comprise some of the most vulnerable tenants in Australia. They can take many forms, such as people living in guesthouses, hostels, motels and private homes. They are not covered by *Residential Tenancies Act 2010* (NSW) and as such do not sign residential tenancy agreements. They therefore are not afforded the rights and protections that normal tenants receive under the standard residential agreement.

There have been calls to ensure that this group of people has the benefit of greater government regulation to protect them from unsafe and unhygienic premises, harsh rent increases, and give them greater privacy and security of tenure within the confines of their accommodation. New South Wales lags behind other states that have improved legislative protections for these tenants.

At present, boarders and lodgers have to rely on NCAT to ensure that some basic rights to shelter are enforced. In the case of *Doran v Lia*, GEN 10/57830, 20 April 2011, the Consumer, Trader and Tenancy Tribunal found 'that the accommodation was not reasonably fit for the purposes of [a boarding house] and thus the money outlaid by the applicant [$600] should be returned by way of compensation'.

Legal Links

To further investigate the poor conditions that exist for many people living in boarding house go to:

- http://cambridge.edu.au/redirect/?id=6608
- http://cambridge.edu.au/redirect/?id=6609

Review 14.7

1. Explain the purpose of the rental bond payment.
2. Outline the landlord's responsibility for making repairs to the property.
3. List the notice periods that must be given by a tenant and a landlord for ending a tenancy.
4. Discuss how the *Residential Tenancies Act 2010* (NSW) improved the protections for tenants.

14.4 Securing other types of shelter

Aged care

In Australia, it is projected that by 2025 there will be more people aged 65 years and over than there will be children aged 0–14 years. This pattern will continue and will have significant implications of the provision of appropriate aged care for older Australians. The level of care required will determine the type of supported accommodation needed by older people.

Retirement villages

These are regulated by the *Retirement Villages Act 1999* (NSW) and the *Retirement Villages Regulation 2009* (NSW). According to NSW Fair Trading, a retirement village is 'any residential complex predominantly occupied by retired persons aged over 55 years who have entered into some form of contractual arrangement with the owner or operator of the village'.

It estimates that there are close to 600 retirement villages across New South Wales, with approximately 36 000 residents. These are operated by church, charitable, community and private operators. There are three main types of accommodation offered in retirement villages:

1. self-contained premises for people who can live independently
2. serviced premises (or assisted living apartments), where cleaning, meals and other services are provided

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Figure 14.11 As Australia's population ages, more supported accommodation will be needed to meet older people's requirements.

3 a mix of the two, so that residents can transfer if it becomes necessary.

One of the criticisms of retirement villages is that there is a variety of fee structures and financial arrangements for entry to and exit from a retirement village and that it is hard for people wishing to enter a retirement village to compare services and costs.

All residents have to sign a contract and some of these can be lengthy and complex. Each retirement village must establish a 'residents' committee' and a 'disputes committee' to allow the residents to have a say in the day-to-day running of the village and to mediate any disputes that may occur.

All residents have a right of appeal to NCAT. It can make orders with respect to the movement of residence from a self-care situation to a hostel unit due to deterioration in health. The tribunal can also make orders with respect to matters arising from village contracts and rules, ongoing charges and accounts, termination, security and the sale and letting of premises.

Nursing homes

If an older person doesn't need to be in a hospital, but requires more care than can be offered at home, they may move to a nursing home. Most nursing homes have nurses and aides trained in aged care on hand 24 hours a day. These are usually classified into 'low level' and 'high level' care and are regulated by the *Aged Care Act 1997* (Cth).

People in these situations are permanent residents who have been assessed by an aged care assessment team to ascertain whether they are no longer able to live at home unassisted. In 'low care', the resident will be provided with assistance with day-to-day living such as meals, laundry and cleaning. Other services such as various treatment and therapies as needed should be provided.

All residents, depending on their assets, will have to pay an **accommodation bond** to secure a place in hostel-style accommodation. Part of this will be refunded when the resident leaves the home, but a proportion of the bond will be paid to the home for services rendered. This is predetermined when the resident signs the resident agreement (contract) upon entry. Any interest earned on the investment of the bond by the home is also returned to the resident.

accommodation bond
a payment made by nursing home residents to secure a place, partially refunded when they leave the home

In addition, if a resident enters 'high care' for more than 28 days, they may be asked to pay an **accommodation charge**. This daily amount, which is asset-tested, is fixed from the day they enter high care until they are discharged. They cannot be required to pay the charge more than a month in advance. An aged care home must be certified as meeting minimum building and care standards before it is allowed to levy an accommodation charge.

accommodation charge
a daily amount payable by nursing home residents who require 'high care'

Some residents who cannot afford to pay these costs can be subsidised by the federal government to cover the bond or charge. The resident would pay the basic daily care fee.

In addition to residential care, the *Aged Care Act 1997* (Cth) also regulates the following types of supported aged care:

- community care (CACP)
- Extended Aged Care at Home (EACH)
- Extended Aged Care at Home – Dementia (EACH-D)
- transition care.

A constant challenge in nursing homes is the quality of care that is afforded to older people. Those with the ability to pay can purchase a place

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Legal links

The *Charter of Care Recipients' Rights and Responsibilities – Residential Care* is available on the Department of Social Security website, at http://cambridge.edu.au/redirect/?id=6381.

in a privately run nursing home, which may provide more comfortable and private accommodation.

The most vulnerable people requiring this type of shelter have limited choice as to what place they ultimately acquire and must accept the limited resources available and the services this can provide from government taxes. In addition to this, there is a shortage of nursing care – in particular, training in aged care, which is fundamental to being able to address the needs of older people, especially those dependent on ongoing care.

Under the *Aged Care Act 1997* (Cth), nursing home providers must adhere to the *Charter of Care Recipients' Rights and Responsibilities – Residential Care*, which lists 21 rights for care recipients, including personal privacy, quality care, health information and personal independence. There is also the right to be treated with respect and dignity. In addition, four responsibilities are listed, including respecting the rights of other residents and of staff.

Some criticism has been made over the years as to the enforceability of the charter and the resources dedicated to ensure that aged care providers are adhering to the charter. This does not mean to diminish the providers that provide a quality service and the dedicated staff that work in what is a challenging area of employment.

Residential parks

According to NSW Fair Trading, a residential park includes 'caravan parks, manufactured home estates, mobile home villages and relocatable home parks'. Residential parks in New South Wales are regulated under the *Residential Parks Act 1998* (NSW).

For many people this is an alternative form of accommodation that has a variety of tenures associated with it. Some people stay temporarily overnight or up to a number of weeks. This is usually classed as some form of holiday accommodation and in these circumstances a licence is paid to the park owner to occupy a site for the length of the stay.

Alternatively, some residents who wish to stay long term are classed as being in a landlord and tenant relationship. As such they are given protections under the *Residential Parks Act 1998* (NSW) concerning security of tenure, especially once they have signed a residential tenancy agreement. Long-term residents are also covered by the *Landlord and Tenant (Rental Bonds) Act 1977* (NSW) with respect to payment and retrieval of bond money.

Squats

Some people occupy properties without the owner's permission and reside in these premises rent free. At times, the premises may be abandoned buildings where the owner is going to redevelop a site and the value of the land may be worth more than the value of the premises. Such buildings can remain unused for a number of years. This type of situation is usually more common in urban areas than in the countryside, and in some cities of the world squatting is an accepted practice. The reason for this is that the site is providing shelter for people who may not otherwise have it and, as the building is unoccupied, a social use is being made of the building.

However, residents in these situations have no tenancy rights as there is no agreement between the owner of the property and themselves. The owner may get an order from a court to evict people who trespass.

14.5 Dispute resolution mechanisms

Most disputes that arise from people acquiring or residing in some form of shelter usually result from a clash of rights and responsibilities between landlord and tenant, or neighbour and neighbour, or they may emerge during the purchasing of shelter. For most people the courts are out of reach due to costs and delays.

Alternative dispute resolution and the creation of specialist tribunals has proven to be more cost-effective and timely than the courts, given the immediacy of disputes around shelter. Non-legal measures such as non-government organisations and the media are just as important to ensure that

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all people have the opportunity to acquire adequate and affordable shelter.

Courts and tribunals

Specialist tribunals have improved the accessibility of the law for many people with disputes around shelter. Courts will ultimately be an avenue of appeal and importantly an avenue of justice in some matters that require a specialist understanding of the law. Contractual disputes can arise during the conveyancing process. This can occur when false and misleading information may have been disclosed in the contract for sale or when a legal representative fails to discover easements or other factors affecting a property for sale.

The evolution of specialist tribunals has been a sensible one, especially in the area of landlord and tenant rights and responsibilities.

The NSW Civil and Administrative Tribunal (NCAT) was established under *Civil and Administrative Tribunal Act 2013* (NSW). It ensures access to the law, particularly for tenants who might otherwise be unable to pursue matters arising from their tenancy agreement. NCAT can hear most disputes revolving around residential tenancy agreements involving landlords and tenants, including residents of Housing NSW (public housing) and residential parks; matters are usually heard within 21 days. Urgent hearings can be scheduled within two or three days when needed. Legal presentation can be allowed but only when good reason is given. This is to ensure that the parties come to the tribunal on a level footing, which in most cases would be upset by an experienced legal representative advocating a matter.

NCAT can hear and resolve matters relating to disputes arising from residential tenancy agreements that are highlighted in the earlier sections, 'Leasing' and 'Residential parks'. Matters referred to in the 'contemporary issue' section on social housing also make reference to NCAT.

Alternative dispute resolution

Alternative dispute resolution (ADR) can be the most effective and inexpensive method of resolving disputes around shelter.

Mediation and conciliation take various forums to prevent a court or tribunal from having to adjudicate in some matters. Many government agencies and tribunals use ADR to resolve matters quickly and efficiently (for example, the Human Rights Commission and NCAT).

NCAT cites conciliation as a method of dispute resolution when its states that the conciliation process 'is closely linked to the hearing process, rather than [being] a separate step of dispute resolution. Conciliation brings people in dispute together to talk about their issues in an informal, private meeting and try to reach an agreement. Conciliation is also used extensively in matters involving multiple applications about the same dispute, for example in residential parks and retirement village matters.'

Government organisations

Various state and federal government organisations have been established to implement policy that allows governments to meet their commitments in providing social housing options for those most in need. Other government organisations provide information and research to better inform the government and the community around issues affecting the provision of shelter.

Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA)

FaHCSIA is a federal government department that oversees a number of federal government initiative policies including those on housing affordability, homelessness and social housing.

Housing NSW

Housing NSW is an agency of the NSW Department of Family and Community Services (FACS) and is one of the largest providers of social housing in the world. It meets modern community needs by providing various housing solutions. Housing NSW partners with the community, industry and individuals to provide affordable, safe and decent housing for those most in need. The aim is to allow them to live with dignity, find support if needed and achieve sustainable futures.

Rental Bond Board

The Rental Bond Board is an independent government body. When a tenant pays a rental bond to their landlord, the landlord must lodge it with this board, which is the custodian of the money. Daily

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Figure 14.12 Housing NSW is one of the largest providers of social housing in the world.

functions – bond lodgement, custody, refund and information – are administered by NSW Fair Trading.

Home Building Service

The Home Building Service is an arm of NSW Fair Trading. Its main function is to ensure compliance with the *Home Building Act 1989* (NSW). Under the Act, builders and tradespeople must have a licence to undertake residential building work. This includes specialist tradespeople, such as plumbers, electricians and airconditioning specialists. The Act also sets up standards around competence, probity, contracts, statutory warranties and home warranty insurance to protect people against incomplete or faulty work. There has been criticism over the years that building contracts are too broad and do not provide adequate protection for people building a home.

Housing Appeals Committee

The Housing Appeals Committee is an independent agency that can review administrative decisions of social housing providers. The aim is to provide a dispute resolution system that is fair, informal and quick. Applicants and tenants of public housing and community housing organisations can seek a review when they believe the housing provider has made a decision that is not in accordance with its own policies.

Community justice centres

Community justice centres provide free mediation to people attempting to resolve their disputes. This can include neighbourhood disputes, which can involve matters pertaining shelter.

Non-government organisations

There are numerous non-government organisations (NGOs) that advocate on behalf of people in various forms of shelter. NGOs are a non-legal measure and the effectiveness of what they do lies in their ability to pressure relevant sectors of government into improving the rights of the people they represent.

They may undertake their own research and produce academic papers that highlight gaps in the law or issues concerning the accessibility of the laws to their members. In addition to this, they may use the media to draw attention to a particular issue that may force a government minister to reply in public. As a non-legal measure such groups find it difficult to attract adequate funds to carry out their missions. At times they are ignored by government – especially those groups that represent the more marginalised people in society who might not make a significant impact at the ballot box.

NGOs include the following:

- The *Seniors Rights Service* (formerly known as the Aged-care Rights Service, or TARS) is a community legal centre. It provides legal advice and advocacy for people living in self-care retirement villages. It also provides non-legal advocacy to people in Commonwealth-funded hostels and nursing homes, and recipients of in-home aged care in New South Wales. All calls to the service are confidential. Its 2014–15 annual report said:

> Our advocates have assisted 920 recipients or carers with advocacy matters, dealing with issues of security of tenure in their aged care home, quality of care, specified care and services, staff skills, fee disputes and communication systems. This is an increase of 452 advocacy cases from the previous year. Another 1327 people including other family members, ACAT and concerned professionals, including aged care managers caring for clients, have been assisted to access information on aged care rights and standards of

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care. These calls are 572 more than we responded to last year.

It would seem that NGOs such as the Seniors Rights Service are valuable advocates for older people who need support and advice when faced with difficulties in the aged care system.

- The *Council of Social Service NSW* (NCOSS) has an important role in coordinating non-government social and community services in New South Wales. It provides informed and independent policy development, advice and review. At times it develops position papers, especially on the social housing sector.
- The *Tenants' Union of NSW* is the key NGO for the representation of tenants and other renters in New South Wales. It gives advice to tenants about their rights and obligations under the existing residential tenancy law.
- *Homelessness Australia* is the main national organisation that offers advocacy for people experiencing homelessness and those who provide services to them. It is involved in the research, development and promotion of national policies and action to reduce homelessness. It also has a role in educating the community about homelessness.

The media

Complex contractual disputes involving the plight of the most marginalised people in Australian society often form the basis of public interest stories that mainstream media want to follow. The power of the media is in the audience they can reach and the ability to highlight an issue that might well be swept aside or ignored within a government department. The media does not always change government policy, funding or decision-making, but they are an important part of the law reform process.

The media have the ability to present the views of various stakeholders on an issue that may be in the public interest. An example of this has been the ongoing need to strengthen the protections afforded to people classed as boarders and lodgers. Many of the people who live in this form of tenure have been denied basic rights to safety and privacy, as well being the subject to misleading and deceptive behaviour by some operators of boarding houses.

Recent deaths and squalid conditions have been exposed in the media and have again put the state government under increasing pressure to improve the rights of these people.

Review 14.8

1. Summarise the differences between retirement villages and nursing homes, in terms of both the level of care and the fee structures.
2. Explain why 'squatters' have no legal property rights.
3. Outline the key roles of government organisations that deal with shelter.
4. Explain the areas in which NGOs advocate on behalf of people in various forms of shelter.

14.6 Contemporary issue: Affordability

The ability of individuals to acquire accessible, affordable and secure housing is the primary driver of their participation within their local and broader communities. A significant threat to this is the erosion of housing affordability in many of the housing markets in Australia. Definitions of 'housing affordability' can vary depending on the data used, but ultimately it means a person's ability to pay for their own shelter.

Some estimates put the number of Australians paying above the benchmark of 30% of household income for housing at around 1.5 million people. It is well established that this puts substantial pressure on family finances, especially for people in rental situations where it is becoming increasingly difficult to find adequate and affordable accommodation without having to relocate away from essential services.

The COAG Reform Council's comments on the state of housing in Australia are not encouraging. In 2012–13, its report looked at the private rental market, and found that up to 42% of low-income households were suffering from housing stress – a figure that is historically high and continues to rise.

According to the Australian Institute of Health and Welfare in the report, *Housing Assistance in*

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News

Home prices outpacing earnings: IMF

Clancy Yeates

Sydney Morning Herald, 12 June 2014

Australian homes are among the most expensive in the world when household incomes and rents are taken into account, International Monetary Fund figures show.

As part of a move to push governments to act against housing bubbles, the fund unveiled comparative data on Thursday morning intended to underline the high cost of homes.

It shows rising prices have pushed two key measures of home values – the ratios of house prices to incomes and prices to rents – well above their long-term averages.

With houses selling for more than four times the average household income, the IMF said this ratio in Australia was much higher than its historical average.

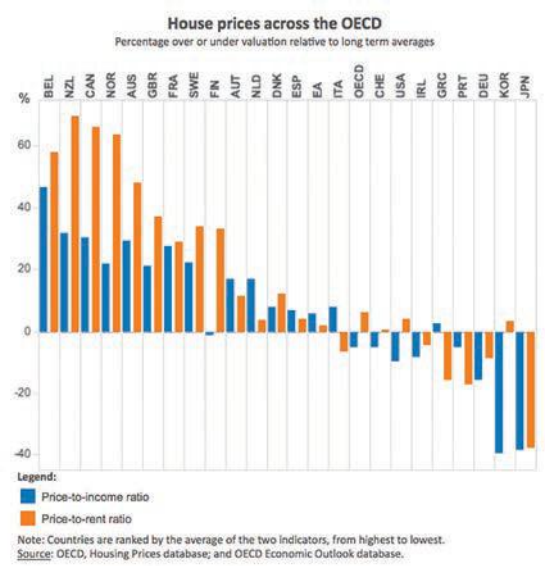

Figure 14.13 House price-to-income ratios around the world.

A 24-country comparison showed that Australian homes were behind only those of Belgium and Canada when judged by this measure.

The other metric it used to measure home values was the ratio of prices to rents. This was also much higher than the long-term average in Australia, which by this criterion ranked fifth most-expensive behind Belgium, Norway, New Zealand and Canada.

IMF deputy managing director Min Zhu said the fund was publishing the data in an attempt to ensure governments moved from a policy of 'benign neglect' regarding house prices. 'Our research indicates that boom-bust patterns in house prices preceded more than two-thirds of the recent 50 systemic banking crises,' Mr Zhu said in a blog post.

He also noted Australia was among a handful of countries where price-to-income and price-to-rent ratios were 'well above' their historical averages.

The IMF data is the latest indication of the high cost of Australian housing, which some economists believe has started to deter buyers. In April, Barclays economist Kieran Davies said prices were 'flashing red' with prices at 4.3 times household income and 28 times annual rent, both just below record highs.

In a sign the market might be cooling, however, capital city prices recorded their first monthly fall in a year during May, according to RP Data-Rismark. Sydney's median house price fell 1.1 per cent in the month to $678 500 and Melbourne's dipped 3.6 per cent to $555 000.

Australian houses have long stood out as expensive when compared with other nations. But Mr Zhu conceded that detecting overvaluation was 'more art than science' and it was important to also consider factors such as credit growth and household debt.

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News

On this front, recent figures have been less dramatic. Latest Reserve Bank of Australia figures show housing lending growing at its fastest annual pace in three years, but it is still well below the pace reached before the global financial crisis.

Household debt as a share of disposable income is also at a three-year high, at 148.8 per cent, but remains below record highs.

In order to prevent housing markets from overheating, the IMF recommends governments consider rules to rein in riskier bank lending, which Australia has so far avoided.

Mr Zhu said more than 20 countries had adopted 'macroprudential' policies such as caps on low-deposit loans or debt-to-income ratios in recent years.

Legal Links

The Numbeo website takes user contributed data to present an interactive world map of housing price to income ratios – see http://cambridge.edu.au/redirect/?id=6373.

Australia 2013, housing stress continues to increase. It stated:

> [T]he average cost of housing has increased substantially over the past decade. National house prices increased 147% between 2001 and 2011 – from $169 000 to $417 500. … The proportion of Australian households in housing stress has increased, from 14% in 1994–95 to 18% in 2011–12. Of these, 2 in 5 (42%) were low-income households.

In addition to this, the numbers of people on waiting lists for social housing across Australia continue to climb.

One of the main measures of housing affordability is the **Housing Affordability Index**, which reports on the relationship between household income, mortgage costs and the price of housing. If the reported index value is 100, this means that the earnings of a median-income family is exactly enough to let them get a mortgage on a median-priced home. If the index is below 100, then a median-income family would not be able to get a mortgage loan on a median-priced home. For example, in 2014 the Housing Affordability Index in Sydney was 61.5, indicating poor housing affordability in that city. This was even lower than the national Housing Affordability Index (see Fig. 14.14), which has been under 100 for some time. Figure 14.14 indicates that housing affordability has been steadily increasing over recent years, partly due to the Reserve Bank cuts to interest rates in 2014–15 in response economic factors such as growth of the economy.

Housing Affordability Index
a key indicator that reports on the relationship between household income, mortgage costs and the price of housing

Research 14.4

Use the internet to do the following.

1. Identify and define the following:
   - **a** housing affordability
   - **b** housing stress
   - **c** social housing.
2. Analyse the effect that the Global Financial Crisis and subsequent interest rate cuts had on housing affordability.
3. Investigate the implementation of the stamp duty tax and evaluate whether reducing it was effective in providing more affordable housing. Why? Why not?

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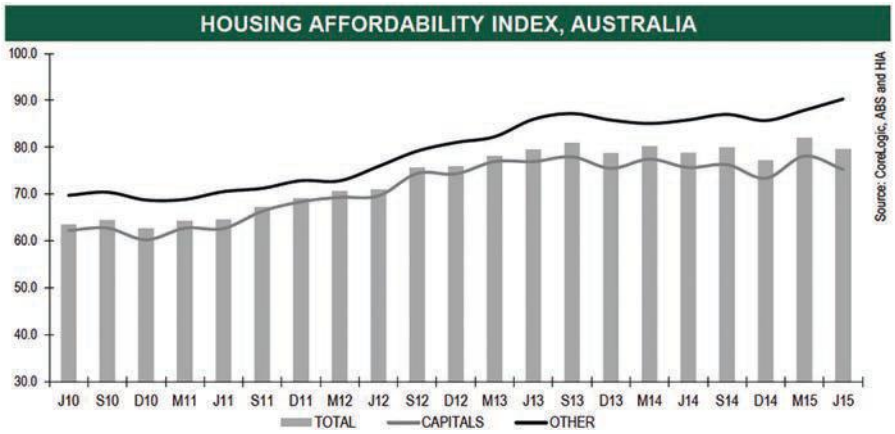

Figure 14.14 The Housing Affordability Index.

Improving housing affordability

A number of government initiatives have been implemented to improve housing affordability. Some of these have been combined programs for first-home buyers between the federal and New South Wales governments. These were aimed at providing funds for first-home buyers so they can afford a deposit on a home and reducing some taxes, such as stamp duty, to reduce the costs of home ownership.

Housing NSW has provided funds for mortgage assistance for low-income earners as well as rental assistance schemes such as 'Rentstart'. The National Affordable Housing Agreement (NAHA), which came into effect in 2009, was signed between the state and federal governments. It aims to ensure that 'all Australians have access to affordable, safe and sustainable housing that contributes to social and economic participation'. It aims to do this through better coordination and integration of all governmental services and improvements to social housing as well as housing for Indigenous Australians. It will also continue to explore ways to increase the supply of affordable housing. Ultimately, some of the structural problems associated with housing affordability will take a number of years to address, especially in the private market, but only with sustained government policies that aim to improve market conditions.

At the time of writing, the Housing Affordability Index has improved over the previous two years in some areas. This is due to falling interest rates and property prices from a slowdown in the market and improved incomes in certain markets even though Sydney experienced a boom in house prices in 2013–14. The Housing Industry Association/Commonwealth Bank housing affordability index released in March 2014 showed a rise of 2.1 from the previous quarter, for a reading of 77.2.

In 2014 Sydney was the least affordable, with an index of 61.5, compared with the national average of 77.2.

These results, however, do not indicate whether there has been an improvement in the supply of private rental properties or a levelling off of increasing rental prices. Sydney is now regarded as one of the most expensive cities in the world, and some of our other major cities are not far behind in terms of housing affordability. Housing affordability will continue to be a significant challenge for all governments and will be integral to long-term social inclusiveness and cohesion. It is well accepted that prolonged high housing costs and low interest rates result in a widening of the wealth distribution between those able to purchase housing and those who cannot.

The following are some generally recognised solutions to housing affordability:

- increasing the supply of affordable rental housing
- tax reform – many commentators have argued that negative gearing of investment properties for tax benefits has artificially increased demand and hence property prices
- improving rental assistance
- setting benchmarks for all levels of governments to achieve in housing affordability.

The law can be effective to some degree in promoting the above conditions, but non-

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Research 14.5

Using the internet, find and read three articles related to housing affordability and stress (see, for example, http://cambridge.edu.au/redirect/?id=6374.

government organisations that deal with the fallout from housing stress continue to lobby government to adopt a well-funded, coordinated approach to housing affordability. Achieving such a coordinated approach would seem to be politically challenging.

Groups such as the Salvation Army, Australians for Affordable Housing, Shelter NSW and many more understand that addressing housing affordability is a long-term issue that requires political and economic will. Lastly, the media has the ability to highlight the plight of those Australians experiencing housing stress and the social implications of this.

Review 14.9

1. Recall the percentage change in median income, rent and mortgage for New South Wales and justify how this makes Sydney one of the most expensive cities in the world.
2. Explain why the 2014 Housing Industry Association/Commonwealth Bank housing affordability index revealed a recent improvement in housing affordability.
3. Critically evaluate the solutions to housing affordability and decide which you believe would be most and least effective.

14.7 Contemporary issue: Discrimination

State and federal laws make it illegal to discriminate against a person seeking shelter. The issue of discrimination is more prevalent in the rental market, particularly in areas where there is a shortage of housing supply. Migrants, Indigenous Australians and single mothers are more likely to be denied accommodation due to prejudiced beliefs about a person due to their race, family or financial situation.

Some real estate agents believe that by discriminating they are protecting the interests of their landlords, which they have a duty to do. However, if a person complies with all that is required of them and produces the necessary documentation, there is no reason that the person and their family should be denied shelter.

In New South Wales, the *Anti-Discrimination Act 1977* (NSW) prohibits discrimination on the basis of a broad range of categories. These include race, gender, age and marital status. The president of the Anti-Discrimination Board can refer complaints of unlawful discrimination to NCAT. The tribunal has a number of divisions; complaints about discrimination are heard by the Administrative and Equal Opportunity Division, which was established under the *Civil and Administrative Tribunal Act 2013*. Some of these complaints concern people who have been discriminated against in the process of acquiring shelter.

According to the tribunal's website, the tribunal may determine several outcomes. Some of these are to:

- find that there has been a breach of the Anti-Discrimination Act
- award compensation of up to $100 000 for loss or damage suffered because of the breach

Figure 14.15 Some people are judged purely on appearance or culture. In some cases, these people are denied rights.

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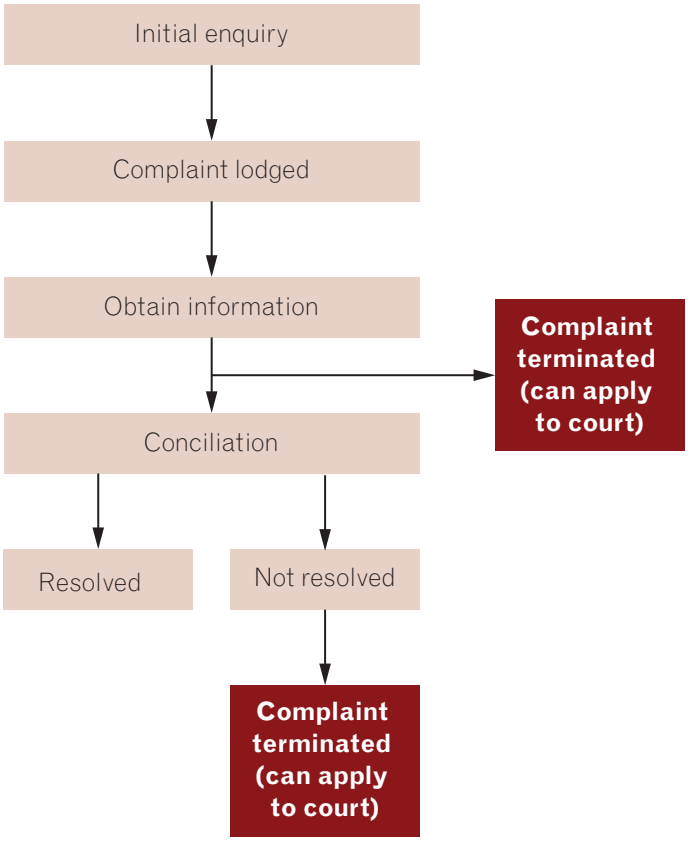

Figure 14.16 The complaints process followed by the Human Rights Commission.

- order the person responsible for the discrimination, harassment, victimisation or vilification not to continue or repeat the conduct
- order the person responsible to take certain actions such as reinstating a person to their job if they have been dismissed
- order the person to publish an apology or a retraction.

At the federal level there is a range of discrimination legislation that the Human Rights Commission has the authority to investigate and conciliate, such as complaints of alleged discrimination and human rights breaches lodged under these laws. The main body of federal discrimination legislation is the:

- *Australian Human Rights Commission Act 1986* (Cth)
- *Age Discrimination Act 2004* (Cth)
- *Disability Discrimination Act 1992* (Cth)
- *Racial Discrimination Act 1975* (Cth)
- *Sex Discrimination Act 1984* (Cth).

Complaints made against being denied shelter due to certain forms of discrimination are investigated by the Human Rights Commission.

It should be noted that under the current regime of discrimination law at state and federal levels, discrimination in all areas (including access to housing) is difficult to establish. In addition to this, some argue that the monetary penalties are too low and hardly entice people to bother making a complaint.

The federal government drafted the Human Rights and Anti-Discrimination Bill 2012 with an aim of consolidating all federal discrimination law into one Act. Another aim was to place the responsibility on respondents to show why there was no discrimination. A lack of political will by both sides of politics has failed to deliver these reforms that would strengthen the legislative regime that prohibits discriminatory behaviour.

Discrimination in the housing sector is commonplace for marginalised people within the community and will remain difficult to eliminate. In essence, some landlords and the real estate agents they operate through have predetermined the types of people they do not want renting their properties in the private market. Where this occurs it

In Court

***Vasilikopoulos v New South Wales Land and Housing Corporation* [2010] NSWCA 91**

Betty Vasilikopoulos sued her landlord after taking a fall in her bathtub. According to Mrs Vasilikopoulos, she had repeatedly notified her landlord of the dangers that might occur due to the poor infrastructure and design of her bathtub and shower. The landlord had agreed to investigate this problem at a later date. Mrs Vasilikopoulos had also just undergone knee surgery and was in an even more vulnerable state due to her restricted mobility. The case was dismissed as the court found the landlord had no duty of care for Mrs Vasilikopoulos' condition after her surgery as the landlord was not aware of this. The premises became unsuitable for her and her husband due to their deteriorating health, and the landlord was found to hold no special duty for this occurrence.

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is difficult to establish the real reasons those people are denied housing. While technically equality of the law exists for all people seeking shelter, the reality is that discrimination continues to erode people's fundamental right to secure shelter.

Review 14.10

1. List the reasons why a person might be discriminated against and detail the subsequent protection available from the law.
2. Analyse why discrimination is such a prominent problem for those seeking shelter.
3. Explain why African–Australians often find it difficult to procure accommodation.

14.8 Contemporary issue: Homelessness

The definition of 'homelessness' is broader than most Australians realise. Historically, we associated homelessness with a person living on the streets or in make-shift shelters. Australian federal law defines homelessness as 'inadequate access to safe and secure housing'. Unsafe or inadequate can be constituted by the following:

- It is damaging to a person's health and/or threatens the person's safety.
- It marginalises a person or group of people through a lack of 'personal' amenities or does not provide economic and social support.
- It places a person in a situation in which the 'adequacy, safety, security and affordability' of housing are under the threat.

The *Census of Population and Housing*, released in 2012, estimated that up to 105 237 people were homeless on census night – up from 89 728 in 2006 (a 17% increase). Accurate, updated figures will be released with the next census data, and will be listed on Cambridge GO.

Another way of examining homelessness is to consider the two following categories:

1. primary homelessness, which includes people who live on the streets or in deserted buildings
2. people who move between temporary shelters, living in boarding houses with no security of tenure.

There are numerous causes of homelessness, so reducing the number of people living 'rough' or in very insecure or unsafe housing situations requires a variety of strategies. According to the Salvation Army, people can end up homeless due to:

- domestic or family violence, relationship breakdown and the subsequent financial difficulties that may arise from these
- rising rental costs and a lack of affordable rental properties
- mental illness, drug and alcohol abuse
- the tightening of income support from the government and changes in family structures over time.

It is estimated that approximately 75% of all people categorised as being homeless are single without any viable support networks.

In 2008 the federal government released its white paper on homelessness, *The Road Home: A National Approach to Reducing Homelessness*, and committed to a target of halving the number of people experiencing homelessness by the year 2020. The paper sets interim targets of reducing this number by 20% by 2013. It also committed to ensuring that all rough sleepers who needed overnight accommodation would be offered crisis accommodation by the same year. Part of this strategy was coupled with the NAHA, which commits to more public and **community housing**, and renewing and building more housing for overcrowded Indigenous shelters.

community housing
secure and affordable rental properties for people who earn a low income and who have a housing need; homes are provided by not-for-profit community housing organisations

Close to $2 billion has been targeted to deliver improved housing outcomes for Indigenous Australians who reside in remote areas, and additional funds for social housing maintenance and new projects.

As mentioned earlier in Section 14.1, there is no legal right to shelter in Australian law. There is a right clearly outlined in numerous international instruments and, in light of this, state and federal

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Table 14.4 Rough sleepers by state and region

	Capital cities	Regional centres	Rural and remote	Total	Capital cities	Regional centres	Rural and remote	Total	Rate per 10 000
	No.	No.	No.	No.	%	%	%	%	No.
NSW	1182	547	1986	3715	32	15	53	100	6
Vic	845	245	1114	2204	38	11	51	100	4
QLD	591	792	3782	5165	12	15	73	100	13
WA	767	207	1418	2392	32	9	59	100	12
SA	251	16*	581	848	30	2*	68	100	5
TAS	125	34	226	385	32	9	59	100	7
NT	488	144**	956	1588	31	9**	60	100	3
ACT	78	0	0	78	100	0	0	100	3
Australia	4327	1985	10063	16375	26	12	62	100	8

*Includes Whyalla and Pt Pirie **Includes Palmerston and Alice Springs

governments recognise that there is a social obligation in a nation as wealthy as Australia to ensure its policies provide the maximum opportunity for all Australians to acquire adequate and affordable housing.

In 2006, Miloon Kathari, the United Nations Special Rapporteur on Adequate Housing, advised the United Nations Human Rights Council that Australia had 'failed to implement its legal obligation to progressively realise the human right to adequate housing ... particularly in view of its responsibilities as a rich and prosperous country'.

It remains to be seen how effective the government's white paper on homelessness will be over the long term. As indicated earlier, homelessness has increased between 2006 and the present day. On this indicator it is difficult to imagine the ambitious goals of the paper being fulfilled and the criticisms made of Australia in 2006 being a catalyst for change. However, the white paper does represent a more positive political commitment to address what is a complex and difficult area.

Non-government organisations that interface with the homeless on a daily basis provide an invaluable safety net for those most in need of shelter. Groups such as the Salvation Army, the St Vincent de Paul Society, the Wesley Mission and the many youth shelter and advocacy groups try to fill the gaps where government assistance fails or does not reach. They also keep reminding governments of their obligations under their own policies and international law, and provide invaluable responses to government position papers from hands-on perspectives.

Review 14.11

1. Analyse and justify why the definition of homelessness includes far more than just someone living on the streets.
2. Explain the purpose of the federal government's white paper, *The Road Home: A National Approach to Reducing Homelessness*.
3. Evaluate and explain why social service groups have a completely different approach from the federal government to homelessness.
4. Summarise the suggestions for solutions for the lack of safe and affordable housing.

14.9 Contemporary issue: Social housing and community housing

Social housing

Social housing includes public housing and Indigenous housing properties managed by Housing NSW. This is a type of secure housing that

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is provided to low- and very low-income households at affordable rents. Residents must meet certain eligibility requirements and establish that they have a housing need. Social housing tenancies are covered by the *Residential Tenancies Act 2010* (NSW). They are similar to normal tenancy arrangements; however, some parts of the Act do not apply.

Some of the exemptions that exist for social housing tenants under the Act reflect the fact the landlord–tenant relationship is not the same as in the private market and that residents pay subsidised rent. Some of the exemptions therefore refer to the provision of rent receipts and do not recognise the resident tenants in the same way as private renters are recognised under the Act, and breaches of the agreement may be handled differently. Residents may claim their rent is excessive if their rental assistance is cancelled.

In assessing whether an applicant meets the criteria for social housing, the relevant government minister will determine eligibility and whether rental rebates apply under the *Housing Act 2001* (NSW). People who apply after 2008 are now subject to income limits, which are adjusted annually. Income limits are calculated according to the make-up of the family that will be occupying government-provided housing. For example, from 6 July 2015 the weekly income limits were $890 for an adult with one child, $200 for each additional adult and $100 for each additional child. Additional levels are also available for people with disabilities, with varying rates for the degree of disability.

Assets are also assessed under the Act. As a general rule, an applicant is not eligible for social housing if they own or have a share in a property and could live in it or sell the equity in it to provide their own housing. There are some exceptions to this rule, such as if the person is in the process of a property settlement because of a relationship breakdown, needs to move for particular medical treatment, or where alternative accommodation must be found due to issues such as domestic violence .

Housing NSW is obligated to deal with repairs, whether they are urgent or non-urgent, under the *Residential Tenancies Act 2010* (NSW). Residents also have the right to apply to NCAT to have repairs fixed.

The most common reasons for ending a social housing agreement are that the rent is in arrears; for anti-social behaviour or criminal activity such as drug offences; and the premises being vacated for a long period of time. Some tenants make unauthorised alterations to the property, which can also result in the termination of the agreement. Housing NSW will provide a 14-day notice to terminate and will take the matter to NCAT for termination and possession orders.

Residents may take matters concerning their tenancy to NCAT, but the review of administrative decisions of Housing NSW is taken to the Housing Appeals Committee. This is an independent agency established to provide cheap, timely and informal dispute resolution for applicants and tenants of public housing. The committee also has jurisdiction to hear matters pertaining to community housing bodies.

Housing NSW provides a number of subsidised programs in addition to housing stock. Some of these are:

- Rentstart – a one-off loan to help residents obtain a private rental agreement. This money could assist with bond money or other costs associated with moving into a new rental premise.
- Special assistance subsidies, which are rental subsidies to allow someone to rent in the private market but only pay the same rent as if they were living in public housing.
- Property leasing – the department may lease a property itself from the private market and then sub-let this to social housing tenants at a subsidised rate.

Review 14.12

1. Justify the reasons why people must meet certain criteria before being eligible for social housing.
2. Summarise the reasons a social housing agreement may be terminated.
3. Analyse the subsidised programs put in place by Housing NSW, hypothesising on their effect on the community.

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Community housing

Community housing is similar to social housing in that both provide secure and affordable rental housing for people on low or very low incomes who have a housing need. The essential difference is that community housing is provided by not-for-profit community housing organisations instead of Housing NSW. There are a number of these providers around the state and the rationale is that this low-cost housing provides another avenue for the provision of housing infrastructure.

Tenants may appeal decisions made by community housing providers to the Housing Appeals Committee. This includes decisions about eligibility for community housing, transfer, offers of housing and rental subsidy calculations. Some matters come under the jurisdiction of NCAT, such as maintenance and leasing issues.

The provision of social housing has many benefits to the community. Marginalised and disadvantaged members of the community who require shelter should be able to enjoy their human right to adequate and affordable housing. While this is a financial burden on the community, governments around Australia have recognised for many years the obligations they have to ensure all citizens are able to contribute and participate in their communities, and shelter is central to the ability to do this.

Resources will never be able to sufficiently meet the need for social housing even though waiting lists in New South Wales indicate some improvement over the previous decade. Creating the conditions for people to find long-term accommodation in the private market is always a desirable goal, and social housing at times can assist this process. There are many people with varying degrees of disadvantage, some of their own doing and others due to circumstances out of their control, and they do not have the financial resources to provide for themselves and their families.

The effect of creating areas of concentrated disadvantage in communities is well known after the disastrous public housing experiments of the 1960s. Integrating social housing into our neighbourhoods is not cost-effective but avoids the stigmatisation that many social housing tenants continue to experience. However, there remain too many social housing precincts that are over-represented in criminal and adverse health statistics and welfare dependency. Policy-makers must continue to look for creative solutions, given the ever-increasing costs of social and community housing in the context of diminishing budgets, if we are to meet our international obligations regarding the provision of shelter.

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Chapter summary

- Shelter is more than a physical entity to be obtained.
- People who lack adequate and affordable housing are confronted with many other layers of disadvantage.
- There is no right to shelter within Australian domestic law. Most of the legislative framework within Australia is centred on clarifying people's rights and responsibilities within various forms of housing tenure.
- The right to shelter exists in international law. Being a signatory to such treaties, Australia has an obligation under international law to ratify these provisions into domestic law.
- State and federal governments acknowledge that there is an obligation to provide shelter if Australia is to protect the human rights of its citizens and ensure society is inclusive for all.
- Shelter can be categorised into housing that is acquired by individuals (private housing) or provided by government (public housing).
- The legal process for purchasing shelter is called conveyancing.
- The process of buying and selling property can be carried out in two ways. One is through a private treaty, whereby the property is put up for sale and advertised for potential buyers to make an offer. The other is through an auction, whereby the property is put up for sale on a particular day through a bidding process.
- The contract for the sale of property is a 'standard form contract', which contains a number of standard disclosures that must be included in the contract.
- The three main steps in the contract process are exchange, between exchange and settlement, and settlement of the contract.
- In New South Wales there are three land titling systems: Crown land, Old System title (or common law) and Torrens title (or the Real Property Act).
- Company title is a system of registration used to document ownership of shared space such as flats or townhouses, and was used prior to the first strata-title legislation in New South Wales in 1961.
- The main source of finance for purchasing a property is a mortgage.
- A credit report is compiled on an individual's credit history and such a report is used to assess the type of risk a person might present when borrowing funds.
- Once the contract for sale has been exchanged between the vendor and buyer, the purchaser has a five-day cooling off period to consider if they wish to go ahead with the purchase.
- A residential lease agreement is a contract between a tenant and landlord to pay to occupy (rent) a residential property for an agreed length of time for a monthly rental payment.
- The NSW Civil and Administrative Tribunal (NCAT) can hear most disputes involving residential tenancy agreements between landlords and tenants, including residents of Housing NSW (public housing) and residential parks.
- There are numerous government and non-government organisations that regulate and inform the private and public housing sectors.
- The long-term costs of increasing numbers of people being outside the housing market are far greater than the recurrent costs incurred in intervening to promote affordability, ensure discrimination legislation is effective, reduce homelessness and provide sufficient social housing to enable the poorest Australians to acquire shelter and contribute to the community.
- One of the main measures of housing affordability is the Housing Affordability Index.
- State and federal law make it illegal to discriminate against a person seeking shelter.
- Homelessness in Australian federal law is defined as being 'inadequate access to safe and secure housing'.
- Non-government organisations that interface with the homeless on a daily basis provide an invaluable safety net for those most in need of shelter.
- Social housing includes public housing and Indigenous housing properties managed by Housing NSW. This is a type of secure housing

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that is provided to low- and very low-income households at affordable rents.

- Community housing is rental housing that is secure and affordable for people on a low or very low incomes who have a housing need. Community housing is provided by not-for-profit community housing organisations, rather than Housing NSW.

Questions

Multiple-choice questions

1 *Housing Act 2001* (NSW) concerns:
- **A** homelessness
- **B** eligibility for public housing
- **C** housing affordability
- **D** lease agreements

2 Which of the following is *not* one of the approaches in the New South Wales Government Homelessness Action Plan?
- **A** Responding effectively to homelessness
- **B** Supporting innovative approaches to homelessness
- **C** Preventing homelessness
- **D** Breaking the cycle

3 Which of the following says that everyone has the right to a standard of living?
- **A** Article 25 of the *Universal Declaration of Human Rights*
- **B** Article 27 of the *Convention on the Rights of the Child*
- **C** Article 5(e)(iii) of the *International Convention on the Elimination of All Forms of Racial Discrimination*
- **D** Article 14(2)(h) of the *Convention on the Elimination of All Forms of Discrimination Against Women*

4 The benchmark percentage of household income to be paid on housing costs is:
- **A** 10%
- **B** 20%
- **C** 30%
- **D** 40%

5 To improve housing affordability the federal government's white paper, *The Road Home: A National Approach to Reducing Homelessness*, dedicates:
- **A** $2 million
- **B** $800 million
- **C** $2 billion
- **D** $10 billion

Chapter summary questions

1 Discuss how shelter is a legal right despite there not being a right to shelter under Australian domestic law.

2 Explain why shelter is classified as a human right.

3 Outline the process of a private treaty, including the 'standard form contract'.

4 What is NCAT?

5 Critically evaluate the difference between needing shelter and being homeless.

Extended-response questions

1 Using examples, explain how the legal system protects the right to shelter.

2 Critically analyse the relationship between recent changes in social attitudes and the subsequent developments of government policies aimed at improving access to shelter.

3 Evaluate why the law includes specific categories and criteria for those looking to acquire shelter.

4 In an extended paragraph, critically evaluate whether you believe the federal and state governments or social service groups do more to help homeless people and those seeking shelter. Justify your answer.

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In Section III of the HSC Legal Studies examination you will be expected to complete an extended response question for two different options you have studied. There will be a choice of two questions for each option. It is expected that your response will be around 1000 words in length (approximately eight examination writing booklet pages). Marking criteria for extended response questions can be found at http://www.cambridge.edu.au/education. Refer to these criteria when planning and writing your response.

Themes and challenges

The themes and challenges should be integrated throughout the teaching of this topic. The following are some suggestions as to how the content covered is related to themes and challenges.

The role of the law in encouraging cooperation and resolving conflict in regard to shelter

- International law sets international benchmarks with respect to the rights of shelter and encourages states to work proactively in providing adequate and affordable shelter.
- The legislative framework that exists with respect to purchasing shelter and leasing is ultimately aimed at encouraging cooperation and resolving conflict. Standard form contracts when purchasing shelter have made clearer the obligations of all parties. The rights and obligations of landlords and tenants are clearly provided for in the *Residential Tenancies Act 2010* (NSW).
- The creation of NCAT provides an accessible and cost-effective avenue for the resolution of tenancy disputes. This includes disputes in relation to social and other forms of housing.
- The mediation and conciliation process used in the resolution of disputes arising from discrimination in the acquiring of shelter encourages all parties to come to an agreement themselves.

Issues of compliance and non-compliance

- The development of the Torrens title system provided greater certainty in establishing the ownership of properties when being sold. This has strengthened compliance in this area as opposed to the Old System method still in use for some properties.
- The *Residential Tenancies Act 2010* (NSW), which amended the previous legislation, improved the rights of tenants through what some would argue is a better balance of rights between landlords and tenants.
- NCAT has improved compliance with the law because it makes the law more accessible to all and makes orders with respect to breaches of the *Residential Tenancies Act 2010* (NSW).
- The standard form contract has improved the rights of buyers in the conveyancing process because of the mandatory disclosures that must be made by the vendor.
- Boarders and lodgers lack effective legislative protection and as a result are the more vulnerable residents in society. There are many examples of landlords making false and misleading statements about the state of premises.
- Comparing aged care is problematic and it is difficult to ensure that resident's rights are clear and compliance issues are being met.
- Enforcement of discrimination provisions in state and federal law is a challenge for authorities. Proof can be hard to establish and the monetary payout may deem the process not worth pursuing.
- Strata schemes can produce entrenched and ongoing conflict as a result of people living in close proximity to each other. Improved compliance has resulted from the clearer guidelines established under the *Strata Schemes Management Act 1996* (NSW).

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Laws relating to shelter as a reflection of changing values and ethical standards

- Public morality has evolved to the extent that there is universal recognition of a right to shelter in international law. Values and ethics imply that governments in Australia have an obligation to put in place legislation and policies to ensure all people have the ability to acquire adequate and affordable shelter.
- The improved rights of tenants are a reflection of the acknowledgement that tenants traditionally have been in a more powerless position than landlords.
- The *Charter of Care Recipients' Rights and Responsibilities – Residential Care* for all aged care accommodation is an acceptance that older people have a right to quality care and accommodation.
- The suite of discrimination legislation reflects that the community accepts that the government has a role to play to ensure that the more marginalised and disadvantaged people in society have a right not to be discriminated against when acquiring shelter.

The role of law reform in protecting the rights of those seeking shelter

- Improved rights for tenants are reflected in the reform of the rights of tenants in 2010.
- The evolution of standard form contracts has ensured greater protection for buyers of property with respect to the disclosures that must be made by the vendor.
- The federal government is proposing to consolidate all federal discrimination legislation into a single Act to improve the enforcement of discrimination provisions.
- The New South Wales Government has been lobbied over the years to improve the rights of boarders and lodgers. At present this has not occurred.

The effectiveness of the legal and non-legal responses in achieving just outcomes in regard to the provision of shelter

- Non-legal measures are featured throughout the shelter topic. Non-legal measures need to be discussed in the light of their ability to pressure governments, highlight issues, undertake research and publicise issues concerning shelter. These measures can promote greater compliance, initiate law reform, educate the wider community and promote values and ethics around shelter for the poor and marginalised.
- Non-legal measures can be ignored, in particular if mainstream society is uninterested in the area of focus they are promoting. Governments are more likely to respond depending on how the issue is tracking in the electorate. For example, the need for boarders and lodgers to be given greater legislative protections has been well established but so far state governments have taken no real action.

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Additional resources

Chapter 16
Option 7: World order

16.1 The nature of world order

The development of world order over time

State sovereignty

State sovereignty had its origins in the *Treaty of Westphalia*, the collective name given to the two treaties concluded on 2 October 1648 – otherwise known as the 'Peace of Westphalia'. The treaties ended the Thirty Years' War within the Holy Roman Empire and the Eighty Years' War between Spain and the Dutch Republic, and marked the beginning of the modern concept of states and diplomacy. As European imperialism, trade and ideas spread throughout the world, so too did the Westphalian concept of the state. As European empires dissolved, colonies became states, following the European model. All international treaties and agreements are based on states exercising their sovereignty and working together. Today, states are like the building blocks of the international system, and international treaties and agreements are like the cement that binds them together.

Multilateralism

Multilateral cooperation occurs when states act together for a common purpose. The reason for its emergence was, quite simply, survival. From the 17th century, the leaders of Europe gradually began to find the political will to act together to stop the cycle of war and violence. Success in this endeavour was patchy, and repeatedly the desire for peace was overwhelmed by destructive forces, yet gradually the hope of multilateral cooperation for mutual benefit and to prevent war became ingrained in Western Europe.

The first modern instance of multilateral cooperation was the *Treaty of Westphalia*, ending a period of religious war in Europe in which 10 million people died. The next significant example was the Concert of Europe, an agreement by the victorious powers in 1815, after the Napoleonic Wars, to prevent future wars between the states of Europe.

During the 19th century, political leaders became increasingly aware that new weaponry was highly destructive, and that this, combined with the introduction of mass **conscription** and inflamed by imperial rivalry and militarism, could result in a war of previously unimaginable levels. In addition, between 1848 and 1870 there was a violent series of revolutions and wars, which further increased the desire for multilateral cooperation to ensure peace. Peace conferences were held at The Hague, Holland (now The Netherlands) in 1899 and 1907.

conscription
compulsory enlistment in the military force of a state

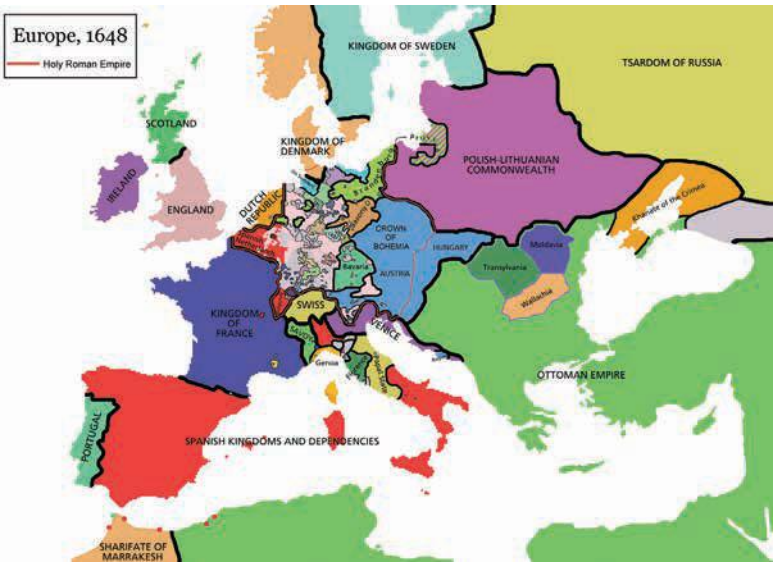

Figure 16.2a Europe in 1648 after the Peace of Westphalia.

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The Hague Conferences functioned as a form of global legislature and drew up conventions to limit warfare by various means, such as banning weapons of certain kinds. The conferences also resulted in an agreement to set up a Permanent Court of Arbitration, which could to settle international disputes. This court was based in The Hague.

More on World War I and the League of Nations

The commencement of World War I saw the world become divided into two armed camps, with nations choosing to side with the Allies, led by Britain, or the Central Powers, led by Germany. Both armed camps were prepared to fight to the finish and the warring nations of Europe bled themselves dry as they unleashed all the horrors of modern warfare on each other. But victory seemed elusive. Meanwhile, there were many people who viewed the war as insanity and argued for a return to multilateralism through the creation of a 'league of nations'.

Figure 16.2b US President Woodrow Wilson was credited with ensuring that the League of Nations was created after World War I. Wilson had made the establishment of a League of Nations one of America's most important war aims.

The creation of the League of Nations was a substantial act of multilateral cooperation. The league achieved some notable successes in the 1920s. However, it was hampered by serious flaws in its legal framework and a lack of political will on the part of the world leaders at the time to fully support it. Finally, it was blatant military aggression by powerful nations, the very thing that the league was designed to prevent, that sealed its fate. The league had no answer for Japan's annexation of Manchuria in 1931, Italy's invasion of Abyssinia in 1935, and finally Nazi Germany's annexations of Austria and Czechoslovakia by March 1939. By the time Germany invaded Poland in September 1939, the league was nothing but a distant memory, though as a legal entity it lingered until 1945.

President Roosevelt and the creation of the United Nations

You might think that the failure of the League of Nations in the 1930s would have killed off any further ambitious experiments in multilateral cooperation to prevent war. However, in the first dark years of World War II, when the Nazi war machine seemed unstoppable as it overwhelmed all opposition in Europe, another blueprint for a world organisation was placed on the agenda. In August 1941, two experienced world leaders, both of whom had been in office during World War I, met on a battleship off the coast of Canada and drew up a document that was to become the first step in the creation of a new world organisation. The document, drafted by US President Franklin Delano Roosevelt (affectionately known as 'FDR' to his contemporaries) and British Prime Minister Winston Churchill, has since become known as the *Atlantic Charter*. This was an eight-point plan in which they pledged themselves:

> after the final destruction of Nazi tyranny … to see established a peace which will afford to all nations the means of dwelling in safety within their own boundaries, and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want [6th point]

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Figure 16.2c In August 1941, US President Roosevelt (front left) and Prime Minister Churchill (front right) wrote the *Atlantic Charter*, which became a blueprint for the post-war world.

and to the 'abandonment of the use of force' and the 'the establishment of a wider and permanent system of general security' [8th point].

The *Atlantic Charter* was a visionary attempt to avoid the mistakes of the past, to formally establish early in World War II what the Allies' objectives were, and to bring about a peace that would be fair and enduring, unlike the outcomes from Versailles in 1919. However, FDR was also a realist. He built bipartisan support within the US political system for a new world organisation, and he and Churchill worked hard with their wartime allies to secure their support. The term 'United Nations' was first used on 1 January 1942, when 26 nations pledged their governments to fight for a common purpose against the Axis powers. Detailed planning for the new world organisation proceeded throughout the following three years of the war. The *Charter of the United Nations* was signed in San Francisco by 50 nations on 26 June 1945, and on 24 October 1945 the United Nations (UN) became a legal entity. The second try at a grand scheme for multilateral cooperation had begun.

16.2 Responses to world order

The United Nations

The future possibilities for the UN

Peace Building Commission

Realising that regional situations which threaten peace and security cannot be completely dealt with by peacekeeping operations, the UN General Assembly and the Security Council jointly set up a Peace Building Commission (PBC) at the 2005 World Summit. The PBC primarily aims to provide a longer period of assistance to countries when they emerge from conflict, as this will help stop them from sliding back into violence. The PBC is an advisory body: it assembles support and resources for reconstruction, institution-building and sustainable development. It also works in partnership with other agencies and organisations. For instance, in March 2012 a UN report announced a deepening of the collaboration between the PBC and the Africa Development Bank to support the PBC's priorities in the six post-conflict countries on its agenda – Burundi, the Central African Republic (CAR), Guinea, Guinea-Bissau, Liberia and Sierra Leone.

Peace building is a long process, where success may not be seen for years, perhaps decades. The new PBC hopes to guide the global community into giving longer-term attention to the process of recovery from conflict.

Proposals for a United Nations Emergency Peace Service (UNEPS)

Several peace and security NGOs are currently arguing that a permanent UN Emergency Peace Service (UNEPS), which could intervene quickly in a crisis, should be established. The World Federation of UN Associations (WFUNA) is just one of the NGOs pushing for the creation of a UNEPS. It takes months for peacekeeping services to respond to international crises – a UNEPS would be able to do so within 48–72 hours. In developing nations with urgent issues, such as Darfur, Sudan, infrastructure could be rebuilt by a combination of military services, negotiators and other specialists working full-time on the issues. The faster reaction times could lead to a reduction in deaths in international crises.

Under Article 25 of the UN charter, UN member states are obliged to carry out the decisions of the

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Security Council. As former UN weapons inspector Hans Blix's report states:

> The primary responsibility placed upon the Council for the maintenance of international peace and security is thus matched by the authority that is given to it and that can be exercised to reduce the risk of WMD, whether in the hands of the five permanent members or other members of the United Nations, or non-state actors.

16.4 Contemporary issue: Regional and global situations

Legal Links

For further information on UNEPS see the World Federalist Movement's website (refer to http://cambridge.edu.au/redirect/?id=6421).

that threaten peace and security – the nuclear threat

Non-legal responses

The humanitarian impact movement

The *Ottawa Convention* outlaws anti-personnel mines (APLs). Leadership by Canada, Mauritius and Ireland led to its creation in 1997 and by 2015 the treaty had been ratified by 162 countries. Under the terms of the treaty, states agree not to use landmines, to cease production and transfer of landmines and to destroy all stockpiles of landmines. More than 1400 NGOs had been involved in the International Campaign to Ban Landmines coalition (ICBL). ICAN believes that this is the model to follow in 'filling the legal gap' on nuclear weapons.

The humanitarian impact movement received a further boost in May 2015 with the failure of the *Non-Proliferation Treaty* (NPT) Review Conference held at the United Nations building in New York. After weeks of deliberations, the NPT Review Conference failed to produce an agreed statement or plan for the eventual elimination of nuclear weapons. As a result, within months of the failure of the NPT Review Conference, 114 countries had signed what has now become known as the 'Humanitarian Pledge'. In the absence of an agreed plan within the framework of the NPT, the countries that have signed the Humanitarian Pledge believe that the only way forward now is to proceed to towards the creation of a new treaty, one that bans the use nuclear weapons.

See the ICAN website for an updated list of the countries that have signed the Humanitarian Pledge (previously known as the Vienna Pledge): http://cambridge.edu.au/redirect/?id=6422.

As of the end of 2015 the Coalition government in Australia had not signed the Humanitarian Pledge. The Coalition is cautious about signing the pledge because of Australia's American alliance. Australia has as a cornerstone of its defence policy a reliance on Extended Nuclear Deterrence or END. This means that Australia relies for its defence on America's 'nuclear umbrella' for protection. For Australia to fully embrace a nuclear weapons ban treaty it would have to let go of its reliance on nuclear weapons for its defence. Therefore, the Coalition government was willing to be involved in the three conferences on the humanitarian impact of nuclear weapons, but not willing to join the other 114 nations that were ready to start negotiating a nuclear weapons ban treaty. While the Australian Labor Party expressed support for a nuclear weapons ban treaty at its July 2015 conference, it remains to be seen whether a future Labor government will commit Australia to achieving a treaty banning nuclear weapons.

Efforts of individuals – Ramesh Thakur and Gareth Evans

Both Ramesh Thakur and Gareth Evans have played an active role in the nuclear disarmament debate for many years. Gareth Evans is currently Chancellor of the Australian National University (ANU) in Canberra and Ramesh Thakur is currently the Director of the Centre for Nuclear Non-Proliferation and Disarmament (CNND) in the Crawford School, at ANU. In 2006 Gareth Evans was involved with former UN weapons inspector, Hans Blix, in the production of a report on nuclear weapons, *Weapons of Terror: Freeing the World of Nuclear, Biological and Chemical Weapons*. The report was in the tradition of the earlier Canberra Commission (1995) and represented an extremely detailed investigation into every conceivable aspect of achieving disarmament. Australia's Gareth Evans also worked on the report.

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In 2007, Hans Blix was awarded the Sydney Peace Prize for his 'principled and courageous opposition to proponents of war in Iraq, for life long advocacy of humanitarian law and non violence, and for leadership of disarmament programs to rid the world of weapons of terror'.

In 2008, then Prime Minister Kevin Rudd announced that the Australian Government would take the lead in setting up a commission to investigate nuclear disarmament plans, which would be known as the International Commission on Nuclear Non-Proliferation and Disarmament. The main goal of the commission would be to develop tighter rules for the 40-year-old NPT when it came up for review in 2010. Rudd appointed Gareth Evans to the commission because of his long track record in working for nuclear disarmament, starting with the Canberra Commission in 1995. The commission's report was released in mid-December 2009. Unfortunately, the report, *Eliminating Nuclear Threats: A Practical Guide for Global Policymakers*, failed to make an impact at the NPT Review Conference held in 2010.

In preparation for the 2015 NPT Review Conference, Gareth Evans, Ramesh Thakur and Tanya Ogilvie-White produced a book called *Nuclear Weapons: The State of Play 2015*. This book surveys the current situation in regard to nuclear non-proliferation and disarmament. At the August 2015 United Nations of Association of Australia (UNAA) conference, Ramesh Thakur stated that after failure of the 2015 NPT Review Conference that 'the NPT may have reached the limit of its potential' and that now we need a treaty to 'fill the legal gap' and ban nuclear weapons, followed by the development of a comprehensive nuclear weapons convention which would ban the possession of, use of, and threat to use nuclear weapons. Such a treaty would also have full monitoring and verification procedures in place.

For an electronic copy of the book *Nuclear Weapons: The State of Play 2015*, go to http://cambridge.edu.au/redirect/?id=6423.

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Cases, statutes and media reports (CSM)

In legal studies, it is important that written responses are backed up by cases, statute law and media reports. This means knowing the basic facts about certain important cases, learning some key pieces of statutory legislation, and being able to cite recent events that relate to certain topics or areas of law (media reports).

Always remember the acronym CSM when writing extended responses. Ask yourself, 'Have I included some cases, statutes and media reports?'

Cases

Legal cases are matters brought before the courts for decision. As discussed in the textbook, cases in Australia can be heard by a number of different courts according to a jurisdiction's court hierarchy. More minor matters might be heard before lower courts, such as the Local Court in NSW, whereas appeals or more significant matters will generally be heard by higher state or federal courts, such as the Supreme Court of NSW or the High Court of Australia. Remember, most legal disputes decided in the courts are a matter of applying the facts of the case to the law that exists. In some legal cases, there might be some uncertainty as to what the law is or should be. These may be important cases in Australian law – they may help to clarify how the law applies in an area that is otherwise vague or unclear. These cases may then be frequently cited in later cases and discussions about that area of the law.

Each case reported in a court will have a unique citation to identify it. This will identify the name of the case and its location in the law report in which it has been published. As with legislation, there are well-established rules and conventions for case citations. During your studies you will need to research or refer to legal cases, and you will need to use the established citation rules as outlined below.

Case citations are made up of a number of components. These are:

- **name** – this includes the names of the principal parties in the case. The name is always written in italics.
- '**v**' – most cases will be cited with two parties, separated by a 'v' which means 'versus'. When reading aloud, the 'v' is read as '**and**'.
- year – this follows the name and refers to the year the report is published (note, this is not always the same year as the case). This is written in either **[square brackets]** or **(round brackets)**. Square brackets indicate that the report is compiled sequentially by year, and no volume number is needed. Round brackets indicate that the law report uses sequential volume numbers, and you will need to refer to the volume to find the particular case.
- **volume number** (where applicable) – as referred to above.
- **abbreviation** – each law report series has a specific abbreviation, and you will need to refer to the specific series where the case is reported. The table below contains some of the most common abbreviations.

Abbreviation	Law report
A Crim R	Australian Criminal Reports
ALR	Australian Law Reports
All ER	All England Law Reports
CLR	Commonwealth Law Reports
FCR	Federal Court Reports
FLR	Federal Law Reports
KB	Law Reports, King's Bench Division
NSWLR	New South Wales Law Reports
QB	Law Reports, Queen's Bench Division

- **page number** – this is the first page where the case appears in the report.

Statutes

Legislation, also known as statute, refers to laws that have been passed through state and federal parliaments, and includes acts and regulations. An

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example of this is the *Australia Act 1986* (Cth). When citing legislation, there are four main components to consider. These are:

- **short title** – this is the name of the act or regulation (usually specified in the legislation under section 1). This part is written in *italics*. The short title also includes the year of the legislation, discussed below.
- **year** – part of the short title, the citation must include the year that the act or regulation was passed (i.e. when it received Royal Assent). This part is also written in *italics*.
- **jurisdiction** – the citation must specify the jurisdiction that the legislation comes from – for example an act from New South Wales will include '(NSW)' after the short title. A Federal, or Commonwealth, act will include '(Cth)'. Note that this part is **not** written in italics. Other state and territory jurisdictions are written as follows: (Vic), (Qld), (SA), (WA), (ACT), (Tas) and (NT).
- any **section number(s)** – if a specific section needs to be referred to, this is usually written after the legislation name. For a section, this is shortened to 's' (e.g. s 52); for more than one section, 'ss' is used (e.g. ss 5, 14).

The rules also apply to bills that have not yet been passed by a parliament – the year cited will be the year the bill was introduced. The only difference is that the bill title does not appear in italics, e.g. Native Title Amendment Bill 2009 (Cth).

Note that when talking about a *specific* act, regulation or bill, you should always refer to the legislation using a capital letter: e.g. 'the Act' or 'the Bill'. When from referring to acts or bills in general, always use a lower case letter.

Media reports

A media report is anything that appears in the news. Media reports most commonly appear in newspapers, but media reports also include magazine articles, documentaries and articles/ reports published online. The law is a dynamic thing and sparks much public comment. Luckily for students of legal studies, the media is always carrying items, or making comments, that are relevant to the law. It is important that you recognise this and remain aware of current events in the legal arena. This will help you gain a greater understanding of the concepts and content that you are covering in the course, and will also give you relevant, up-to-date examples to use in your written responses. However, be aware that outrage sells, and sometimes the headline and the article have very little in common. Therefore, as you regularly peruse the media for reports, evaluate the information that is being provided and be alert for bias and the sales factor.

Try keeping a media file of relevant articles throughout the year. Set up a folder (either hardcopy or electronically) with three subdivisions: 'The legal system', 'The individual and the law' and 'Law in practice'. Articles relevant to any of the topics, even if you have not yet studied them in class, can be placed into plastic sleeves (or files) under the relevant heading. Make some brief notes and include these with the article. You may wish to use the 'Media report pro forma' supplied on *Cambridge GO* to help you with this. Make sure that you write down the source and date of each item.

You can regularly check newspaper websites, as they allow you to access their most recent articles (e.g. the *Sydney Morning Herald* allows you access to articles that have appeared in the previous eight days). When accessing newspaper articles electronically, it is important to do so as soon as possible, as it is difficult to get old articles without being asked to pay for them. Articles can be copied into Word for easier manipulation, then placed in the relevant folder. An even better method of storage is to use a commercially available database such as Procite or Endnote, or to make a database yourself. However, do not forget to evaluate each item and its source for reliability, validity, bias and usefulness.

When writing a research essay, correctly cite your media reports in a consistent way in footnotes or endnotes. For example: *Sydney Morning Herald*, 'New development in gang torture case', 9 December 2009.

When writing in an exam, however, it is not necessary to remember exact titles and dates of media reports – simply placing the event or issue that has been reported in the media in a timeframe is sufficient. For example, 'the recent debate on gang violence', 'in recent months', 'earlier this year' or 'in 2013'.

The internet is a valuable source of information for legal studies students. However, there is also a lot of misinformation posted online. Some websites

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will not be updated for months at a time, so the information on them will be old and irrelevant; some sites are just venues for individuals or groups to promote their own agendas and views, or for businesses to sell items; and some have incorrect facts and figures. Therefore, you must check for reliability, validity, bias and usefulness in any website you access.

Sites provided by government departments are useful, as they are dynamic and the information provided is reliable. The websites of large newspapers, magazines and television networks are useful in the same way, although it must be remembered that most of these are commercial organisations. So when you surf the internet looking for information, it is important that you check the provider of the website and the last time it was updated.

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